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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

[Docket No. FAA–2005–19411; Amdt. No. 93–89]

RIN 2120–AI47

Reservation System for Unscheduled Arrivals at Chicago's O'Hare International Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; Extension of expiration date.

SUMMARY: This action extends the expiration date of Special Federal Aviation Regulation (SFAR) No. 105 through October 31, 2010. This action maintains the reservation system established for unscheduled arrivals at Chicago O'Hare International Airport (O'Hare) following the expiration of limitations imposed on scheduled operations at the airport. This action is necessary to reduce congestion and delays at the airport and is consistent with O'Hare's status as a Schedules Facilitated Airport (Level 2) under the International Air Transport Association (IATA) Worldwide Scheduling Guidelines (WSG).

DATES: This final rule is effective on October 31, 2008, and SFAR No. 105 published at 70 FR 39610 (July 8, 2005), as amended in this rule, shall remain in effect until October 31, 2010.

FOR FURTHER INFORMATION CONTACT: Gerry Shakley, System Operations Services, Air Traffic Organization; *telephone:* (202) 267–9424; *e-mail: gerry.shakley@faa.gov.* For legal questions concerning this rule, contact: Robert Hawks, Regulations Division, Office of the Chief Counsel; *telephone:* (202) 267–7143; fax: (202) 267–7971; *e-mail: rob.hawks@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You may obtain an electronic copy using the Internet by:

(1) Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

(2) Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/*; or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You also may obtain a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket 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 or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact its local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at *http://www/faa/gov/regulations_policies/rulemaking/sbre_act.*

Authority

The U.S. Government has exclusive sovereignty over the airspace of the United States.[1] Under this broad authority, Congress has delegated to the Administrator extensive and plenary authority to ensure the safety of aircraft and the efficient use of the nation's navigable airspace. In this regard, the Administrator is required to assign by regulation or order use of the airspace to ensure its efficient use.[2]

The FAA's broad statutory authority to manage the efficient use of airspace encompasses management of the nationwide system of air commerce and air traffic control. To ensure the efficient use of the airspace, the FAA must take steps to prevent congestion at an airport from disrupting or adversely affecting the air traffic system for which the FAA is responsible. Inordinate delays can have a crippling effect on other parts of the system, causing significant losses in time and money for individuals and businesses, including the air carriers and other operators at O'Hare and beyond. This rule facilitates the Agency's exercise of its authority to manage the safe and efficient use of the navigable airspace.

Background

Since November 2003, O'Hare has suffered an inordinate and unacceptable number of delays resulting from over-scheduling at the airport, which also has had a crippling effect on the entire National Airspace System. In August 2004, the FAA intervened by ordering a limit on the number of scheduled arrivals at the airport during the peak operating hours of 7 a.m. through 8:59 p.m., Central Time, effective November 1, 2004, so that the system could return to a reasonably balanced level of operations and delay.[3]

On October 20, 2004, the FAA published a notice of proposed rulemaking (NPRM) seeking public comments on a proposed reservation system for unscheduled arrivals at O'Hare (69 FR 61708), effective November 1, 2004. While this rulemaking was pending, the FAA implemented a corresponding voluntary reservation program for unscheduled arrivals using the general procedures followed during the Special Traffic Management Programs and the High Density Rule.

On July 8, 2005, the FAA published SFAR No. 105, ''Reservation System for Unscheduled Arrivals at Chicago's O'Hare International Airport.''[4] As stated in SFAR No. 105, the benefits achieved by the FAA's August 18 Order would dissipate if certain operations at the airport remained capped but other operations were permitted to grow. SFAR No. 105 maintained the historical level of unscheduled operations at O'Hare and supported other agency actions at O'Hare that address congestion and delay until additional capacity exists at the airport.

In SFAR No. 105, the FAA discussed that it may be necessary to extend this

[1] 49 U.S.C. 40103(a).

[2] 49 U.S.C. 40103(b)(1).

[3] Operating Limitations at Chicago International Airport, Docket No. FAA–2004–16944.

[4] 70 FR 39610.

rule limiting unscheduled arrivals at O'Hare to coincide with a final rule addressing scheduled arrivals, if adopted, or with an extension of the August 2004 Order. The NPRM addressing scheduled arrivals at O'Hare was published on March 25, 2005 (70 FR 15520).

On November 2, 2005, the FAA extended the expiration date on SFAR No. 105 until March 31, 2006.[5] On March 31, 2006, the FAA extended the expiration date on SFAR No. 105 through October 28, 2006,[6] to maintain the current operating environment at the airport while considering comments to the proposed rule for scheduled arrivals.[7]

On August 29, 2006, the FAA published the ''Congestion and Delay Reduction at Chicago O'Hare International Airport'' final rule.[8] That final rule codified the limit on scheduled arrivals initially imposed under the FAA's August 2004 Order and expires on October 31, 2008. On November 1, 2006, the FAA extended the expiration date on SFAR No. 105 through October 31, 2008, to coincide with the sunset date of the ''Congestion and Delay Reduction at Chicago O'Hare International Airport'' final rule.[9]

The ongoing implementation of the O'Hare Modernization Program should result in increased capacity at the airport. On October 31, 2008, the ''Congestion and Delay Reduction at Chicago O'Hare International Airport'' final rule will sunset, and O'Hare will be designated a Schedules Facilitated Airport (Level 2) under the IATA WSG. Under the Level 2 guidelines, airlines conducting scheduled operations at O'Hare must submit their proposed schedules in advance on a semiannual basis and cooperate through schedule adjustments to reduce congestion and delays. Through this voluntary system of schedule adjustments, O'Hare should be able to utilize the increased capacity without restrictions on arrivals and departures.

Under the Level 2 guidelines, scheduled operations are managed in advance to reduce the risks of congestion and delay. Because of the nature of unscheduled operations, it is impossible to effectively manage capacity significantly in advance of the operations. Consequently, to coincide with the Level 2 status of O'Hare, and to reduce the risks of congestion and delay, the FAA extends the limits imposed by SFAR No. 105 until October 31, 2010.

Extending the limits imposed by SFAR No. 105 should not unduly burden unscheduled operations at O'Hare. The reservation system currently in place provides reservations in excess of the number of unscheduled flights arriving at O'Hare. From May 2002 to September 2008, there were on average 25 daily general aviation unscheduled operations, which constitute the majority of unscheduled operations. This data reflects a decline from 2006 (33 operations in same period) and 2007 (29 operations in the same period). Under the current rule, 64 daily arrival reservations are available for allocation. The data also reflects limited demand for public charter flights, which are permitted to obtain reservations up to six months in advance of operations. Although the demand for unscheduled operations does not exceed available capacity, the reservation system spreads the unscheduled operations throughout the day to allow the FAA to manage congestion and delay, and it provides some advance information about the anticipated number of unscheduled operations.

Because of the current demand levels, the FAA does not believe that an increase in the number of hourly reservations exclusively set aside for unscheduled arrivals is justified. Additionally, the rule allows the approval of additional reservations that do not result in significant delay or congestion or when there is additional capacity temporarily available, which should provide added flexibility for unscheduled operations.

Therefore, the FAA finds that notice and comment procedures under 5 U.S.C. section 553(b) are impracticable and contrary to the public interest. The FAA further finds that good cause exists to make this rule effective in less than 30 days.

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 regulation.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted a copy of the new information collection requirements(s) in this final rule to the Office of Management and Budget (OMB) for its review. An agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid OMB control number. OMB approved the collection of this information and assigned OMB Control Number 2120–0694.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

In the preamble of SFAR No. 105, the FAA stated that it might consider extending SFAR 105 for a time period that would coincide with a final rule limiting scheduled operations. The FAA will continue to extend this SFAR

[5] 70 FR 66253.

[6] The limits on unscheduled arrivals do not apply on Saturdays.

[7] 71 FR 16217.

[8] 71 FR 51382.

[9] 71 FR 64111.

through October 31, 2010. The rule requires maintaining the current level of operations at Chicago O'Hare to ensure consistency with O'Hare's Level 2 status. In the final economic assessment of SFAR No. 105, the FAA found that the rule provided system delay benefits at minimal cost. Similarly, the FAA finds that this extension is cost beneficial by continuing to provide system delay benefits at minimal cost.

FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule extends the expiration date of SFAR No. 105, which provides for fewer airport delays at minimum cost. Just as in the initial and final regulatory flexibility analyses, the FAA expects there will be a substantial number of small entities affected by the extension of this SFAR, however, the economic impact continues to be insignificant.

Therefore as the acting FAA administrator, I certify this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of the extension of this final rule and has determined that it not have an effect on foreign commerce.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) 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 an expenditure of $100 million or more (in 1995 dollars) 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.'' The FAA currently uses an inflation-adjusted value of $136.1 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA 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, the FAA determined that this final rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this proposed rulemaking action qualifies for the categorical exclusion identified in paragraph 312f, and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 18, 2001). The FAA has determined that it is not a ''significant energy action'' under the executive order because it is not a ''significant regulatory action'' under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects for Part 93

Air traffic control, Airports, Navigation (air), Reporting and recordkeeping requirements.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14 Code of Federal Regulations as follows:

PART 93—SPECIAL AIR TRAFFIC RULES AND AIRPORT TRAFFIC

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44514, 44701, 44719, 46301.

■ 2. In part 93, Special Federal Aviation Regulation (SFAR) No. 105 is amended by revising Section 9 to read as follows:

Special Federal Aviation Regulation No. 105—Operating Limitations for Unscheduled Operations at Chicago's O'Hare International Airport

* * * * *

■ *Section 9. Expiration.* This Special Federal Aviation Regulation expires at 9 p.m., Central Time, on October 31, 2010 unless sooner terminated.

Issued in Washington, DC, on October 24, 2008.

Robert A. Sturgell,

Acting Administrator.

[FR Doc. E8–25904 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 385

[Docket No. RM08–8–000]

Ex Parte Contacts and Separation of Functions

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the final regulations (Docket No. RM08–8–000) that were published in the **Federal Register** on October 22, 2008 (73 FR 62881). The final rule document revised the Federal Energy Regulatory Commission's regulations to clarify its rules governing ex parte contacts and separation of functions as they apply to proceedings arising out of investigations initiated under Part 1b of the Commission's regulations.

DATES: *Effective Date:* November 21, 2008.

FOR FURTHER INFORMATION CONTACT: Wilbur Miller, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, 202–502–8953, *wilbur.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: In FR Document E8–25103, appearing on page 62886 in the **Federal Register** of October 22, 2008, at the beginning of the **SUPPLEMENTARY INFORMATION** text, before paragraph 1, add the following: ''Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.''

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25934 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 102

[CBP Dec. 08–42]

Technical Corrections Relating to the Rules of Origin for Goods Imported Under the NAFTA and for Textile and Apparel Products

AGENCIES: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule; technical corrections.

SUMMARY: This document sets forth technical corrections to part 102 of the U.S. Customs and Border Protection (CBP) regulations to reflect recent changes in the Harmonized Tariff Schedule of the United States. The affected provisions in part 102, which are based in part on specified changes in tariff classification, comprise a codified system used for determining the country of origin of goods imported under the North American Free Trade Agreement (NAFTA) and for the country of origin of textile and apparel products (other than those of Israel).

DATES: This final rule is effective on October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, (202) 572–8828.

SUPPLEMENTARY INFORMATION:

Background

On June 6, 1996, CBP published in the **Federal Register** (61 FR 28932) as T.D. 96–48, a document which adopted as a final rule, amendments to the CBP regulations establishing specific rules for determining when the country of origin of a good is one of the parties to the North American Free Trade Agreement (NAFTA) as required by Annex 311 of the NAFTA (as opposed to the rules for preference purposes in Chapter 4 and Annex 401). In order to simplify and standardize country of origin determinations for purposes of the NAFTA, the rules of origin in T.D. 96–48 set forth a codified method that uses specified changes in tariff classification (tariff shifts) and other rules to express the substantial transformation concept. Under this codified method, the substantial transformation that an imported good must undergo in order to be deemed a good of the country where the change occurred is expressed through these rules.

On July 1, 1996, shortly after the publication of T.D. 96–48, CBP also gave effect to section 334 of the Uruguay Round Agreements Act by implementing rules of origin applicable to all textile and apparel imports except for purposes of determining whether goods originate in Israel (*see* T.D. 95–69, published in the **Federal Register** on September 5, 1995 (60 FR 46188)).

The specific changes in tariff classification requirements for determining the country of origin of imported goods (other than textiles and apparel products covered by § 102.21) under the provisions of the NAFTA are set forth in § 102.20 of the CBP regulations (19 CFR 102.20) except for textiles and apparel products covered by § 102.21. Section 102.20 prescribes the tariff shift rules that are used to determinewhether a good is considered a good of a NAFTA country (United States, Canada or Mexico). The rules of origin relating to trade in textile and apparel products, other than those that are products of Israel, are found in § 102.21.

In addition, we note that CBP published in the **Federal Register** (73 FR 43385) on July 25, 2008, a notice of proposed rulemaking in which it proposed to amend the CBP regulations to establish uniform rules governing CBP determinations of the country of origin of imported merchandise. Specifically, CBP proposed that the rules in 19 CFR part 102 be applicable for all purposes for which ''product of'' or ''country of origin'' criterion is prescribed under customs and related laws, the navigation laws of the United States, and the CBP regulations, except for the purpose of determining whether a good other than a textile or apparel good is entitled to preferential treatment under the United States' free trade agreements with Israel and Jordan, or unless otherwise specified, or as otherwise provided for by statute. The technical corrections to the tariff shift rules set forth in this document will enable interested parties to properly evaluate the impact, if any, of the proposed rulemaking on the country of origin of their goods.

Need for Correction

Pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (codified at 19 U.S.C. 3005), the International Trade Commission (ITC) is required to keep the HTSUS under continuous review and prepare investigations proposing modifications to the HTSUS to the President. In April 2006, the ITC issued Investigation No. 1205–6, Proposed Modifications to the Harmonized Tariff Schedule of the UnitedStates, Publication No. 3851. The modifications proposed in the report were effective onFebruary 3, 2007, pursuant to Presidential Proclamation 8097 which was published in the **Federal Register** on January 4, 2007 (72 FR 453).

As a result of the 2007 modifications to the HTSUS, certain tariff provisions have been added or removed, and certain goods have been transferred, for tariff classification purposes, to different or newly-created tariff provisions. The changes to the HTSUS involve product coverage and/or numbering of certain

headings and subheadings and are not intended to have any other substantive effect. Accordingly, this document makes technical corrections to §§ 102.20 and 102.21 in order for the regulations to conform the tariff shift rules to the current version of the HTSUS. In addition, this document amends §§ 102.20(a) and 102.21(a), (b), (c), and (d) by removing the word ''shall'' each place it appears and adding, in its place, the word ''will'' or ''must'' as appropriate.

The examples set forth below illustrate the need for the technical corrections to §§ 102.20 and 102.21 described above.

Example 1: Pursuant to the existing terms of § 102.20(n), the tariff shift rule for heading 7416, HTSUS, permits, in relevant part, a tariff shift to this heading ''from any other heading.'' Prior to the 2007 amendments to the HTSUS, copper springs were classified in subheading 7416.00, HTSUS, and therefore were subject to the above tariff shift rule. This rule is satisfied when copper springs of heading 7416, HTSUS, are processed from other articles of copper from any other heading. Under the 2007 amendments to the HTSUS, however, heading 7416 was deleted and copper springs were moved from subheading 7416.00 to subheading 7419.99, HTSUS. As a result, copper springs(classified in subheading 7419.99, HTSUS) which are processed from other articles of copper of subheading 7419.99 would not presently satisfy the tariff shift rule set forth above. In order to maintain the original result of the tariff shift rule for copper springs that had been classified within heading 7416, HTSUS, the tariff shift rule in § 102.20(n) must be amended to provide for a change to copper springs of subheading 7419.99, HTSUS, from any other subheading, including from any other good of subheading 7419.99, HTSUS.

Example 2: Under the 2007 amendments to the HTSUS, a new subheading was created at 2910.40, HTSUS, for a product referred to as ''dieldrin (ISO, INN).'' Prior to the 2007 amendments, this product was classified in the basket ''other'' provision under subheading 2910.90, HTSUS. As new subheading 2910.40, HTSUS, is not included in the rules set forth in § 102.20(f), it is not possible to determine the origin of goods classifiable under this provision using the current regulations. Accordingly, § 102.20(f) must be amended in order to add subheading 2910.40, HTSUS, and the applicable tariff shift rule must also be amended in order to provide for the new subheading. It should be noted that these technical corrections to § 102.20(f) will produce the same result as when dieldrin (ISO, INN) was classified under subheading 2910.90, HTSUS, in the 2006 HTSUS.

Example 3: Under current § 102.21(e), there is a rule for subheadings 6209.10.0000 through 6209.20.5035, HTSUS. Under the 2007 amendments to the HTSUS, subheading 6209.10, HTSUS, which covers babies' garments and clothing accessories of wool or fineanimal hair, was deleted, with the goods moving to subheading 6209.90. As a result, the tariff shift rule for heading 6209.10.0000–6209.20.5035, HTSUS, has been renumbered to reflect that subheading 6209.10, HTSUS, was deleted, and reflect the new range of tariff subheadings. As the rule for subheadings 6209.20.5045 through 6209.90.9000, HTSUS, is the same as the rule for subheading 6209.10, HTSUS, no change in the rule is necessary.

Inapplicability of Notice and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), CBP has determined that it would be impracticable and contrary to the public interest to delay publication of this rule in final form pending an opportunity for public comment and that there is good cause for this final rule to become effective immediately upon publication. The technical corrections contained in this document merely conform the tariff shift rules in the regulations to the current HTSUS and will facilitate trade by ensuring that country of origin determinations made using the regulations are consistent with the HTSUS.

Regulatory Flexibility Act

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12866

These amendments do not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Signing Authority

While the subject matter of this document pertains to the authority of the Secretary of the Treasury to approve regulations relating to certain revenue functions (see 19 CFR Part 0), CBP retains authority pursuant to Treasury Directive 28–01 to sign a document making nonsubstantive technical corrections to a previously issued regulation. For this reason, the CBP Commissioner is the proper official to sign this document.

List of Subjects in 19 CFR Part 102

Customs duties and inspections, Imports, Reporting and recordkeeping requirements, Rules of origin, Trade agreements.

Amendments to the CBP Regulations

■ For the reasons set forth above, part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102) is amended as set forth below:

PART 102—RULES OF ORIGIN

■ 1. The authority citation for part 102 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 3314, 3592.

■ 2. In § 102.20:

■ a. The introductory text is amended by removing the word ''shall'' and adding, in its place, the word ''will'';

■ b. The table is further amended by removing the entries for: ''0210.90'', ''2811.23–2811.29'', ''2826.11–2833.19'', ''2833.22–2833.26'', ''2836.10'', ''2836.70'', ''2838'', ''2839.20–2839.90'', ''2841.10–2841.30'', ''2850–2851'', ''2903.11–2903.30'', ''2906.14'', ''2912.11–2912.13'', ''2915.11–2915.35'', ''2918.90'', ''2920.10–2926.90'', ''2936.10–2936.29'', ''3001.10–3001.90'', ''3006.80'', ''3102.70'', ''3103.10–3103.20'', ''3104.10–3104.30'', ''3301.11–3301.90'', ''3404.10–3404.20'', ''3808.10'', ''3808.20'', ''3808.30'', ''3808.40'', ''3808.90'', ''3824.20'', ''4601.20–4601.99'', ''4815'', ''4823.12'', ''4823.19'', ''4823.60–4823.70'', ''6811.10'', ''6811.20'', ''6811.30'', ''6811.90'', ''6812.50'', ''6812.60–6812.70'', ''6812.90'', ''7012–7018'', ''7321.11–7321.83'', ''7801–7803'', ''7805–7806'', ''7901–7906'', ''8002–8004'', ''8005'', ''8006–8007'', ''8101.10–8101.95'', ''8442.10–8442.30'', ''8443.11–8443.60'', ''8443.90'', ''8456.10–8456.99'', ''8469.11–8469.12'', ''8469.20–8469.30'', ''8485'', ''8505.11–8505.30'', ''8509.10–8509.80'', ''8517.11–8517.80'', ''8517.90'', ''8519.10–8519.40'', ''8520.10–8520.20'', ''8520.32–8520.33'', ''8520.39–8520.90'', ''8524'', ''8525.10–8525.20'', ''8525.30–8525.40'', ''8527.19–8527.90'', ''8528.12–8528.30'', ''8543.11–8543.19'', ''8543.40–8543.89'', ''8708.31'', ''8708.39'', ''8708.60'', ''9009.11–9009.30'', ''9009.91–9009.99'', ''9010.41–9010.50'', ''9030.10–9030.40'', ''9030.82–9030.83'', ''9031.10–9031.30'', ''9403.10–9403.80'', ''9501'', ''9502.10'', ''9502.99'', ''9503.10–9503.30'', ''9503.41–9503.49'', ''9503.50–9503.60'', ''9503.70–9503.90'', ''9614.20'', and ''9614.90'';

■ c. The table is further amended by adding, in numerical order, entries for:''0210.91–0210.99'', ''2811.29'', ''2826.12–2826.19'', ''2833.22–2833.25'', ''2839.90'', ''2841.30'', ''2850'', ''2852'', ''2853'', ''2903.11–2903.39'', ''2912.11–2912.12'', ''2915.11–2915.33'', ''2915.36'', ''2918.91–2918.99'', ''2920.11–2926.90'', ''2936.21–2936.29'', ''3001.20–3001.90'', ''3006.91'', ''3006.92'', ''3103.10'', ''3104.20–3104.30'', ''3301.12–3301.90'', ''3404.20'', ''3808.50'', ''3808.91'',

''3808.92'', ''3808.93'', ''3808.94'', ''3808.99'', ''4601.21–4601.99'', ''4823.61–4823.70'', ''6811.40'', ''6811.81'', ''6811.82'', ''6811.83'', ''6811.89'', ''6812.80'', ''6812.91'', ''6812.92–6812.93'', ''6812.99'', ''7013–7018'', ''7321.11–7321.89'', ''7801–7802'', ''7806'', ''7901–7905'', ''8002–8003'', ''8007'', ''8101.10–8101.94'', ''8442.30'', ''8443.11–8443.39'', ''8443.91'', ''8456.10–8456.90'', ''8469.00'', ''8486.10–8486.40'', ''8486.90'', ''8487'', ''8505.11–8505.20'', ''8505.90'', ''8508.11–8508.60'', ''8508.70'', ''8509.40–8509.80'', ''8517.11–8517.69'', ''8517.70'', ''8519.20–8519.30'', ''8519.50'', ''8519.81'', ''8519.89'', ''8525.50–8525.60'', ''8525.80'', ''8527.19–8527.99'', ''8528.41'', ''8528.49'', ''8528.51'', ''8528.59'', ''8528.61'', ''8528.69–8528.73'', ''8543.10'', ''8543.70'', ''8708.30'', ''8708.50'', ''8708.95'', ''9010.50'', ''9030.10'', ''9030.20'', ''9030.31'', ''9030.32'', ''9030.33'', ''9030.39'', ''9030.40'', ''9030.82–9030.84'', ''9031.10–9031.20'', ''9403.10–9403.89'', ''9503'', and ''9614.00'';

■ d. The table is further amended by revising the entries in the ''Tariff shiftand/or other requirements'' column adjacent to the ''HTSUS'' column listing for: ''2707.10–2707.99'', ''2811.29'', ''2824.10–2824.90'', ''2826.12–2826.19'', ''2833.22–2833.25'', ''2833.29'', ''2835.29–2835.39'', ''2836.99'', ''2839.90'', ''2841.30'', ''2841.50'', ''2841.90'', ''2842.90'', ''2850'', ''2852'', ''2853'', ''2903.11'', ''2903.39'', ''2903.51–2904.90'', ''2905.11–2905.19'', ''2906.19'', ''2907.12–2907.22'', ''2909.11–2909.49'', ''2910.10–2910.90'', ''2912.11–2912.12'', ''2912.19–2912.49'', ''2915.11–2915.33'', ''2915.36'', ''2915.39'', ''2917.11–2917.39'', ''2918.11–2918.22'', ''2918.91–2918.99'', ''2920.11–2926.90'', ''2929.10–2930.90'', ''2936.21–2936.29'', ''2936.90'', ''3001.20–3001.90'', ''3002.10–3002.90'', ''3003.10'', ''3003.20'', ''3003.31'', ''3003.39'', ''3003.40'', ''3003.90'', ''3004.10'', ''3004.20'', ''3004.31'', ''3004.32'', ''3004.39'', ''3004.40'', ''3004.50'', ''3004.90'', ''3005.10'', ''3006.10'', ''3006.20–3006.60'', ''3006.70'', ''3006.91'', ''3006.92'', ''3102.90'', ''3103.10'', ''3103.90'', ''3104.20–3104.30'', ''3104.90'', ''3206.20–3209.90'', ''3301.12–3301.90'', ''3404.20'', ''3404.90'', ''3808.50'', ''3808.91'', ''3808.92'', ''3808.93'', ''3808.94'', ''3808.99'', ''3824.71–3824.90'', ''3920.10–3921.90'', ''4203–4206'', ''4412'', ''4413–4421'', ''4601.21–4601.99'', ''4823.61–4823.70'', ''4823.90'', ''6811.40'', ''6811.81'', ''6811.82'', ''6811.83'', ''6811.89'', ''6812.80'', ''6812.91'', ''6812.92–6812.93'', ''6812.99'', ''7013–7018'', ''7020'', ''7321.11–7321.89'', ''7411–7418'', ''7419.10–7419.99'', ''7801–7802'', ''7806'', ''7901–7905'', ''7907'', ''8002–8003'', ''8007'', ''8101.10–8101.94'', ''8101.96'', ''8101.99'', ''8103.20–8113.00'', ''8418.10–8418.91'', ''8425.11–8430.69'', ''8442.30'', ''8443.11–8443.39'', ''8443.91'', ''8443.99'', ''8456.10–8456.90'', ''8469.00'', ''8470.10–8471.50'', ''8471.60–8472.90'', ''8479.10–8479.89'', ''8486.10–8486.40'', ''8486.90'', ''8487'', ''8505.11–8505.20'', ''8505.90'', ''8508.11–8508.60'', ''8508.70'', ''8509.40–8509.80'', ''8517.11–8517.69'', ''8517.70'', ''8519.20–8519.30'', ''8519.50'', ''8519.81'', ''8519.89'', ''8523'', ''8525.50–8525.60'', ''8525.80'', ''8527.19–8527.99'', ''8528.41'', ''8528.49'', ''8528.51'', ''8528.59'', ''8528.61'', ''8528.69–8528.73'', ''8536.10–8536.90'', ''8541–8542'', ''8543.10'', ''8543.70'', ''8543.90'', ''8544.11–8544.70'', ''8708.29'', ''8708.30'', ''8708.40'', ''8708.50'', ''8708.80'', ''8708.91'', ''8708.92'', ''8708.94'', ''8708.95'', ''8708.99'', ''9006.10–9006.69'', ''9010.50'', ''9010.90'', ''9027.10–9027.90'', ''9030.10'', ''9030.20'', ''9030.31'', ''9030.32'', ''9030.33'', ''9030.39'', ''9030.40'', ''9030.82–9030.84'', ''9030.89'', ''9030.90'', ''9031.10–9031.20'', ''9031.41–9031.49'', ''9201–9208'', ''9401.10–9401.80'', ''9402'', ''9403.10–9403.89'', ''9503'', and ''9614.00''.

The additions and revisions read as follows:

§ 102.20 Specific rules by tariff classification.

* * * * *

HTSUS	Tariff shift and/or other requirements
*	* * * * * *
0210.91–0210.99	A change to subheading 0210.91 through 0210.99 from any other chapter; or A change to edible meals and flours of subheading 0210.91 through 0210.99 from any product other than edible meals and flours of Chapter 2.
*	* * * * * *
2707.10–2707.99	A change to subheading 2707.10 through 2707.99 from any other heading; or A change to phenols of subheading 2707.99 from any other subheading or from any other good of subheading 2707.99, provided that the good resulting from such change is the product of a chemical reaction; or A change to any other good of subheading 2707.99 from phenols of subheading 2707.99 or from any other subheading, provided that the good resulting from such change is the product of a chemical reaction; or A change to subheading 2707.10 through 2707.99 from any other subheading, including any subheading within that group, provided that the good resulting from such change is the product of a chemical reaction.
*	* * * * * *
2811.29	A change to sulphur dioxide of subheading 2811.29 from any other good of subheading 2811.29 or from any other subheading; or A change to any other good of subheading 2811.29 from sulphur dioxide of subheading 2811.29 or from any other subheading.
*	* * * * * *
2824.10–2824.90	A change to red lead or to orange lead of subheading 2824.90 from any other good of subheading 2824.90 or from any other subheading, except from heading 2607; or A change to any other good of subheading 2824.90 from red lead or from orange lead of subheading 2824.90 or from any other subheading, except from heading 2607; or A change to subheading 2824.10 through 2924.90 from any other subheading, including another subheading within that group, except from heading 2607.

HTSUS	Tariff shift and/or other requirements
*	* * * * * *
2826.12–2833.19	A change to fluorides of ammonium or of sodium of subheading 2826.19 from any other good of subheading 2826.19 or from any other subheading; or A change to any other good of subheading 2826.19 from fluorides of ammonium or of sodium of subheading 2826.19 or from any other subheading; or A change to fluorosilicates of sodium or of potassium of subheading 2826.90 from any other good of subheading 2826.90 or from any other subheading; or A change to any other good of subheading 2826.90 from fluorosilicates of sodium or of potassium of subheading 2826.90 or from any other subheading; or A change to chlorides of iron of subheading 2827.39 from any other good of subheading 2827.39 or from any other subheading; or A change to chlorides of cobalt of subheading 2827.39 from any other good of subheading 2827.39 or from any other subheading; or A change to chlorides of zinc of subheading 2827.39 from any other good of subheading 2827.39 or from any other subheading; or A change to any other good of subheading 2827.39 from chlorides of iron, of cobalt, or of zinc of subheading 2827.39 or from any other subheading; or A change to zinc sulphide of subheading 2830.90 from any other good of subheading 2830.90 or from any other subheading; or A change to cadmium sulphide of subheading 2830.90 from any other good of subheading 2830.90 or from any other subheading; or A change to any other good of subheading 2830.90 from zinc sulphide or cadmium sulphide of subheading 2830.90 or from any other subheading; or A change to subheading 2826.12 through 2833.19 from any other subheading, including another subheading within that group.
*	* * * * * *
2833.22–2833.25	A change to subheading 2833.22 through 2833.25 from any other subheading, including another subheading within that group.
*	* * * * * *
2833.29	A change to chromium sulphate of subheading 2833.29 from any other good of subheading 2833.29 or from any other subheading; or A change to zinc sulphate of subheading 2833.29 from any other good of subheading 2833.29 or from any other subheading; or A change to any other good of subheading 2833.29 from chromium sulphate or zinc sulphate of subheading 2833.29 or from any other subheading, except from heading 2520.
*	* * * * * *
2835.29–2835.39	A change to phosphates of trisodium of subheading 2835.29 from any other good of subheading 2835.29 or from any other subheading; or A change to any other good of subheading 2835.29 from phosphates of trisodium of subheading 2835.29 or from any other subheading; or A change to subheading 2835.29 through 2835.39 from any other subheading, including another subheading within that group.
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2836.99	A change to bismuth carbonate of subheading 2836.99 from commercial ammonium carbonate or other ammonium carbonates or from lead carbonates of subheading 2836.99 or from any other subheading, except from subheading 2617.90; or A change to commercial ammonium carbonate or to other ammonium carbonates of subheading 2836.99 from any other good of subheading 2836.99 or from any other subheading; or A change to lead carbonates of subheading 2836.99 from any other good of subheading 2836.99 or from any other subheading, except from heading 2607; or A change to any other good of subheading 2836.99 from commercial ammonium carbonate or other ammonium carbonates or from lead carbonates of subheading 2836.99 or from any other subheading, provided that the good classified in subheading 2836.99 is the product of a ''chemical reaction'' as defined in Note 1.
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2839.90	A change to silicates of potassium of subheading 2839.90 from any other good of subheading 2839.90 or from any other subheading; or A change to any other good of subheading 2839.90 from silicates of potassium of subheading 2839.90 or from any other subheading.
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2841.30	A change to subheading 2841.30 from any other subheading.
2841.50	A change to chromates of zinc or of lead from any other good of subheading 2841.50 or from any other subheading; or A change to any other good of subheading 2841.50 from chromates of zinc or of lead of subheading 2841.50 or from any other subheading, except from heading 2610.
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2841.90	A change to aluminates from any other good of subheading 2841.90 or from any other subheading; or

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	A change to any other good of subheading 2841.90 from aluminates of subheading 2841.90 or from any other subheading, provided that the good classified in subheading 2841.90 is the product of a ''chemical reaction'' as defined in Note 1.
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2842.90	A change to fulminates, cyanates and thiocyanates of subheading 2842.90 from any other good of subheading 2842.90 or from any other subheading; or A change to any other good of subheading 2842.90 from fulminates, cyanates and thiocyanates of subheading 2842.90 or from any other subheading, provided that the good classified in subheading 2842.90 is the product of a ''chemical reaction'' as defined in Note 1.
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2850	A change to heading 2850 from any other heading.
2852	A change to other metal oxides, hydroxides or peroxides of heading 2852 from any other good of heading 2852 or from any other heading, provided that the good is the product of a ''chemical reaction'', as defined in Note 1, except from subheading 2825.90; or A change to other fluorides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2826.19; or A change to other chlorides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2827.39; or A change to other bromides or to bromide oxides from any other good of heading 2852 or from any other heading, except from subheading 2827.59; or A change to iodides or to iodide oxides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2827.60; or A change to other chlorates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2829.19; or A change to other perchlorates, bromotes, perbromates, iodates or periodates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2829.90; or A change to other sulphides or polysulphides, whether or not chemically defined, of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2830.90; or A change to other sulfates of heading 2852 from any other good of heading 2852 or from any other heading, except from heading 2520 or from subheading 2833.29; or A change to other nitrates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2834.29; or A change to other phosphates from any other good of heading 2852 or from any other heading, except from subheading 2835.29; or A change to other cyanides or to cyanide oxides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2837.19; or A change to complex cyanides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2837.20; or A change to fulminates, cyanates or thiocyanates of heading 2852 from any other good of heading 2852 or from any other heading; or A change to other chromates, dichromates or peroxochromates of heading 2852 from any other good of heading 2852 or any other heading, except from heading 2610, or from subheading 2841.50; or A change to other salts of inorganic acids or to peroxoacids, other than azides, of heading 2852 from any other good of heading 2852 or from any other heading, provided that the good classified in heading 2852 is the product of a ''chemical reaction'' as defined in Note 1, except from subheading 2842.90; or A change to other silver compounds of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2843.29; or A change to derivatives containing only sulpho groups, their salts and esters from any other good of heading 2852 or from any other heading, except from heading 2908; or A change to palmitic acid, stearic acid, their salts or their esters from any other good of heading 2852 or from any other heading, except from subheading 2915.70; or A change to oleic, linolenic or linolenic acids, their salts or their esters from any other good of heading 2852 or from any other heading, except from subheading 2916.15; or A change to benzoic acid, its salts or its esters from any other good of heading 2852 or from any other heading, except from subheading 3301.90 or subheading 2916.31; or A change to lactic acid, its salts or its esters from any other good of heading 2852 or from any other heading, except 2918.11; or A change to other organo-inorganic compounds of heading 2852 from any other good of heading 2852 or from any other heading, except from heading 2931.
2853	A change to heading 2853 from any other heading.
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2903.11–2903.39	A change to subheading 2903.31 through 2903.39 from any subheading outside that group; or A change to any other good of subheading 2903.11 through 2903.39 from any other subheading, including another subheading within that group.
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2903.51–2904.90	A change to aldrin (ISO), chlordane (ISO) or heptachlor (ISO) of subheading 2903.52 from any other subheading, except from subheading 2903.59; or A change to any other good of subheading 2903.59 from any other subheading, except from subheading 2903.52; or A change to any other good of subheading 2903.51 through 2904.90 from any other subheading, including another subheading within that group.

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2905.11–2905.19	A change to pentanol (amyl alcohol) and isomers thereof of subheading 2905.19 from any other good of subheading 2905.19 or from any other subheading; or A change to any other good of subheading 2905.19 from pentanol (amyl alcohol) and isomers thereof of subheading 2905.19 or from any other subheading; or A change to any other good of subheading 2905.11 through 2905.19 from any other subheading, including another subheading within that group.
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2906.19	A change to terpineols of subheading 2906.19 from any other good of subheading 2906.19 or from any other subheading, except from heading 3805; or A change to any other good of subheading 2906.19 from terpineols of subheading 2906.19 or from any other subheading, except from subheading 3301.90 or 3805.90.
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2907.12–2907.22	A change to xylenols or their salts of subheading 2907.19 from any other good of subheading 2907.19 or from any other subheading, except from subheading 2707.99; or A change to any other good of subheading 2907.19 from xylenols and their salts of subheading 2907.19 or from any other subheading, except from subheading 2707.99; or A change to any other good of subheading 2907.12 through 2907.22 from any other subheading, including another subheading within that group, except from subheading 2707.99.
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2909.11–2909.49	A change to monomethyl ethers of ethylene glycol or of diethylene glycol of subheading 2909.44 through 2909.49 from any other good of subheading 2909.44 through 2909.49 or from any other subheading; or A change to any other good of subheading 2909.44 through 2909.49 from monomethyl ethers of ethylene glycol or of diethylene glycol of subheading 2909.44 through 2909.49 or from any other subheading; or A change to any other good of subheading 2909.11 through 2909.49 from any other subheading, including another subheading within than group.
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2910.10–2910.90	A change to dieldrin (ISO, INN) of subheading 2910.40 from any other subheading, except from subheading 2910.90; or A change to subheading 2910.90 from any other subheading, except from subheading 2910.40; or A change to any other good of subheading 2910.10 through 2910.90 from any other subheading, including another subheading within that group.
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2912.11–2912.12	A change to subheading 2912.11 through 2912.12 from any other subheading, including another subheading within that group.
2912.19–2912.49	A change to butanal (butyraldehyde, normal isomer) of subheading 2912.19 from any other good of subheading 2912.19 or from any other subheading; or A change to any other good of subheading 2912.19 from butanal (butyraldehyde, normal isomer) of subheading 2912.19 or from any other subheading, except from subheading 3301.90; or A change to any other good of subheading 2912.19 through 2912.49 from any other subheading, including another subheading within that group, except from subheading 3301.90.
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2915.11–2915.33	A change to sodium acetate of subheading 2915.29 from any other good of subheading 2915.29 or from any other subheading; or A change to cobalt acetates of subheading 2915.29 from any other good of subheading 2915.29 or from any other subheading; or A change to any other good of subheading 2915.29 from sodium acetate or cobalt acetates of subheading 2915.29 or from any other subheading; or A change to any other good of subheading 2915.11 through 2915.33 from any other subheading, including another subheading within that group.
2915.36	A change to subheading 2915.36 from any other subheading, except from subheading 2915.90.
2915.39	A change to isobutyl acetate of subheading 2915.39 from any other good of subheading 2915.39 or from any other subheading; or A change to 2-Ethoxyethyl acetate of subheading 2915.39 from any other good of subheading 2915.39 or from any other subheading; or A change to any other good of subheading 2915.39 from isobutyl acetate or 2-Ethoxyethyl acetate of subheading 2915.39 or from any other subheading, except from subheading 3301.90.
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2917.11–2917.39	A change to dibutyl orthophthalates of subheading 2917.34 from any other good of subheading 2917.34 or from any other subheading; or A change to any other good of subheading 2917.34 from dibutyl orthophthalates of subheading 2917.34 or from any other subheading; or A change to any other good of subheading 2917.11 through 2917.39 from any other subheading, including another subheading within that group.
2918.11–2918.22	A change to subheading 2918.18 from any other subheading, except from subheading 2918.19; or A change to any other good of subheading 2918.19 from any other subheading, except from subheading 2918.18; or A change to subheading 2918.11 through 2918.22 from any other subheading, including another subheading within that group.

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2918.91–2918.99	A change to subheading 2918.91 through 2918.99 from any other subheading outside that group, except from subheading 3301.90.
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2920.11–2926.90	A change to subheading 2920.11 through 2920.19 from any subheading outside that group; or A change to diethylamine and its salts of subheading 2921.19 from any other good of subheading 2921.19 or any other subheading; or A change to any other good of subheading 2921.19 from diethylamine and its salts of subheading 2921.19 or from any other subheading; or A change to anisidines, dianisidines, phenetidines, and their salts of subheading 2922.29 from any other good of subheading 2922.29 or any other subheading; or A change to any other good of subheading 2922.29 from anisidines, dianisidines, phenetidines, and their salts of subheading 2922.29 or from any other subheading; or A change to subheading 2924.12 from any other subheading, except from subheading 2924.19; or A change to subheading 2924.19 from any other subheading, except from subheading 2924.12; or A change to subheading 2925.21 through 2925.29 from any subheading outside that group; or A change to any other good of subheading 2920.11 through 2926.90 from any other subheading, including another subheading within that group.
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2929.10–2930.90	A change to subheading 2930.50 from any other subheading, except from subheading 2930.90; or A change to dithiocarbonates (xanthates) of subheading 2930.90 from any other good of subheading 2930.90 or from any other subheading; A change to any other good of subheading 2930.90 from dithiocarbonates (xanthates) of subheading 2930.90 or from any other subheading, except from subheading 2930.50; or A change to any other good of subheading 2929.10 through 2930.90 from any other subheading, including another subheading within that group.
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2936.21–2936.29	A change to subheading 2936.21 through 2936.29 from any other subheading, including another subheading within that group.
2936.90	A change to unmixed provitamins of subheading 2936.90 from any other good of subheading 2936.90 or from any other subheading; or A change to any other good of subheading 2936.90 from any other subheading, except from subheading 2936.21 through 2936.29.
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3001.20–3001.90	A change to glands and other organs, dried, whether or not powdered, of subheading 3001.90 from any other good of subheading 3001.90 or from any other subheading, except from subheading 0206.10 through 0208.90 or 0305.20, heading 0504 or 0510, or subheading 0511.99 if the change from these provisions is not to a gland or other organ powder classified in subheading 3001.90, and except a change from subheading 3006.92; or A change to any other good of subheading 3001.90 from glands and other organs, dried, whether or not powdered, of subheading 3001.90 or from any other subheading, except from subheading 3006.92; or A change to any other good of subheading 3001.20 through 3001.90 from any other subheading, including another subheading within that group, except a change from subheading 3006.92.
3002.10–3002.90	A change to subheading 3002.10 through 3002.90 from any other subheading including another subheading within that group, except a change from subheading 3006.92.
3003.10	A change to subheading 3003.10 from any other subheading, except from subheading 2941.10, 2941.20, 3003.20, or 3006.92.
3003.20	A change to subheading 3003.20 from any other subheading, except from subheading 2941.30 through 2941.90, or 3006.92.
3003.31	A change to subheading 3003.31 from any other subheading, except from subheading 2937.12 or 3006.92.
3003.39	A change to subheading 3003.39 from any other subheading, except from hormones or their derivatives classified in Chapter 29, or except from subheading 3006.92.
3003.40	A change to subheading 3003.40 from any other subheading, except from heading 1211, subheading 1302.11, 1302.19, 1302.20, 1302.39, or 3006.92, or alkaloids or derivatives thereof classified in Chapter 29.
3003.90	A change to subheading 3003.90 from any other subheading, provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content, or except from subheading 3006.92.
3004.10	A change to subheading 3004.10 from any other subheading, except from subheading 2941.10, 2941.20, 3003.10, 3003.20, or 3006.92.
3004.20	A change to subheading 3004.20 from any other subheading, except from subheading 2941.30 through 2941.90, 3003.20, or 3006.92.
3004.31	A change to subheading 3004.31 from any other subheading, except from subheading 2937.12, 3003.31, 3003.39, or 3006.92.
3004.32	A change to subheading 3004.32 from any other subheading, except from subheading 3003.39 or 3006.92, or from adrenal corticosteroid hormones classified in Chapter 29.
3004.39	A change to subheading 3004.39 from any other subheading, except from subheading 3003.39 or 3006.92, or from hormones or derivatives thereof classified in Chapter 29.
3004.40	A change to subheading 3004.40 from any other subheading, except from heading 1211, subheading 1302.11, 1302.19, 1302.20, 1302.39, 3003.40, or 3006.92, or alkaloids or derivatives thereof classified in Chapter 29.
3004.50	A change to subheading 3004.50 from any other subheading, except from subheading 3003.90 or 3006.92, or vitamins classified in Chapter 29 or products classified in heading 2936.

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3004.90	A change to subheading 3004.90 from any other subheading, except from subheading 3003.90 or 3006.92, and provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content.
3005.10	A change to subheading 3005.10 from any other subheading, except from subheading 3006.92 or 3825.30.
3006.10	A change to subheading 3006.10 from any other subheading, except from subheading 1212.20, 3006.92, 3825.30, or from articles of catgut of heading 4206.
3006.20–3006.60	A change to subheading 3006.20 through 3006.60 from any other subheading, including another subheading within that group, except from subheading 3006.92 or 3825.30.
3006.70	A change to subheading 3006.70 from any other subheading, except from subheading 3006.92 or 3825.30, and provided no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
3006.91	A change to subheading 3006.91 from any other subheading, except from heading 3926.
3006.92	A change to subheading 3006.92 from any other chapter.
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3102.90	A change to calcium cyanamide of subheading 3102.90 from any other subheading or from any other good of subheading 3102.90; or A change to any other good of subheading 3102.90 from calcium cyanamide of subheading 3102.90 or from any other subheading, except from subheading 3102.10 through 3102.80.
3103.10	A change to subheading 3103.10 from any other subheading.
3103.90	A change to basic slag of subheading 3103.90 from any other good of subheading 3103.90 or from any other subheading; or A change to any other good of subheading 3103.90 from basic slag of subheading 3103.90 or from any other subheading, except from subheading 3103.10.
3104.20–3104.30	A change to subheading 3104.20 through 3104.30 from any other subheading, including another subheading within that group.
3104.90	A change to carnallite, sylvite or other crude natural potassium salts of subheading 3104.90 from any other good of subheading 3104.90 or from any other subheading; or A change to any other good of subheading 3104.90 from any other subheading, except from subheading 3104.20 through 3104.30.
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3206.20–3209.90	A change to pigments and preparations based on cadmium compounds of subheading 3206.49 from any other good of subheading 3206.49 or from any other subheading; or A change to pigments and preparations based on hexacyanoferrates (ferrocyanides and ferricyanides) from any other good of subheading 3206.49 or from any other subheading; or A change to any other good of subheading 3206.49 from pigments and preparations based on cadmium compounds or hexacyanoferrates (ferrocyanides and ferricyanides) of subheading 3206.49 or from any other subheading; or A change to any other good of subheading 3206.20 through 3209.90 from any other subheading, including another subheading within that group.
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3301.12–3301.90	A change to oil of bergamot of subheading 3301.19 from any other good of subheading 3301.19 or from any other subheading; or A change to oil of lime of subheading 3301.19 from any other good of subheading 3301.19 or from any other subheading; or A change to any other good of subheading 3301.19 from oil of bergamot or of lime of subheading 3301.19 or from any other subheading; or A change to oil of geranium of subheading 3301.29 from any other good of subheading 3301.29 or from any other subheading; or A change to oil of jasmin of subheading 3301.29 from any other good of subheading 3301.29 or from any other subheading; or A change to oil of lavender or of lavandin of subheading 3301.29 from any other good of subheading 3301.29 or from any other subheading; or A change to oil of vetiver of subheading 3301.29 from any other good of subheading 3301.29 or from any other subheading; or A change to any other good of subheading 3301.29 from oil of geranium, jasmine, lavender or lavandin, or of vetiver of subheading 3301.29 or from any other subheading; or A change to any other good of subheading 3301.12 through 3301.90 from any other subheading, including another subheading within that group.
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3404.20	A change to subheading 3404.20 from any other subheading.
3404.90	A change to artificial waxes and prepared waxes of chemically modified lignite of subheading 3404.90 from any other good of subheading 3404.90 or from any other subheading; or A change to any other good of subheading 3404.90 from artificial waxes and prepared waxes of chemically modified lignite of subheading 3404.90 or from any other subheading, except from heading 1521 or subheading 2712.20 or 2712.90.
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3808.50	A change to insecticides from any other subheading, except from vegetable saps or extracts of pyrethrum or of the roots of plants containing rotenone of subheading 1302.19 or from subheading 3808.91 or from any insecticide classified in Chapter 28 or 29; or

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	A change to fungicides from any other subheading, except from fungicides classified in Chapter 28 or 29 or from subheading 3808.92; or
	A change to herbicides, anti-sprouting products and plant-growth regulators from any other subheading, except from herbicides, anti-sprouting products and plant-growth regulators classified in Chapter 28 or 29 or from subheading 3808.93; or
	A change to a mixture of herbicides, anti-sprouting products and plant-growth regulators from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients; or
	A change to disinfectants from any other subheading, except from subheading 3808.94; or
	A change to any other good of subheading 3808.50 from any other good of subheading 3808.50 or from any other subheading, except from rodenticides and other pesticides classified in Chapter 28 or 29 or from subheading 3808.99; or
	A change to a mixture of subheading 3808.50 from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients, except from subheading 3808.99.
3808.91	A change to subheading 3808.91 from any other subheading, except from vegetable saps or extracts of pyrethrum or of the roots of plants containing rotenone of subheading 1302.19 or from any insecticide classified in Chapter 28 or 29 or subheading 3808.50.
3808.92	A change to subheading 3808.92 from any other subheading, except from fungicides classified in Chapter 28 or 29, or subheading 3808.50.
3808.93	A change to subheading 3808.93 from any other subheading, except from herbicides, anti-sprouting products or plant-growth regulators classified in Chapter 28 or 29 or subheading 3808.50; or
	A change to a mixture of subheading 3808.93 from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients.
3808.94	A change to subheading 3808.94 from any other subheading, except from disinfectants of subheading 3808.50.
3808.99	A change to subheading 3808.99 from any other subheading, except from rodenticides or other pesticides classified in Chapter 28 or 29; or
	A change to a mixture of subheading 3808.99 from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients.
*	* * * * * *
3824.71–3824.90	A change to subheading 3824.71 from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71 or from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound; or
	A change to other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included of subheading 3824.71 from any other good of subheading 3824.71 or from any other subheading, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.73 through 3824.79, or 3824.90; or
	A change to subheading 3824.72 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.73 through 3824.79; or
	A change to other mixtures of halogenated hydrocarbons of subheading 3824.73 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, or 3824.74 through 3824.79, or 3824.90; or
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.73 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.72, or 3824.74 through 3824.79; or
	A change to other mixtures of halogenated hydrocarbons of subheading 3824.74 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, 3824.73, or 3824.75 through 3824.79, and except from subheading 3824.90; or
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.74 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.72 through 3824.73 and subheading 3824.75 through 3824.79; or
	A change to subheading 3824.75 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, 3824.73 through 3824.74, subheading 3824.76 through 3824.79, or 3824.90; or

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	A change to subheading 3824.76 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, 3824.73 through 3824.75, 3824.77 through 3824.79, or 3824.90; or A change to subheading 3824.77 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, 3824.73 through 3824.76, 3824.78 through 3824.79, or 3824.90; or A change to subheading 3824.78 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.72 through 3824.77 or 3824.79; A change to mixtures of halogenated hydrocarbons of subheading 3824.79 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included of subheading 3824.71, 3824.73 through 3824.78, and except from subheading 3824.90; or A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.79 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3824.72 through 3824.78; A change to naphthenic acids, their water-insoluble salts or their esters of subheading 3824.90 from any other good of subheading 3824.90 or from any other subheading; or A change to any other good of subheading 3824.90 from naphthenic acids, their water-insoluble salts or their esters of subheading 3824.90 or from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3824.71, or 3824.73 through 3824.79; or A change to any other good of subheading 3824.71 through 3824.90 from any other subheading, including another subheading within that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
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3920.10–3921.90	A change to other plates, sheets, film, foil or strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials of cellulose or its chemical derivatives, of vulcanized fiber, of subheading 3920.79 from any other good of subheading 3920.79 or from any other subheading; or A change to any other good of subheading 3920.79 from plates, sheets, film, foil or strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials of cellulose or its chemical derivatives, of vulcanized fiber, of subheading 3920.79 or from any other subheading; or A change to any other good of subheading 3920.10 through 3921.90 from any other subheading, including another subheading within that group.
*	* * * * * *
4203–4206	A change to articles of leather or of composition leather, of a kind used in machinery or mechanical appliances or for other technical uses of heading 4205 from any other good of heading 4205 or from any other heading; or A change to any other good of heading 4205 from articles of leather or of composition leather, of a kind used in machinery or mechanical appliances or for other technical uses of heading 4205 or from any other heading; or A change to any other good of heading 4203 through 4206 from any other heading, including another heading within that group.
*	* * * * * *
4412	A change to heading 4412 from any other heading, except from plywood of subheading 4418.71 through 4418.79; or A change to surface-covered plywood of heading 4412 from any other plywood that is not surface covered or is surface-covered only with a clear or transparent material which does not obscure the grain, texture, or markings of the face ply.
4413–4421	A change to plywood of subheading 4418.71 through 4418.79 from any other good of heading 4418 or from any other heading, except from heading 4412; or A change to any other good of subheading 4418.71 through 4418.79 from plywood of subheading 4418.71 through 4418.79 or from any other heading; or A change to any other good of heading 4413 through 4421 from any other heading, including another heading within that group.
*	* * * * * *
4601.21–4601.99	A change to subheading 4601.21 through 4601.29 from any subheading outside that group; or A change to subheading 4601.92 through 4601.94 from any subheading outside that group; or A change to subheading 4601.99 from any other subheading.
*	* * * * * *
4823.61–4823.70	A change to subheading 4823.61 through 4823.69 from any subheading outside that group; or A change to any other good of subheading 4823.61 through 4823.70 from any other subheading, including another subheading within that group.

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4823.90	A change to floor coverings on a base of paper or of paperboard, whether or not cut to size, from any other good of subheading 4823.90 or from any other subheading; or A change to self-adhesive paper, in strips or rolls, from any other good of subheading 4823.90 or from any other subheading; or A change to other gummed or adhesive paper, in strips or rolls, from any other good of subheading 4823.90 or from any other subheading; or A change to cards not punched and for punchcard machines from any other chapter; or A change to any other good of subheading 4823.90 from floor covering on base paper or of paperboard, self-adhesive paper, other gummed or adhesive paper, or from cards not punched and for punchcard machines of subheading 4823.90, or from any other subheading.
*	* * * * * *
6811.40	A change to subheading 6811.40 from any other heading.
6811.81	A change to subheading 6811.81 from any other heading.
6811.82	A change to subheading 6811.82 from any other heading.
6811.83	A change to subheading 6811.83 from any other heading.
6811.89	A change to subheading 6811.89 from any other heading.
6812.80	A change to clothing, clothing accessories, footwear or headgear of subheading 6812.80 or from any other good of subheading 6812.80 or from any other subheading, except from subheading 6812.91; or A change to paper, millboard or felt of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from compressed asbestos fiber jointing of subheading 6812.80 or from subheading 6812.92 through 6812.93; or A change to compressed asbestos fiber jointing, in sheets or rolls, of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from paper, millboard or felt of subheading 6812.80 or from subheading 6812.92 through 6812.93; or A change to other fabricated asbestos fibers, mixtures with a basis of asbestos and magnesium carbonate, or to articles of such mixtures or of asbestos, whether or not reinforced, other than goods of heading 6811 or 6813 from any other heading; or A change to yarn or thread of subheading 6812.80 from any other subheading including from any other good of subheading 6812.80; or A change to cords or string, whether or not plaited, of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from yarn or thread of subheading 6812.80; or A change to woven or knitted fabric of subheading 6812.80 from any other subheading including from any other good of subheading 6812.80.
6812.91	A change to subheading 6812.91 from any other subheading, except from other clothing, clothing accessories or headgear of subheading 6812.80.
6812.92–6812.93	A change to subheading 6812.92 through 6812.93 from any subheading outside that group, except from subheading 6812.80. A change to subheading 6812.99 from any other heading; or
6812.99	A change to yarn or thread of subheading 6812.99 from any other subheading including from any other good of subheading 6812.99; or A change to cords or string, whether or not plaited of subheading 6812.99 from any other subheading or from any other good of subheading 6812.99, except from yarn or thread of subheading 6812.99; or A change to woven or knitted fabric of subheading 6812.99 from any other subheading including from any other good of subheading 6812.99.
*	* * * * * *
7013–7018	A change to heading 7013 through 7018 from any other heading, including another heading within that group; or A change from uncut and unpolished glassware blanks classified in heading 7013 to cut and polished glassware classified in heading 7013, provided that there has been a substantial amount of both cutting and polishing operations in a single country.
*	* * * * * *
7020	A change to glass inners for vacuum flasks or for other vacuum vessels of heading 7020 from any other good of heading 7020 or from any other heading; or A change to any other good of heading 7020 from any other heading, except from heading 7010 through 7018.
*	* * * * * *
7321.11–7321.89	A change to subheading 7321.11 through 7321.89 from any other heading; or A change to subheading 7321.11 through 7321.89 from subheading 7321.90, except when that change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
7411–7418	A change to cooking or heating apparatus of a kind used for domestic purposes, non-electric and parts thereof, of copper, of subheading 7418.19 from any other good of subheading 7418.19 or from any other subheading; or A change to any other good of subheading 7418.19 from cooking or heating apparatus of a kind used for domestic purposes, non-electric and parts thereof, of copper, of subheading 7418.19 or from any other subheading; or A change to any other good of heading 7411 through 7418 from any other heading, including another heading within that group.
7419.10–7419.99	A change to cloth, grill or netting of copper wire or to expanded metal of copper of subheading 7419.99 from any other good of subheading 7419.99 or from any other subheading; or A change to any other good of subheading 7419.99 from cloth, grill or netting of copper wire or expanded metal of copper of subheading 7419.99; or

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	A change to copper springs of subheading 7419.99 from any other good of subheading 7419.99 or from any other subheading; or A change to any other good of subheading 7419.99 from copper springs of subheading 7419.99; or A change to any other good of subheading 7419.10 through 7419.99 from any other subheading, including another subheading within that group.
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7801–7802	A change to heading 7801 through 7802 from any other heading, including another heading within that group.
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7806	A change to any of the following goods classified in heading 7806 from materials also classified in heading 7806: tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; cables/stranded wire/plaited bands; or A change to lead bars, rods, profiles, or wire of heading 7806 from any other good of heading 7806 or from any other heading; or A change to any other good of heading 7806 from lead bars, rods, profiles, or wire of heading 7806 or from any other heading.
7901–7905	A change to any of the following goods classified in heading 7901 through 7905, including from materials also classified in heading 7901 through 7905: Matte; unwrought; powder, except from flakes; flakes except from powder; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; wire except from rod; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip; or A change to any other good of heading 7901 through 7905 from any other heading, including another heading within that group.
7907	A change to any of the following goods classified in heading 7907 from materials also classified in heading 7907: tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; or A change to tubes, pipes and tube or pipe fittings of heading 7907 from any other good of heading 7907; or A change to any other good of heading 7907 from tubes, pipes or tube or pipe fittings of heading 7907 or from any other heading.
*	* * * * * *
8002–8003	A change to any of the following goods classified in heading 8002 through 8003, from materials also classified in heading 8002 through 8003: Bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; wire except from rod; or A change to heading 8002 through 8003 from any other heading, including another heading within that group.
8007	A change to any of the following goods classified in heading 8007 from other materials also classified in heading 8007: Tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; cables/stranded wire/ plaited bands; plates except from sheets or strip; sheets except from plate or strip; strip except from sheet or plate; or A change to any of the following goods classified in heading 8007 from other materials also classified in heading 8007: foil from powder or flakes; powder from foil; flakes from foil; or A change to foil, powder or flakes from any other good of heading 8007 or from any other heading; or A change to plates, sheet or strip from any other good of heading 8007 or from any other heading; or A change to any other good of heading 8007 from plates, sheet, strip, foil, powder or flakes of heading 8007 or from any other heading.
8101.10–8101.94	A change to subheading 8101.10 through 8101.94 from any other subheading, including another subheading within that group; or A change to any of the following goods classified in subheading 8101.10 through 8101.94 from materials also classified in subheading 8101.10 through 8101.94: Matte; unwrought.
8101.96	A change to subheading 8101.96 from any other subheading, except from bars and rods, other than those obtained by simple sintering, profiles, plates, sheets, strip or foil of subheading 8101.99.
8101.99	A change to any of the following goods classified in subheading 8101.99, including from materials also classified in subheading 8101.99: Tubes except from pipes; pipes except from tube; tube or pipe fittings except from tubes or pipes; cables/stranded wire/ plaited bands; bars, other than those obtained simply by sintering, except from rods, other than those obtained simply by sintering, or profiles; rods, other than those obtained simply by sintering, except from bars, other than those obtained simply by sintering, or profiles; profiles except from rods or bars, other than those obtained simply by sintering; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip; or A change to any other good of subheading 8101.99 from bars or rods, other than those obtained simply by sintering, profiles, plates, sheet, strip or foil or from any other subheading.
*	* * * * * *
8103.20–8113.00	A change to germanium of subheading 8112.92 through 8112.99 from any other good of subheading 8112.92 through 8112.99 or from any other subheading; or A change to vanadium of subheading 8112.92 through 8112.99 from any other good of subheading 8112.92 through 8112.99 or from any other subheading; or A change to any other good of subheading 8112.92 through 8112.99 from germanium or vanadium of subheading 8112.92 through 8112.99 or from any other subheading; or A change to any of the following goods classified in subheading 8103.20 through 8113.00, including from materials also classified in subheading 8103.20 through 8113.00: Matte; unwrought; powder except from flakes; flakes except from powder; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; wire except from rod; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip; tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; cables/stranded wire/plaited bands; or

HTSUS	Tariff shift and/or other requirements
	A change to any other good of subheading 8103.20 through 8113.00 from any other subheading, including another subheading within that group.
*	* * * * * *
8418.10–8418.91	A change to absorption-type electrical refrigerators of subheading 8418.29 from any other good of subheading 8418.29 or from any other subheading; or A change to any other good of subheading 8418.29 from absorption-type electrical refrigerators of subheading 8418.29 or from any other subheading; or A change to heat pumps of subheading 8418.61 from any other subheading, except from compression type units whose condensers are heat exchangers of subheading 8418.69; or A change to compression type units of subheading 8418.69 from any other subheading, except from heat pumps of subheading 8418.61 or from any other good of subheading 8418.69; or A change to other refrigerating or freezing equipment of subheading 8418.69 from any other subheading, except from heat pumps of subheading 8418.61; or A change to any other good of subheading 8418.69 from compression type units of subheading 8418.69 or from any other subheading; or A change to any other good of subheading 8418.10 through 8418.91 from any other subheading, including another subheading within that group.
*	* * * * * *
8425.11–8430.69	A change to pit-head winding gears or to winches specially designed for use underground of subheading 8425.31 through 8425.39 from any other good of subheading 8425.31 through 8425.39 or from any other subheading; or A change to any other good of subheading 8425.31 through 8425.39 from pit-head winding gears or to winches specially designed for use underground of subheading 8425.31 through 8425.39 or from any other subheading; or A change to mine wagon pushers, locomotive or wagon traversers, wagon tippers and similar railway wagon handling equipment of subheading 8428.90 from any other good of subheading 8428.90 or from any other subheading; or A change to any other good of subheading 8428.90 from mine wagon pushers, locomotive or wagon traversers, wagon tippers and similar railway wagon handling equipment of subheading 8428.90 or from any other subheading; or A change to any other good of subheading 8425.11 through 8430.69 from any other subheading, including another subheading within that group.
*	* * * * * *
8442.30	A change to subheading 8442.30 from any other subheading.
*	* * * * * *
8443.11–8443.39	A change to printing machinery of subheading 8443.11 through 8443.19 from any other subheading outside that group, except from machines for uses ancillary to printing of subheading 8443.91; or A change to printer units of ADP machines of subheading 8443.31 through 8443.32 from any other good of subheading 8443.31 through 8443.32 or from any other subheading, except from parts and accessories suitable for use solely or principally with the machines of subheading 8443.31 through 8443.32 of subheading 8443.99 when that change is the result of simple assembly, or from subheading 8504.90 or heading 8473, when that change is the result of simple assembly, and except from other units of ADP machines of subheading 8517.62 through 8517.69 or heading 8528, or from subheading 8471.60 through 8472.90; or A change to facsimile machines of subheading 8443.31 through 8443.32 from any other good of subheading 8443.31 through 8443.32 or from any other subheading, except from teleprinters of subheading 8443.32, or from subheading 8443.99 or 8517.70 when the change is the result of a simple assembly, or from subheading 8517.11 through 8517.69; or A change to teleprinters of subheading 8443.32 from any other good of subheading 8443.32 or from any other subheading, except from facsimile machines of subheading 8443.31 through 8443.32, and except from subheading 8443.99 or 8517.70 when the change is the result of a simple assembly , or from subheading 8517.11 through 8517.69; or A change to printing machines of subheading 8443.39 from any other subheading, except from subheading 8443.11 through 8443.39, or from machines for uses ancillary to printing of subheading 8443.91; or A change to electrostatic photocopying apparatus of subheading 8443.39 from any other good of subheading 8443.39 or from any other subheading; or A change to other photocopying apparatus of subheading 8443.39 from any other good of subheading 8443.39 or from any other subheading; or A change to thermo-copying apparatus of subheading 8443.39 from any other good of subheading 8443.39 or from any other subheading.
8443.91	A change to machines for uses ancillary to printing from any other good of subheading 8443.91 or from any other subheading, except subheading 8443.11 through 8443.19; or A change to any other good from any other heading, except from heading 8501 when resulting from a simple assembly.
8443.99	A change to accessory or auxiliary machines which are intended for attachment to an electrostatic photocopier and which do not operate independently of such photocopier from any other good of subheading 8443.99, provided that change is not the result of a simple assembly, or from any other subheading, except from subheading 8443.31 through 8443.32, 8471.60 through 8472.90, 8504.90 or from heading 8473 or from other units of ADP machines of subheading 8517.62 through 8517.69 or heading 8528 when that change is the result of a simple assembly; or A change to parts or accessories of printers of subheading 8443.31 or 8443.32 from any other heading except from heading 8414, 8501, 8504, 8534, 8541, or 8542 when resulting from a simple assembly, or from heading 8473 or subheading 8517.70; or A change to parts of facsimile machines from any other good of subheading 8443.99 or from any other subheading, except from parts for teleprinters, including teletypewriters, of subheading 8443.99 or from heading 8517; or A change to parts for teleprinters, including teletypewriters, from any other good of subheading 8443.99 or any other subheading, except from parts of facsimile machines of subheading 8443.99 or from heading 8517; or

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	A change to parts or accessories of photocopying apparatus incorporating an optical system or of the contact type or to thermocopying apparatus from any other good of subheading 8443.99 or from any other subheading.
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8456.10–8456.90	A change to subheading 8456.10 through 8456.90 from any other heading, except from machine-tools for dry-etching patterns on semiconductor materials of subheading 8486.20.
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8469.00	A change to word-processing machines of heading 8469 from any other good of heading 8469 or from any other subheading, except from automatic typewriters of heading 8469; or A change to automatic typewriters of heading 8469 from any other good of heading 8469 or from any other subheading, except from word-processing machines of heading 8469; or A change to other electric typewriters of heading 8469 from any other good of heading 8469 or from any other subheading, except from other non-electric typewriters of heading 8469; or A change to other non-electric typewriters of heading 8469 from any other good of heading 8469 or from any other subheading, except from other electric typewriters of heading 8469.
8470.10–8471.50	A change to accounting machines of subheading 8470.90 from any other good of subheading 8470.90, provided that the change is not the result of a simple assembly; or A change to any other good of subheading 8470.90 from accounting machines of subheading 8470.90, provided that the change is not the result of a simple assembly; or A change to analog or hybrid automatic data processing machines of subheading 8471.30 through 8471.50 from any other good of subheading 8471.30 through 8471.50, provided that the change is not the result of a simple assembly; or A change to any other good of subheading 8471.30 through 8471.50 from analog or hybrid automatic data processing machines of subheading 8471.30 through 8471.50, provided that the change is not the result of a simple assembly; or A change to subheading 8470.10 through 8471.50 from any subheading within that group or from heading 8473, provided that the change is not the result of a simple assembly; or A change to subheading 8470.10 through 8471.50 from any other subheading outside that group, except from heading 8473.
8471.60–8472.90	A change to addressing machines or address plate embossing machines of subheading 8472.90 from any other good of subheading 8472.90, provided that the change is not the result of simple assembly; or A change to any other good of subheading 8472.90 from addressing machines and address plate embossing machines of subheading 8472.90, provided that the change is not the result of simple assembly; or A change to subheading 8471.60 through 8472.90 from any other subheading outside that group, except from subheading 8504.40 or from heading 8473; or A change to subheading 8471.60 through 8472.90 from any other subheading within that group or from subheading 8504.90 or from heading 8473, provided that the change is not the result of simple assembly.
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8479.10–8479.89	A change to subheading 8479.10 through 8479.89 from any other subheading, including another subheading within that group, except from subheading 8486.10 through 8486.40.
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8486.10–8486.40	A change to other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.10 from any other good of subheading 8486.10 or from any other subheading, except from other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.40, or from subheading 8456.90; or A change to sawing machines of subheading 8486.10 from any other good of subheading 8486.10 or from any other subheading, except from subheading 8464.10; or A change to steam or sand blasting machines and similar jet projecting machines of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from steam or sand blasting machines and similar jet projecting machines of subheading 8424.30 or 8486.40; or A change to ion implanters designed for doping semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from ion implanters designed for doping semiconductor materials of subheading 8543.10; or A change to other machine tools for dry-etching patterns on semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from heading 8456; or A change to direct write-on-wafer apparatus of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from step or repeat aligners or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or A change to step aligners of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, repeat aligners, or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or A change to repeat aligners of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, step aligners, or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or A change to other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, step or repeat aligners of subheading 8486.20 or from subheading 9010.50; or A change to centrifuges of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8421.19; or A change to machine tools operated by laser or other light or photon beam process of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8456.10; or

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	A change to grinding or polishing machines of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8464.20; or
	A change to other electrical machines or apparatus, having individual functions, of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from other electrical machines or apparatus of subheading 8486.10 through 8486.20, 8486.90, 8543.70, 8542.31 through 8542.39, and except from proximity cards or tags of subheading 8523.52; or
	A change to other furnaces or ovens of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8514.30; or
	A change to other machine-tools for working stone, ceramics or like mineral materials or for cold working glass of subheading 8486.10 through 8486.30 from any other good of subheading 8486.10 through 8486.30 or from any other subheading, except from other machine-tools for working stone, ceramics or like mineral materials or for cold working glass of subheading 8486.10 through 8486.30, or from subheading 8464.90; or
	A change to other mechanical appliances for projecting, dispersing or spraying liquids or powders of subheading 8486.10 through 8486.30 from any other good of subheading 8486.10 through 8486.30 or from any other subheading, except from subheading 8424.89; or
	A change to steam or sand blasting machines or similar jet projecting machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from steam or sand blasting machines and similar jet projecting machines of subheading 8424.30 or 8486.20; or
	A change to pneumatic elevators or conveyors of subheading 8486.40 from any other good of subheading 8486.40 or from other subheading, except from subheading 8428.20; or
	A change to other belt type continuous-action elevators or conveyors for goods or materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.33; or
	A change to other continuous-action elevators or conveyors for goods or materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.39; or
	A change to other lifting, handling, loading or unloading machinery of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.90; or
	A change to other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.10, or from subheading 8456.90; or
	A change to numerically controlled bending, folding, straightening or flattening machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8462.21; or
	A change to other bending, folding, straightening or flattening machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8462.29; or
	A change to other machines for working hard materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8465.99; or
	A change to injection-molding machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading except from subheading 8477.10; or
	A change to vacuum molding machines or other thermoforming machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8477.40; or
	A change to other machinery for molding or otherwise forming of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8477.59; or
	A change to parts of welding machines or of electric machines and apparatus for hot spraying of metals or cermets of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8515.90; or
	A change to pattern generating apparatus designed to produce masks or reticles from photoresist coated substrates of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 9017.20; or
	A change to die attach apparatus, tape automated bonders or wire bonders for assembly of semiconductors of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8515.11 through 8515.80; or
	A change to deflash machines for cleaning and removing contaminants from the metal leads of semiconductor packages prior to the electroplating process (deflash by chemical bath) of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8465.99; or
	A change to other machines or mechanical appliances of subheading 8486.10 through 8486.40 from any other good of subheading 8486.10 through 8486.40 or from any other subheading, except from other machines or mechanical appliances of subheading 8486.10 through 8486.40, 8479.89, 8508.11 through 8508.19 or 8508.60.
8486.90	A change to parts or accessories of drawing, marking-out or mathematical calculating instruments or to instruments for measuring length, for use in the hand, of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 9017; or
	A change to parts or accessories of apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials or of other apparatus or equipment for photographic laboratories or negatoscopes of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 9010; or
	A change to parts of electrical machines or apparatus, having individual functions, of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 8543; or
	A change to parts of machinery for working rubber or plastics or for the manufacture of products from these materials of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from other parts of machinery for working rubber or plastics or for the manufacture of products from these materials of subheading 8486.90, or from subheading 8477.90, and except from heading 8501 when resulting from a simple assembly; or
	A change to tool holders or to self-opening dieheads of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from subheading 8466.10 through 8466.94, work holders, dividing heads or other special attachments of subheading 8486.90, and except from heading 8501 when resulting from simple assembly; or

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	A change to work holders of subheading 8486.90 from any other good of subheading 8486.90, except from tool holders, dividing heads or other special attachments of subheading 8486.90, or from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to dividing heads or to other special attachments for machine tools of subheading 8486.90 from any other good of subheading 8486.90, except from tool holders or work holders of subheading 8486.90, or from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories for machine tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of: • Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or • Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or • Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or • Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or • Machine-tools for working metal or cermets, without removing material, or • Machine-tools for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Machine-tools for working metal by forging, hammering or die-stamping (including presses), or • Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or • Lathes (including turning centers), for removing metal, or • Presses for metal or working metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories of machine tools (including machines for nailing, stapling, gluing or otherwise assembling) for working wood, cork, bone, hard rubber, hard plastics or similar hard materials of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of: • Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or • Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or • Machine-tools for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or • Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or • Machine-tools for working metal by forging, hammering or die-stamping (including presses), or • Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or • Machine-tools for working metal or cermets, without removing material, or • Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or • Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or • Lathes (including turning centers), for removing metal, or of presses for working metal or metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories of machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or for drilling, boring, milling, threading or tapping by removing metal, or for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or to parts and accessories of machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or of lathes (including turning centers), for removing metal, of subheading 8486.90 from any other good of subheading 8486.90 except from parts or accessories of: • Machine-tools for working metal by forging, hammering or die-stamping, or • Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or • Machine-tools for working metal or cermets, without removing material, or • Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Presses for working metal or metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories of machine tools (including presses) for working metal by forging, hammering or die-stamping, or for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or for working metal or cermets, without removing material or to parts or accessories of presses for working metal carbide of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of: • Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or • Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or

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	• Machine-tools for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or • Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or • Machine-tools for working by removing metal or cermets, or • Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or • Machine-tools for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or • Lathes (including turning centers), for removing metal, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or A change to parts suitable for use solely or principally with lifting, handling, loading or unloading machinery from any other good of subheading 8486.90 or from any other subheading, except from subheading 8431.39 and except from heading 8501 when resulting from simple assembly.
8487	A change to heading 8487 from any other heading.
*	* * * * * *
8505.11–8505.20	A change to subheading 8505.11 through 8505.20 from any other subheading, including another subheading within that group.
8505.90	A change to electro-magnetic lifting heads of subheading 8505.90 from any other subheading or from any other good of subheading 8505.90; or A change to any other good of subheading 8505.90 from any other heading.
*	* * * * * *
8508.11–8508.60	A change to subheading 8508.11 through 8508.60 from any other subheading, including another subheading within that group.
8508.70	A change to subheading 8508.70 from any other heading, except from heading 8501 when resulting from simple assembly.
8509.40–8509.80	A change to floor polishers or to kitchen waste disposers of subheading 8509.80 from any other good of subheading 8509.80 or from any other subheading; or A change to any other good of subheading 8509.80 from floor polishers or from kitchen waste disposers of subheading 8509.80 or from any other subheading; or A change to any other good of subheading 8509.40 through 8509.80 from any other subheading, including another subheading within that group.
*	* * * * * *
8517.11–8517.69	A change to subheading 8517.12 from any other subheading, except from other transceivers, other transmission apparatus or other transmission apparatus incorporating reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.61 through 8517.69, or 8525.50 through 8525.60; or A change to other transmission apparatus for radiotelephony or radiotelegraphy or to other transmission apparatus incorporating reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.61 through 8517.69 from any other good of subheading 8517.61 through 8517.69 or from any other subheading, except from subheading 8517.12, other transmission apparatus for radiotelephony or radiotelegraphy or from other transmission apparatus incorporating reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.61 through 8517.69, or 8525.50 through 8525.60; or A change to other units of automatic data processing machines of subheading 8517.62 through 8517.69 from any other good of subheading 8517.62 through 8517.69 or from any other subheading, except from subheading 8504.90 or from heading 8473 or subheading 8517.70 when the change is the result of simple assembly; or A change to reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.69 from any other good of subheading 8517.69 or from any other subheading, except from subheading 8527.99, or A change to any other good of subheading 8517.11 through 8517.69 from any other subheading outside that group, except from facsimile machines or teleprinters of subheading 8443.31 through 8443.32, and except from subheading 8443.99 or 8517.70 when that change is the result of simple assembly.
8517.70	A change to parts or accessories of the machines of heading 8471 not incorporating a cathode ray tube from any other good of heading subheading 8517.70 or from any other subheading, except from heading 8414, 8501, 8504, 8534, 8541, or 8542 when resulting from a simple assembly, and except from heading 8473 or subheading 8443.99; or A change to antennas or antenna reflectors of a kind suitable for use with apparatus for radiotelephony or radiotelegraphy or to other parts suitable for use solely or principally with apparatus for radiotelephony or radiotelegraphy from any other good of subheading 8517.70 or from any other subheading, except from heading 8529; or A change to any other good of subheading 8517.70 from parts or accessories of the machines of heading 8471 not incorporating a cathode ray tube, or from antennas or antenna reflectors of a kind suitable for use with apparatus for radiotelephony or radiotelegraphy, or from other parts suitable for use solely or principally with the apparatus for radiotelephony or radiotelegraphy of subheading 8517.70, or from any other heading.
*	* * * * * *
8519.20–8519.30	A change to coin-or disc-operated record-players of subheading 8519.20 from any other subheading or from any other good of subheading 8519.20; or A change to turntables (record-decks) of subheading 8519.30 from any other subheading or from other turntables of subheading 8519.30; or A change to any other good of subheading 8519.20 through 8519.30 from any other subheading, including another subheading within that group.
8519.50	A change to subheading 8519.50 from any other subheading.
8519.81	A change to transcribing machines from any other subheading or from any other good of subheading 8519.81; or

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	A change to pocket-size cassette-players from any other subheading or from any other goods of subheading 8519.81, except from other cassette-type sound reproducing apparatus; or
	A change to other cassette-type sound reproducing apparatus from any other subheading or from any other goods of subheading 8519.81, except from pocket-size cassette players; or
	A change to digital audio type magnetic tape recorders incorporating sound reproducing apparatus from any other subheading or from any other good of subheading 8519.81, except from other cassette-type magnetic tape recorders incorporating sound reproducing apparatus of subheading 8519.81; or
	A change to other cassette-type magnetic tape recorders incorporating sound reproducing apparatus from any other subheading or from any other good of subheading 8519.81, except from digital audio type magnetic tape recorders incorporating sound reproducing apparatus of subheading 8519.81; or
	A change to any other good of subheading 8519.81 from any other subheading or from any other good of subheading 8519.81.
8519.89	A change to other sound reproducing apparatus from any other subheading or from any other good of subheading 8519.89, except from other sound reproducing apparatus of subheading 8519.89; or
	A change to any other good of subheading 8519.89 from any other good of subheading 8519.89 or from any other subheading.
*	* * * * * *
8523	A change to cards incorporating an electronic integrated circuit (''smart'' cards) of subheading 8523.52 from any other subheading; or
	A change to proximity tags of subheading 8523.52 from any other subheading or from any other good of heading 8523, except from subheading 8543.70; or
	A change to prepared unrecorded media for sound recording or similar recording or other phenomena, other than products of chapter 37, from records, tapes and other recorded media for sound or other similarly recorded phenomena, excluding products of chapter 37, or from any other heading; or
	A change to records, tapes and other recorded media for sound or other similarly recorded phenomenon, excluding products of chapter 37, from prepared unrecorded media for sound recording or similar recoding or other phenomena, other than products of chapter 37.
8525.50–8525.60	A change to subheading 8525.50 through 8525.60 from any other subheading outside that group, except from subheading 8517.12, and 8517.61 through 8517.69.
8525.80	A change to subheading 8525.80 from any other subheading or from any other good of subheading 8525.80, except a change to video camera recorders from television cameras.
*	* * * * * *
8527.19–8527.99	A change to other radio broadcast receivers of subheading 8527.99 from any other good of subheading 8527.99 or from any other subheading; or
	A change to any other good of subheading 8527.99 from radio broadcast receivers of subheading 8527.99 or from any other subheading; or
	A change to any other good of subheading 8527.19 through 8527.99 from any other subheading, including another subheading within that group.
8528.41	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
8528.49	A change to color video monitors from any other good of subheading 8528.49 or from any other subheading, except from subheading 8540.11 through 8540.12; or
	A change to black and white or other monochrome video monitors from any other good of subheading 8528.49 or from any other subheading, except from subheading 8540.11 through 8540.12.
8528.51	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
8528.59	A change to color video monitors from any other good of subheading 8528.59 or from any other subheading, except from subheading 8540.11 through 8540.12; or
	A change to black and white or other monochrome video monitors from any other good of subheading 8528.59 or from any other subheading, except from subheading 8540.11 through 8540.12.
8528.61	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
8528.69–8528.73	A change to subheading 8528.69 through 8528.73 from any other subheading, including another subheading within that group, except from subheading 8540.11 through 8540.12.
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8536.10–8536.90	A change to other articles of plastics of subheading 8536.70 from any other good of subheading 8536.70 or from any other subheading, except from heading 3926; or
	A change to ceramic ferrules, not exceeding 3 mm in diameter or 25 mm in length, having a fiber channel opening and/or ceramic mating sleeves of subheading 8536.70 from any other subheading, except from heading 6901 through 6914; or
	A change to any other good of subheading 8536.10 through 8536.90 from any other subheading, including another subheading within that group.
*	* * * * * *
8541–8542	A change to multichips of subheading 8542.31 through 8542.39 from any other good of subheading 8542.31 through 8542.39 or from any other subheading, except from subheading 8523.52 or 8543.70; or
	A change to a mounted chip, die or wafer classified in heading 8541 or 8542 from an unmounted chip, die, or wafer classified in heading 8541 or 8542; or
	A change to a programmed ''read only memory'' (ROM) chip from an unprogrammed ''programmable read only memory'' (PROM) chip; or

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	A change to any other good of heading 8541 through 8542 from any other subheading, including another subheading within that group.
8543.10	A change to subheading 8543.10 from any other subheading, except from ion implanters designed for doping semiconductor material of subheading 8486.20.
*	* * * * * *
8543.70	A change to subheading 8543.70 from any other subheading, except from proximity cards or tags of subheading 8523.52 and except from other machines or apparatus of subheading 8486.10 through 8486.20.
8543.90	A change to subheading 8543.90 from any other heading, except from parts of subheading 8486.90.
8544.11–8544.70	A change to subheading 8544.42 from any other good of subheading 8544.42, except when resulting from simple assembly; or
	A change to subheading 8544.49 from any other good of subheading 8544.49, except when resulting from simple assembly; or
	A change to subheading 8544.11 through 8544.70 from any other subheading, including another subheading within that group, except when resulting from simple assembly.
*	* * * * * *
8708.29	A change to subheading 8708.29 from any other subheading, except from subheading 8708.95.
8708.30	A change to mounted brake linings and pads from any other heading, except from brake linings and pads of subheading 6813.20 or 6813.81; or
	A change to other brakes or servo-brakes or parts thereof from any other heading.
8708.40	A change to parts for power trains of subheading 8708.40 from any other good of subheading 8708.40 or from any other subheading, except from parts or accessories of the goods of subheading 8708.50, 8708.80 through 8078.92, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.40 from parts for power trains of subheading 8708.40, except when the change is pursuant to General Rule of Interpretation 2(a), or from any other subheading, except from parts or accessories of the goods of subheading 8708.50, 8708.80 through 8078.92, or 8708.94 through 8708.99, when the change is pursuant to General Rule of Interpretation 2(a).
8708.50	A change to non-driving axles or parts thereof from any other good of subheading 8708.50 or from any other subheading; or
	A change to half-shafts or drive shafts or to other parts of tractors suitable for agricultural use, half-shafts or drive shafts or other parts of tractors (except road tractors), cast-iron parts, half-shafts or drive shafts, or to other parts for power trains from any other good of subheading 8708.50 or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.80 through 8708.92, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.50 from half-shafts or drive shafts or other parts of tractors suitable for agricultural use, half-shafts or drive shafts or other parts of tractors (except road tractors), cast-iron parts, half-shafts or drive shafts or from other parts for power trains of subheading 8708.50, except when the change is pursuant to General Rule of Interpretation 2(a), or from non-driving axles and parts thereof of subheading 8708.50, or from any other subheading, except from parts or accessories of subheading 8708.40, 8708.80 through 8708.92, or 8708.94 through 8708.99, when the change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
8708.80	A change to parts for suspension systems for tractors suitable for agricultural use, parts for suspension systems for other tractors (except road tractors), parts of cast iron, or to other parts for suspension systems from any other good of subheading 8708.80 or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.91, 8708.92, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.80 from parts for suspension systems for tractors suitable for agricultural use, parts for suspension systems for other tractors (except road tractors), parts of cast iron, or from other parts for suspension systems, except when the change is pursuant to General Rule of Interpretation 2(a), or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.91, 8708.92, or 8708.94 through 8708.99, when the change is pursuant to General Rule of Interpretation 2(a).
8708.91	A change to parts of tractors suitable for agricultural use, parts of other tractors (except road tractors), parts of cast-iron or to parts or accessories from any other good of subheading 8708.91 or from any other subheading, except from other parts or accessories of subheading 8708.40, 8708.50, 8708.80, 8708.92, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.91 from parts of tractors suitable for agricultural use, parts of other tractors (except road tractors), parts of cast-iron or from parts or accessories of the goods of subheading 8708.91, when that change is pursuant to General Rule of Interpretation 2(a), or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.92, or 8708.94 through 8708.99, when the change is pursuant to General Rule of Interpretation 2(a).
8708.92	A change to parts of tractors suitable for agricultural use, parts of other tractors (except road tractors), parts of cast-iron or to other parts or accessories from any other good of subheading 8708.92 or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.91, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.92 from parts of tractors suitable for agricultural use, parts of other tractors (except road tractors), parts of cast-iron or from other parts or accessories of subheading 8708.92 or from any other subheading.
*	* * * * * *
8708.94	A change to parts for steering systems of tractors suitable for agricultural use, parts for steering systems of other tractors (except road tractors), parts of cast-iron or to other parts for steering systems from any other good of subheading 8708.94 or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.91, 8708.92, or 8708.95 through 8708.99; or

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	A change to any other good of subheading 8708.94 from parts for steering systems of tractors suitable for agricultural use, parts for steering systems of other tractors (except road tractors), parts of cast-iron or from other parts for steering systems of subheading 8708.94, except when the change is pursuant to General Rule of Interpretation 2(a), or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.91, 8708.92, or 8708.95 through 8708.99, when that change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
8708.95	A change to inflators or modules for airbags from any other good of subheading 8708.95 or from any other subheading, except from subheading 8708.29; or A change to airbags or to other parts of tractors suitable for agricultural use, airbags or to other parts of other tractors (except road tractors), other airbags, or to other parts or accessories from inflators or modules for airbags of subheading 8708.95 or from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.91, 8708.92, 8708.94, or 8708.99.
8708.99	A change to subheading 8708.99 from any other subheading, except from parts or accessories of the goods of subheading 8708.40, 8708.50, 8708.80, 8708.91, 8708.92, 8708.94, or 8708.95.
*	* * * * * *
9006.10–9006.69	A change to cameras of a kind used for recording documents on microfilm, microfiche or other microforms of subheading 9006.52 through 9006.59 from any other good of subheading 9006.52 through 9006.59 or from any other subheading; or A change to any other good of subheading 9006.52 through 9006.59 from cameras of a kind used for recording documents on microfilm, microfiche or other microforms of subheading 9006.52 through 9006.59 or from any other subheading; or A change to flashbulbs, flashcubes or the like of subheading 9006.69 from any other good of subheading 9006.69 or from any other subheading; or A change to any other good of subheading 9006.10 through 9006.69 from any other subheading, including another subheading within that group.
*	* * * * * *
9010.50	A change to subheading 9010.50 from any other subheading, except from apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20.
*	* * * * * *
9010.90	A change to subheading 9010.90 from any other heading, except from parts of apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.90.
*	* * * * * *
9027.10–9027.90	A change to exposure meters of subheading 9027.50 from any other good of subheading 9027.50 or from any other subheading; or A change to any other good of subheading 9027.50 from exposure meters of subheading 9027.50; or A change to any other good of subheading 9027.10 through 9027.90 from any other subheading, including another subheading within that group.
*	* * * * * *
9030.10	A change to subheading 9030.10 from any other subheading.
9030.20	A change to cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 from non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 or from any other subheading; or A change to non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 from cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 or from any other subheading, except from subheading 9030.32, 9030.82, 9030.84, 9030.89, or 9030.90.
9030.31	A change to subheading 9030.31 from any other subheading.
9030.32	A change to subheading 9030.32 from any other subheading, except from non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20, or from subheading 9030.82 or 9030.84.
9030.33	A change to subheading 9030.33 from any other subheading, except from subheading 9030.39.
9030.39	A change to subheading 9030.39 from any other subheading, except from non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20, or from subheading 9030.32, 9030.82, or 9030.84.
9030.40	A change to subheading 9030.40 from any other subheading.
9030.82–9030.84	A change to subheading 9030.82 through 9030.84 from any other subheading outside that group, except from other instruments or apparatus with a recording device of subheading 9030.20, 9030.32 or 9030.39.
9030.89	A change to subheading 9030.89 from any other subheading, except from non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 or from subheading 9030.90.
9030.90	A change to subheading 9030.90 from any other subheading, except from non-cathode ray tube oscilloscopes or oscillographs of subheading 9030.20 or from subheading 9030.89.
9031.10–9031.20	A change to subheading 9031.10 through 9031.20 from any other subheading, including another subheading within that group.
9031.41–9031.49	A change to profile projectors of subheading 9031.49 from any other good of subheading 9030.49 or from any other subheading; or A change to any other good of subheading 9031.49 from a profile projector of subheading 9031.49 or from any other subheading, except from subheading 9031.41; or A change to any other good of subheading 9030.41 through 9030.49 from any other subheading outside that group.

HTSUS	Tariff shift and/or other requirements
*	* * * * * *
9201–9208	A change to keyboard pipe organs, harmoniums or other similar keyboard instruments with free metal reeds of subheading 9205.90 from any other good of subheading 9205.90 or from any other subheading, except from heading 9209 when that change is pursuant to General Rule of Interpretation 2(a); or A change to accordions and similar instruments, or mouth organs of subheading 9205.90 from any other good of subheading 9205.90 or from any other subheading, except from heading 9209 when that change is pursuant to General Rule of Interpretation 2(a); or A change to any other good of subheading 9205.90 from keyboard pipe organs, harmoniums and other similar keyboard instruments with free metal reeds, accordions and similar instruments, or mouth organs of subheading 9205.90 or from any other subheading, except from heading 9209 when that change is pursuant to General Rule of Interpretation 2(a); or A change to any other good of heading 9201 through 9208 from any other heading, including another heading within that group, except from heading 9209 when that change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
9401.10–9401.80	A change to subheading 9401.51 through 9401.59 from any subheading outside that group, except from subheading 9401.10 through 9401.80, subheading 9403.10 through 9403.89, and except from subheading 9401.90 or 9403.90 when that change is pursuant to General Rule of Interpretation 2(a); or A change to subheading 9401.10 through 9401.80 from any other subheading outside that group, except from subheading 9403.10 through 9403.89, and except from subheading 9401.90 or 9403.90, when that change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
9402	A change to heading 9402 from any other heading, except from heading 9401.10 through 9401.80 or subheading 9403.10 through 9403.89, and except from subheading 9401.90 or 9403.90 when that change is pursuant to General Rule of Interpretation 2(a).
9403.10–9403.89	A change to subheading 9403.10 through 9403.89 from any other subheading outside that group, except from subheading 9401.10 through 9403.89, and except from subheading 9401.90 or 9403.90, when that change is pursuant to General Rule of Interpretation 2(a).
*	* * * * * *
9503	A change to wheeled toys designed to ridden by children or to dolls' carriages or dolls' strollers, parts or accessories thereof from any other chapter, except from heading 8714 when that change is pursuant to General Rule of Interpretation 2(a); or A change to dolls, whether or not dressed, from any other subheading or from any other good of heading 9503, except from skins for stuffed dolls of heading 9503; or A change to parts or accessories of dolls representing only human beings from any other heading or from any other good of heading 9503, except from toys representing animals or non-human creatures of heading 9503; or A change to electric trains, including tracks, signals and other accessories or parts thereof from any other good of heading 9503 or from any other subheading; or A change to reduced-size (''scale'') model assembly kits, (excluding electric trains) or to parts or accessories thereof, from any other good of heading 9503 or from any other subheading; or A change to other construction sets and constructional toys or to parts or accessories thereof from any other good of heading 9503 or from any other subheading; or A change to toys representing animals or non-human creatures or to parts or accessories thereof from wheeled toys designed to be ridden by children, dolls' carriages, or dolls representing only human beings of heading 9503 or from any other heading; or A change to toys representing animals or non-human creatures from parts or accessories of toys representing animals or non-human creatures of heading 9503; or A change to parts or accessories of toys representing animals or non-human creatures from wheeled toys designed to be ridden by children, dolls' carriages, or dolls' strollers of heading 9503 or from any other heading, except from heading 6111 or 6209; or A change to toy musical instruments and apparatus from any other good of heading 9503 or from any other subheading; or A change to puzzles from any other good of heading 9503 or from any other subheading; or A change to other toys, put up in sets or outfits, or to other toys and models, incorporating a motor, or to other toys from any other chapter.
*	* * * * * *
9507.90	A change to subheading 9507.90 from any other subheading, except from heading 5004 through 5006, 5404, 5406, or 5603, or from subheading 5402.11 through 5402.49.
*	* * * * * *
9614.00	A change to pipes or pipe bowls from any other subheading, except to roughly shaped blocks of wood or root from heading 4407; or A change to articles other than pipes or pipe bowls from any other heading.

* * * * *

■ 3. In § 102.21:

■ a. Paragraphs (a), (b), (c), and (d) are amended by removing the word''shall'' each place it appears and adding, in its place, the word ''will'';

■ b. Paragraph (b)(5) is amended by removing the references to ''6503'' and ''9502.91'';

■ c. The table in paragraph (e) is amended by removing the entries for: ''6209. 10.0000–6209.20.5035'', ''6503'', and ''9502.91'';

■ d. The table in paragraph (e) is further amended by adding, in numericalorder, entries for: ''6209.20.1000–6209.20.5035'', and ''9503.00.0080'';

■ e. The table is further amended by revising the entries in the ''Tariff shiftand/or other requirements'' column adjacent to the ''HTSUS'' column listing for: ''6209.20.1000–6209.20.5035'', ''6505.90'', and ''9503.00.0080''.

The additions read as follows:

§ 102.21 Textile and apparel products.

* * * * *

HTSUS	Tariff shift and/or other requirements
*	*
6209.20.1000 .... 6209.20.5035	(1) If the good consists of two or more component parts, a change to an assembled good of subheading 6209.20.1000 through 6209.20.5035 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession. (2) If the good does not consist of two or more component parts, a change to subheading 6209.20.1000 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5806, 5809 through 5811, 5903, 5906 through 5907, and 6217, and subheading 6307.90, and provided that the change is the result of a fabric-making process.
*	*
6505.90	(1) For felt hats and other felt headgear, made from the hat bodies, hoods or plateaux of heading 6501, whether or not lined or trimmed, if the good consists of two or more components, a change to subheading 6505.90 from any other good of subheading 6505.90 or from any other subheading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession. (2) For felt hats and other felt headgear, made from the hat bodies, hoods or plateaux of heading 6501, whether or not lined or trimmed, if the good does not consist of two or more components, a change to subheading 6505.90 from any other subheading, except from heading 5602, and provided that the change is the result of a fabric-making process. (3) For any other good, if the good consists of two or more components, a change to subheading 6505.90 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession. (4) For any other good, if the good does not consist of two or more components, a change to subheading 6505.90 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5609, 5801 through 5804, 5806, 5808 through 5811, 5903, 5906 through 5907, and 6001 through 6006, and provided that the change is the result of a fabric-making process.
*	*
9503.00.0080	For garments and accessories thereof, footwear or headgear of dolls representing only human beings, a change to an assembled good from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

* * * * *

Dated: October 23, 2008.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E8–25734 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF STATE

22 CFR Part 94

[Public Notice 6417]

Procedures for Children Abducted to the United States; Final Rule

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is adopting as a final rule the regulations regarding incoming parental abduction cases pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. Incoming cases will be processed by the United States Central Authority (USCA), the Office of Children's Issues in the Bureau of Consular Affairs within the U.S. Department of State or an entity designated by the USCA.

DATES: This rule is effective October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Corrin M. Ferber, CA/OCS/PRI, U.S. Department of State, Room 4039, 2201 C Street, NW., Washington, DC 20520; *telephone:* (202) 736–9172 (this is not a toll free number). Hearing- or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: These regulations were originally published as an interim final rule on August 15, 2008, Volume 73, Number 159, page 47829–47831. No comments were received and we are adopting these regulations as final without change.

Since 1988, the Department of State has served as the United States Central Authority (USCA) under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The Office of Children's Issues (CI) in the Department's Bureau of Consular Affairs serves as the primary point of contact for abduction cases and is responsible for processing all Hague Convention applications seeking the return of children wrongfully removed or retained in the United States from any other Hague Convention contracting state. In addition, CI is responsible for facilitating access rights under the Hague Convention. In FY 2007, CI processed approximately 575 cases involving 821 children who were allegedly abducted from or retained outside the United States in other Hague contracting countries. Another 355 cases involving 518 children who were allegedly abducted to or retained in the United States from other Hague contracting countries were also processed in FY2007 (Hague incoming cases).

The processing of incoming Hague Convention applications requires case officers to communicate with foreign Central Authorities about incoming cases, to determine the whereabouts of children wrongfully taken to the United States, to attempt to promote the voluntary return of abducted children, and to facilitate the initiation of judicial proceedings with a view toward

securing the return of abducted children. Many of the case officer functions involve extensive contact with local law enforcement officials, social service agencies, legal aid organizations and local bar associations.

22 CFR Part 94 is being amended to reflect the fact that CI will resume case officer functions for Hague Convention cases where a child has been abducted to or retained in the United States, or will select an entity to assist the Central Authority to carry out these obligations. Since 1996, these functions have been carried out by the National Center for Missing and Exploited Children (NCMEC). *See* 61 FR 7069 (Feb. 26, 1996); 60 FR 66073 (Dec. 21, 1995). CI continued to perform the remaining USCA functions during this time and retained ultimate responsibility for all incoming cases, while the Department of State retained all inherently governmental functions, including matters of Hague Convention interpretation and policy direction. In March 2008, in an effort to reintegrate these various USCA functions, CI significantly modified its agreement with the Department of Justice's Office of Juvenile Justice and Delinquency Prevention and NCMEC such that CI would resume the case officer functions.

This change reflects the expansion of CI's capacity to manage the full range of case officer functions for incoming Hague abduction cases. During the past 12 years, CI has significantly increased its capacity to carry out casework, including its ability to liaise with other federal agencies; federal, state and local law enforcement; domestic and foreign social service agencies, non-governmental organizations; legal aid organizations; and local bar associations. The Office of the Inspector General (OIG) noted in its 2005 report that case officers exhibit the necessary combination of tact, empathy, and professionalism required to do this work. Further, it noted that the ability and commitment of the caseworkers was evident and well supported by management team within CI. The findings of the OIG indicate that CI has developed the necessary tools to manage incoming casework since entering into its initial agreement with NCMEC in 1995. This development, coupled with CI's desire to provide consistent, efficient services to parents, and an interest in maintaining clear communications with foreign Central Authorities, makes this an appropriate time for CI to resume responsibility for handling incoming Hague Convention cases, or, alternatively, to select an entity to assist in the carrying out of these functions.

The Department of State originally published this as an interim final rule on August 15, 2008, Volume 73, Number 159, page 47829–47831. No comments were received.

Regulatory Findings

The Department is publishing this rule in accordance with the exemption contained in 5 U.S.C. 553(a)(2) for matters relating to agency management or personnel. The transfer of responsibility over incoming Hague Convention cases back to the Office of Children's Issues at the Department of State primarily affects internal workload distribution and management of the USCA functions.

Regulatory Flexibility Act/Executive Order 13272: Small Business

Since this action is exempt from notice and comment procedures contained in 5 U.S.C. 553, and no other statute mandates such procedures, no analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. However, these changes to the regulations are not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601–612, and Executive Order 13272, section 3(b).

The Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Public Law 104–4, 109 Stat. 64, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing or adopting any rule that may result in an annual expenditure of $100 million or more (adjusted annually for inflation) by state, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure nor will it significantly or uniquely affect small governments.

Executive Orders 12372 and 13132: Federalism

This rule does not have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 12866: Regulatory Review

The Department of State does not consider this final rule to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. In addition, the Department is generally exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The Department has nevertheless reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in that Executive Order.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

The Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.,* Federal agencies must obtain approval from OMB for most collections of information they conduct, sponsor, or require through regulation. The Department of State has determined that this rule does not require new collection of information for purposes of the PRA.

List of Subjects in 22 CFR Part 94

Infants and children, Reporting and recordkeeping requirements, Treaties.

■ For the reasons set forth in the preamble, 22 CFR Part 94 is amended to read as follows:

PART 94—INTERNATIONAL CHILD ABDUCTION

■ Accordingly, the interim final rule amending 22 CFR 94 which was published at 73 FR 47829 on August 15, 2008, is adopted as a final rule without change.

[FR Doc. E8–25929 Filed 10–29–08; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

[Docket ID MMS–2008–OMM–0001]

RIN 1010–AD18

Revisions to Subpart A—General; Subpart I—Platforms and Structures; and Subpart J—Pipelines and Pipeline Rights-of-Way

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The MMS is amending its regulations to require lessees, lease operators, and pipeline right-of-way holders to submit a report if a facility or pipeline is damaged by a hurricane or other natural phenomena. The final rule also requires operators to provide assessment information on the structural integrity of Outer Continental Shelf platforms; information on the use of unbonded flexible pipe for pipelines; and additional information when installing pipeline risers on floating platforms. The rule also incorporates an industry-developed standard concerning the in-service inspection of mooring hardware for floating drilling units. These changes will allow MMS to better regulate the safety of the oil and gas infrastructure, and to promptly assess damage resulting from hurricanes or other natural phenomena.

DATES: *Effective Date:* This rule becomes effective on December 1, 2008. The incorporation by reference of the publication listed in the regulation was approved by the Director of the Federal Register on December 1, 2008.

FOR FURTHER INFORMATION CONTACT: B.J. Kruse, Chief, Office of Structural and Technical Support at (504) 736–2634, or e-mail *Bernard.Kruse@mms.gov*.

SUPPLEMENTARY INFORMATION: On July 19, 2005, MMS published a final rule (70 FR 41556) titled ''Fixed and Floating Platforms and Structures and Documents Incorporated by Reference'' in the **Federal Register**. That final rule expanded MMS regulations regarding the design, construction, and operation of Outer Continental Shelf (OCS) facilities to include coverage of floating oil and gas production platforms. The rule also incorporated by reference a number of industry-developed standards pertaining to floating platforms. During the process of developing and publishing that final rule, comments were received from both the public and inside MMS that suggested additional requirements. The MMS reviewed the suggested changes and developed a proposed rule that was published in the **Federal Register** on July 3, 2006 (71 FR 37874).

The MMS received three comment letters from industry and one from a local government. Two of the industry letters were from trade organizations that represent numerous companies involved in the oil and gas industry in the Gulf of Mexico. These comment letters can be viewed on our Web site at: *http://www.mms.gov/federalregister/PublicComments/RevisionsSubpartA.htm*.

Discussion of Comments on the Proposed Rule

The proposed rule included a new requirement at § 250.192, that would require lessees, lease operators, and pipeline right-of-way (ROW) holders to submit reports to MMS if their facilities are damaged by a hurricane, earthquake, or other natural phenomenon. One commenter suggested that MMS change the wording of the proposed regulation to specifically require that operators submit platform abandonment statistics and reports when facilities are damaged by arctic hazards such as sea ice and subzero temperatures. The rule was not changed. The current wording contains the phrase ''other natural occurrences,'' which includes adverse arctic conditions.

The MMS received several comments regarding electronic submission of hurricane/natural occurrence evacuation and damage statistics. Several commenters wanted the MMS to include the eWell Permitting and Reporting System as an approved method for submitting this data. The final rule was changed to state that electronic data will be acceptable when the MMS office is equipped to accept it. The eWell system, which we currently use for submission of electronic data, was not specified since the system could change in the future. Several changes were made to the final rule, however, to make reporting requirements more compatible with the eWell system.

A new form (Form MMS–143, Facility/Equipment Damage Report) has been developed to assist lessees, lease operators, and pipeline ROW holders when reporting damage by a hurricane, earthquake, or other natural phenomenon. Adding this requirement to the regulations, with an Office of Management and Budget (OMB) approval for information collection (IC), will allow MMS to request damage information without the delay of obtaining OMB approval for each event. We received two comments that questioned whether submitting Form MMS–143 was required in addition to reports required by Notices to Lessees (NTL) such as NTL 2005–G20, ''Damage Caused by Hurricanes Katrina and Rita.'' These reports are separate. The evacuation and production curtailment statistics required by the form are general status reports. The reports required by NTLs are detailed reports on the findings of any surveys, inspections, and damage assessments as well as remediation plans.

One commenter felt that the requirement at proposed § 250.192(b)(1), that operators submit an initial damage report within 48 hours using Form MMS–143, Facility/Equipment Damage Report, gave operators too little time to check into repair availability. With inadequate time to check on repair and equipment availability, the operator contended that the form could not be completed. The commenter also proposed that subsequent reports should be submitted only when new information is available or the status changes. We partially agree and have changed both the final rule and Form MMS–143. Both the rule and the form now make clear that the portion of the form requiring an operator to estimate the time needed to return the facility/equipment to service need not be completed until the availability of hardware and repair capability has been established. Operators must however, provide this information to the best of their availability within 30 days of submitting their initial damage report. Subsequent reports were also changed from weekly to monthly and when new information is available.

The MMS made several changes to § 250.900(c) that were not part of the proposed rule. These changes were made to clarify the intent of the existing rule and to bring the rule into line with current MMS procedures. First, a time limit of 120 days after an emergency event was added to clarify when operators could make repairs to primary structural elements without MMS approval. A further clarification was made that MMS must be notified of that primary structural damage within 24 hours of its discovery, rather than within 24 hours of the damage occurrence. The rule was also changed to make clear that the notification of completed repairs to the MMS must be in writing. The report must now be submitted within one week after completion of repairs, rather than 24 hours.

Commenters objected to the requirement in proposed § 250.900(e) that platform approvals will be cancelled if the platform is not installed

within 1 year of platform approval. In the final rule, the 1-year requirement applies only to standard design platforms installed in the shallow waters (less than 400 feet water depth) of the Gulf of Mexico. For platforms subject to the MMS Platform Verification Program, cancellation of an approval will be on an individual platform basis. For these platforms, MMS will identify the date when the installation approval will be cancelled (if installation has not occurred) during the application and approval process.

The MMS received no comments on the proposed addition of API RP 2I—In-Service Inspection of Mooring Hardware for Floating Drilling Units—to the list of incorporated industry standards in § 250.901 (also added to the list in § 250.198). Similarly, no comments were received on the proposed requirement in § 250.905 that design safety factors for platforms be submitted to MMS. Both of these proposed changes are in the final rule.

One commenter suggested that wording be added to proposed § 250.911 that would obligate MMS to inform the lessee/applicant when approval to install a platform would be cancelled if installation had not occurred by that date. The MMS did not change the wording in the final rule based on this comment. However, wording similar to that proposed by this commenter was added in final § 250.900(e).

The MMS accepted a comment directed at proposed §§ 250.916, 250.917, and 250.918 that will reduce redundancy in the final Certified Verification Agent (CVA) report by no longer requiring recommendations that have already been communicated through earlier CVA reports.

Two commenters requested that proposed § 250.919 concerning in-service inspections be re-written to clearly exclude pipelines. The section was not changed. The current wording specifies that the in-service inspections apply to the above- and below-water structure of all platforms, as well as pertinent components of the mooring system for floating platforms.

Subpart I currently requires that lessees and operators develop an in-service inspection plan for platforms (§ 250.919). The plan must show in detail the type, extent, and frequency of the inspections lessees and operators will conduct on platforms. The proposed rule required that the plan be submitted to the Regional Supervisor for approval each year by April 1. Commenters questioned the rationale for requiring a complete list of all the platforms (and supporting data) to be submitted annually, when in many cases the data does not change from year to year. One commenter also felt that it was overly burdensome to require an annual plan to be submitted in April and a report on the results of the plan to be submitted in November, as required currently by § 250.919(b). The MMS agrees with these comments and has deleted the requirement and its burden hours for the April annual inspection plan. A slightly revised inspection report will still be required annually on November 1.

One commenter objected to the proposed rule's requirement at § 250.920(d) that operators must obtain approval from MMS before initiating mitigation actions for platforms that do not pass an assessment. We have not changed this requirement in the final rule. Mitigation actions resulting from failed platform assessments usually result in repairs, modifications, or decommissioning, all of which require MMS approval. However, we have changed § 250.900(c) in the final rule to make clear that under emergency conditions, you may make repairs to primary structural elements to restore an existing permitted condition without submitting an application or receiving prior MMS approval for up to 120-calendar days following an event.

One commenter was confused by MMS requirements in proposed § 250.920 for assessment of platforms. The commenter noted that the requirements as proposed should only apply to fixed platforms and further noted a lack of direction for operators wishing to obtain approval for assessing their platform to either the medium (A–2) or low (A–3) consequence-of-failure exposure category. The MMS agrees with these comments and has modified the final rule accordingly. Under the final rule, § 250.920 has been retitled and now refers only to fixed platforms. Also, the section was largely rewritten to make clear that operators will follow standards in documents incorporated by reference when determining the proper exposure categories for assessing their platforms, and do not need MMS approval before assessing their platforms at the A–2 or A–3 level. However, if MMS objects to the assessment level used, operators may be required to re-design or modify the platform. Changes were also made to the section to more closely track the wording of API RP 2A–WSD.

One commenter objected to the proposed requirement in § 250.920(f) of submitting an annual list of all platforms and appropriate data to support their assessment category. The MMS agrees and has delayed the initial filing of this report until November 1, 2009, with subsequent reports filed every 5 years.

Several minor changes were made to Subpart I which were not in the proposed rule. These items are intended to (1) add clarity to the regulation; (2) allow operators more flexibility when initiating emergency repairs; (3) allow for more electronic submission of required documents; or (4) allow the rule to more closely follow the wording/structure of a referenced industry document (e.g., API RP 2A–WSD).

Procedural Matters

Regulatory Planning and Review (Executive Order (E.O.) 12866)

This final rule is not a significant rule as determined by the Office of Management and Budget and is not subject to review under E.O. 12866.

(1) This final rule will not have an annual 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.

(2) This final rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This final rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This final rule will not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this final rule 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.*).

This final rule will affect lessees and operators of leases and pipeline ROW holders in the OCS. This could include about 130 active Federal oil and gas lessees. Small lessees that operate under this rule fall under the Small Business Administration's (SBA) North American Industry Classification System (NAICS) codes 211111, Crude Petroleum and Natural Gas Extraction, and 213111, Drilling Oil and Gas Wells. For these NAICS code classifications, a small company is one with fewer than 500 employees. Based on these criteria, an estimated 70 percent of these companies are considered small. A pipeline company (non-producer) is a small entity if it is a liquid pipeline company with fewer than 1,500 employees, or a natural gas pipeline company with gross annual receipts of $6.5 million or less.

There are approximately 20 pipeline companies operating on the OCS that meet these criteria. This rule, therefore, will affect a substantial number of small entities.

This final rule will not have a significant economic effect on a substantial number of small entities because the additional costs associated with the final rule are small compared to the normal cost of doing business on the OCS. The new requirement to submit damage data after hurricanes merely places into the rule a requirement that MMS already requires on an ad hoc basis. The adoption of an industry-developed standard concerning the inspection of mooring hardware simply codifies a set of practices developed by the industry. Requirements for assessment of platforms and to submit additional data for approval of unbonded flexible pipe have merely been changed slightly from existing requirements and will not have a significant economic effect.

Most of the costs for complying with this rule will be IC costs. The total estimated annual burden hours for responding to the IC requirements in the rule are 49,987. At an estimated cost of $74 per hour, the industry-wide cost for the IC burden would be slightly more than $3.5 million.

Your comments are important. The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the actions of MMS, call 1–888–734–3247. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the DOI.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will 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. 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.

Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings Implication Assessment (E.O. 12630)

Under the criteria in E.O. 12630, this rule does not have significant takings implications. The rule is not a governmental action capable of interference with constitutionally protected property rights. A Takings Implication Assessment is not required.

Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This rule will not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in OCS activities, this rule will not affect that role. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. There are no Indian or tribal lands in the OCS.

Paperwork Reduction Act (PRA)

This rule contains new IC requirements; therefore, a submission to OMB under the PRA is required. The OMB has approved these revisions under OMB Control Number 1010–0168 (expiration October 31, 2011, for 50,287 burden hours).

The title of the collection of information for the rule is ''Revisions to Subpart A—General; Subpart I—Platforms and Structures; and Subpart J—Pipelines and Pipeline Rights-of-Way.'' Respondents are approximately 130 Federal OCS lessees, operators, and their Independent Verification Agents or other third-party reviewers of production facilities, as well as 207 pipeline ROW holders. Responses to this collection are mandatory. The frequency of response is on occasion. The IC does not include questions of a sensitive nature. The MMS will protect proprietary information according to the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2), and 30 CFR 250.197, Data and information to be made available to the public or for limited inspection, and 30 CFR part 252, OCS Oil and Gas Information Program.

The collection of information required by the current subparts A, I, and J of 30 CFR 250 are approved under OMB Control Numbers 1010–0114 (expiration 11/30/10); 1010–0149 (expiration 06/30/2011); and 1010–0050 (expiration 3/31/09), respectively.

The changes between the proposed rule and the final rule are primarily based on comments received and they are as follows:

- Remove the burden hours for § 250.192(a)(3). The proposed rule inadvertently stated that this was a new requirement, but the requirement and burden hours have always been covered in existing regulations (–100 hours).
- A reporting requirement for § 250.192(b) was changed. The requirement in the proposed rule was for weekly submissions, it has now been changed to monthly submissions (–300 hours).
- The proposed burden hours under § 250.919(a) for the annual April inspection plan were removed (–32,500 burden hours).
- In § 250.920(e), the requirement was changed from annually to every 5 years or as directed by the Regional Supervisor (–4,160 burden hours).
- Several of the section numbers in the final regulations have changed from the proposed rule and the IC requirements are now in different sections, but the burden hours remained the same.

We estimate the total annual reporting hour burden for the final rule to be 50,287 hours. There are no paperwork non-hour cost burdens associated with this rulemaking. Following is a breakdown of the burden estimate.

Citation 30 CFR 250 rule and NTL(s)	Reporting and recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours
Subpart A				
192; MMS–132	Daily report of evacuation statistics for natural occurrence/hurricane (Form MMS–132 in the GOMR) when circumstances warrant; inform MMS when you resume production.	Burden approved under collection 1010–0114.		0.
192(b)	Use Form MMS–143 to submit an initial damage report to the Regional Supervisor.	4	100	400
192(b)	Use Form MMS–143 to submit subsequent damage reports on a monthly basis until damaged structure or equipment is returned to service; immediately upon information in previous reports change; date item returned to service must be in final report.	1	100	100
Subpart I				
900(c)	Notify MMS with a written report listing damage and emergency repairs; request approval of repairs; notify USCG when appropriate.	Burden approved under collection 1010–0149.		0.
900(e)	Re/Submit platform installation date and the final as-built location to the Regional Supervisor within 45 days after platform installation.	.5	140	70
905(i)	Provide a summary of safety factors utilized in the design of the platform.	.25	331	83
911; 916; 917; 918	Submit complete schedule of all phases of design, fabrication, and installation with required information; also submit Gantt Chart with required information.	40	15	600
916(c)	Submit interim and final CVA reports and recommendations on design phase.	Burden approved under collection 1010–0149.		0.
917(a), (c)	Submit interim and final CVA reports and recommendations on fabrication phase, including notice of fabrication procedure changes or design specification modifications.	Burden approved under collection 1010–0149.		0.
918(c)	Submit interim and final CVA reports and recommendations on installation phase.	Burden approved under collection 1010–0149.		0
919	Submit annual (November 1 of each year) report on inspection of platforms or floating production facilities, including summary of testing results.	Burden approved under collection 1010–0149.		0
919(b) NTL	After an environmental event, submit to Regional Supervisor initial report followed by updates and supporting information.	12 (initial) 12 (update)	150 90	1,800 1,080
919(c) NTL	Submit results of inspections; obtain MMS approval before making major repairs.	120	200	24,000
920(a)	Demonstrate platform is able to withstand environmental loadings for appropriate exposure category.	20	400	8,000
920(c)	Submit application and obtain approval from the Regional Supervisor for mitigation actions (includes operational procedures).	40	200	8,000
920(e)	Submit a list of all platforms you operate, and appropriate supporting data, every 5 years or as directed by the Regional Supervisor.	40	130 operators/5 years = 26 per year.	1,040
920(f)	Obtain approval from the Regional Supervisor for any change in the platform.	40	100	4,000
Subpart J				
1007(a)(4)(i)(A); (B); (C)	Provide specified information in your pipeline application if using unbonded flexible pipe.	4	6	24

Citation 30 CFR 250 rule and NTL(s)	Reporting and recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours
1007(a)(4)(i)(D)	Provide results of third party IVA review in your pipeline application if using unbonded flexible pipe.	40	1	40
1007(a)(4)(ii)	Provide specified information in your pipeline application	30	35	1,050
Total Burden			1,894	50,287

When final regulations are promulgated, the new IC burdens for 30 CFR part 250 subparts A, I, and J will be incorporated into their respective collections of information for those regulations. Also, this rule incorporates the hours and requirements already approved in 1010–0164 (26,880 burden hours, expiration 2/28/09); therefore, that collection will be discontinued when the final regulations take effect.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public may comment, at any time, on the accuracy of the IC burden in this rule and may submit any comments to the Department of the Interior, Minerals Management Service; Attention: Regulations and Standards Branch; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The MMS has analyzed this rule under the criteria of the National Environmental Policy Act, 516 Departmental Manual (DM) 2.3, and 516 DM 2, Appendix 1, and determined that it falls within the categorical exclusion for ''regulations * * * that are of an administrative, financial, legal, technical, or procedural nature.'' The MMS Categorical Exclusion Review concluded that the provisions of this rule are administrative, procedural, and technical. Furthermore, MMS concluded that the rulemaking does not involve an extraordinary circumstance set forth in 516 DM 2, Appendix 2. For these reasons, preparation of an environmental assessment or environmental impact statement is not required.

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554, app. C section 515, 114 Stat. 2763, 2763A–153–154).

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

List of Subjects in 30 CFR Part 250

Continental shelf, Environmental protection, Incorporation by reference, Oil and gas exploration, Pipelines, Public lands—rights-of-way, Reporting and recordkeeping requirements.

Dated: August 13, 2008.

Julie A. Jacobson,

Deputy Assistant Secretary—Land and Minerals Management.

■ For the reasons stated in the preamble, the Minerals Management Service (MMS) amends 30 CFR part 250 as follows:

PART 250—LEASING OF SULPHUR OR OIL AND GAS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for part 250 continues to read as follows:

Authority: 31 U.S.C. 9701, 43 U.S.C. 1334

■ 2. Revise § 250.192 to read as follows:

§ 250.192 What reports and statistics must I submit relating to a hurricane, earthquake, or other natural occurrence?

(a) You must submit evacuation statistics to the Regional Supervisor for a natural occurrence, such as a hurricane, a tropical storm, or an earthquake. Statistics include facilities and rigs evacuated and the amount of production shut-in for gas and oil. You must:

(1) Submit the statistics by fax or e-mail (for activities in the MMS GOM OCS Region, use Form MMS–132) as soon as possible when evacuation occurs. In lieu of submitting your statistics by fax or e-mail, you may submit them electronically in accordance with 30 CFR 250.186(a)(3);

(2) Submit the statistics on a daily basis by 11 a.m., as conditions allow, during the period of shut-in and evacuation;

(3) Inform MMS when you resume production; and

(4) Submit the statistics either by MMS district, or the total figures for your operations in an MMS region.

(b) If your facility, production equipment, or pipeline is damaged by a natural occurrence, you must:

(1) Submit an initial damage report to the Regional Supervisor within 48 hours after you complete your initial evaluation of the damage. You must use Form MMS–143, Facility/Equipment Damage Report, to make this and all subsequent reports. In lieu of submitting Form MMS–143 by fax or e-mail, you may submit the damage report electronically in accordance with 30 CFR 250.186(a)(3). In the report, you must:

(i) Name the items damaged (e.g., platform or other structure, production equipment, pipeline);

(ii) Describe the damage and assess the extent of the damage (major, medium, minor); and

(iii) Estimate the time it will take to replace or repair each damaged structure and piece of equipment and return it to service. The initial estimate need not be provided on the form until availability of hardware and repair capability has been established (not to exceed 30 days from your initial report).

(2) Submit subsequent reports monthly and immediately whenever information submitted in previous reports changes until the damaged structure or equipment is returned to service. In the final report, you must provide the date the item was returned to service.

■ 3. Amend § 250.198(e) by adding an entry in alphanumerical order in the table for API RP 2I, In-Service Inspection of Mooring Hardware for Floating Drilling Units, and revise the entry for API RP 2A–WSD to read as follows:

§ 250.198 Documents Incorporated by Reference.

* * * * *

(e) * * *

Title of documents	Incorporated by reference at
* * * *	* * *
API RP 2A WSD, Recommended Practice for Planning, Designing, and Constructing Fixed Offshore Platforms—Working Stress Design; Twenty-first Edition, December 2000; Errata and Supplement 1, December 2002; Errata and Supplement 2, October 2005, API Stock No. G2AWSD.	§ 250.901(a), (d); § 250.908(a); § 250.919(b)(2); § 250.920(a), (b), (c), (d), (e), (f).
* * * *	* * *
API RP 2I, In-Service Inspection of Mooring Hardware for Floating Drilling Units; Second Edition, November 1996, Reaffirmed May 2003, API Order No. G02102.	§ 250.901(a), (d).
* * * *	* * *

■ 4. Revise § 250.199(e)(1) as follows:

§ 250.199 Paperwork Reduction Act statements—information collection.

(e) * * *

* * * * *

30 CFR 250 subpart/title (OMB control No.)	Reasons for collecting information and how used
* * * *	* * *
(1) Subpart A, General (1010–0114), including Forms MMS–132, Evacuation Statistics; MMS–143, Facility/Equipment Damage Report; MMS–1123, Designation of Operator; MMS–1832, Notification of Incidents of Noncompliance.	To inform MMS of actions taken to comply with general operational requirements on the OCS. To ensure that operations on the OCS meet statutory and regulatory requirements, are safe and protect the environment, and result in diligent exploration, development, and production on OCS leases. To support the unproved and proved reserve estimation, resource assessment, and fair market value determinations. To allow MMS to rapidly assess damage and project any disruption of oil and gas production from the OCS after a major natural occurrence.
* * * *	* * *

■ 5. Revise § 250.900(c) and (e) to read as follows:

§ 250.900 What general requirements apply to all platforms?

* * * * *

(c) Under emergency conditions, you may make repairs to primary structural elements to restore an existing permitted condition without submitting an application or receiving prior MMS approval for up to 120-calendar days following an event. You must notify the Regional Supervisor of the damage that occurred within 24 hours of its discovery, and you must provide a written completion report to the Regional Supervisor of the repairs that were made within 1 week after completing the repairs. If you make emergency repairs on a floating platform, you must also notify the USCG.

* * * * *

(e) You must submit notification of the platform installation date and the final as-built location data to the Regional Supervisor within 45-calendar days of completion of platform installation.

(1) For platforms not subject to the Platform Verification Program (PVP), MMS will cancel the approved platform application 1 year after the approval has been granted if the platform has not been installed. If MMS cancels the approval, you must resubmit your platform application and receive MMS approval if you still plan to install the platform.

(2) For platforms subject to the PVP, cancellation of an approval will be on an individual platform basis. For these platforms, MMS will identify the date when the installation approval will be cancelled (if installation has not occurred) during the application and approval process. If MMS cancels your installation approval, you must resubmit your platform application and receive MMS approval if you still plan to install the platform.

■ 6. Amend § 250.901 as follows:

■ A. Redesignate paragraphs (a)(9) through (a)(23) as (a)(10) through (a)(24), respectively,

■ B. Add new paragraph (a)(9),

■ C. Revise paragraph (d)(22),

■ D. Add new paragraph (d)(23) to read as follows:

§ 250.901 What industry standards must your platform meet?

(a) * * *

(9) API RP 2I, In-Service Inspection of Mooring Hardware for Floating Drilling Units (incorporated by reference as specified in § 250.198);

* * * * *

(d) * * *

(22) API RP 2SM, RP for Design, Manufacture, Installation, and Maintenance of Synthetic Fiber Ropes for Offshore Mooring;

(23) API RP 2I, In-Service Inspection of Mooring Hardware for Floating Drilling Units.

■ 7. Amend § 250.905 by:

■ A. Adding a second sentence to the introductory text;

■ B. Redesignating current paragraphs (i), (j), and (k), as paragraphs (j), (k), and (l) respectively; and

■ C. Adding new paragraph (i) to read as follows:

§ 250.905 How do I get approval for the installation, modification, or repair of my platform?

* * * * *

In lieu of submitting the paper copies specified in the table, you may submit

your application electronically in accordance with 30 CFR 250.186(a)(3).

* * * * *

Required submittal	Required contents	Other requirements
* *	* * *	* *
(i) Summary of safety factors utilized.	A summary of pertinent derived factors of safety against failure for major structural members, e.g., unity check ratios exceeding 0.85 for steel-jacket platform members, indicated on "line" sketches of jacket sections.	You must submit one copy.
* *	* * *	* *

■ 8. Amend § 250.911 by redesignating current paragraphs (d) through (g), as paragraphs (e) through (h), respectively, and adding new paragraph (d) to read as follows:

§ 250.911 If my platform is subject to the Platform Verification Program, what must I do?

* * * * *

(d) Submit a complete schedule of all phases of design, fabrication, and installation for the Regional Supervisor's approval. You must include a project management timeline, Gantt Chart, that depicts when interim and final reports required by §§ 250.916, 250.917, and 250.918 will be submitted to the Regional Supervisor for each phase. On the timeline, you must break-out the specific scopes of work that inherently stand alone (e.g., deck, mooring systems, tendon systems, riser systems, turret systems).

* * * * *

■ 9. Revise § 250.916(c) to read as follows:

§ 250.916 What are the CVA's primary duties during the design phase?

* * * * *

(c) The CVA must submit interim reports and a final report to the Regional Supervisor, and to you, during the design phase in accordance with the approved schedule required by § 250.911(d). In each interim and final report the CVA must:

(1) Provide a summary of the material reviewed and the CVA's findings;

(2) In the final CVA report, make a recommendation that the Regional Supervisor either accept, request modifications, or reject the proposed design unless such a recommendation has been previously made in an interim report;

(3) Describe the particulars of how, by whom, and when the independent review was conducted; and

(4) Provide any additional comments the CVA deems necessary.

■ 10. Revise § 250.917(c) to read as follows:

§ 250.917 What are the CVA's primary duties during the fabrication phase?

* * * * *

(c) The CVA must submit interim reports and a final report to the Regional Supervisor, and to you, during the fabrication phase in accordance with the approved schedule required by § 250.911(d). In each interim and final report the CVA must:

(1) Give details of how, by whom, and when the independent monitoring activities were conducted;

(2) Describe the CVA's activities during the verification process;

(3) Summarize the CVA's findings;

(4) Confirm or deny compliance with the design specifications and the approved fabrication plan;

(5) In the final CVA report, make a recommendation to accept or reject the fabrication unless such a recommendation has been previously made in an interim report; and

(6) Provide any additional comments that the CVA deems necessary.

■ 11. Revise § 250.918(c) to read as follows:

§ 250.918 What are the CVA's primary duties during the installation phase?

* * * * *

(c) The CVA must submit interim reports and a final report to the Regional Supervisor, and to you, during the installation phase in accordance with the approved schedule required by § 250.911(d). In each interim and final report the CVA must:

(1) Give details of how, by whom, and when the independent monitoring activities were conducted;

(2) Describe the CVA's activities during the verification process;

(3) Summarize the CVA's findings;

(4) Confirm or deny compliance with the approved installation plan;

(5) In the final report, make a recommendation to accept or reject the installation unless such a recommendation has been previously made in an interim report; and

(6) Provide any additional comments that the CVA deems necessary.

■ 12. Revise § 250.919 to read as follows:

§ 250.919 What in-service inspection requirements must I meet?

(a) You must submit a comprehensive in-service inspection report annually by November 1 to the Regional Supervisor that must include:

(1) A list of fixed and floating platforms you inspected in the preceding 12 months;

(2) The extent and area of inspection for both the above-water and underwater portions of the platform and the pertinent components of the mooring system for floating platforms;

(3) The type of inspection employed (e.g., visual, magnetic particle, ultrasonic testing);

(4) The overall structural condition of each platform, including a corrosion protection evaluation; and

(5) A summary of the inspection results indicating what repairs, if any, were needed.

(b) If any of your structures have been exposed to a natural occurrence (e.g., hurricane, earthquake, or tropical storm), the Regional Supervisor may require you to submit an initial report of all structural damage, followed by subsequent updates, which include the following:

(1) A list of affected structures;

(2) A timetable for conducting the inspections described in section 14.4.3 of API RP 2A–WSD (incorporated by reference as specified in § 250.198); and

(3) An inspection plan for each structure that describes the work you will perform to determine the condition of the structure.

(c) The Regional Supervisor may also require you to submit the results of the inspections referred to in paragraph (b)(2) of this section, including a description of any detected damage that may adversely affect structural integrity, an assessment of the structure's ability to withstand any anticipated environmental conditions, and any remediation plans. Under §§ 250.900(b)(3) and 250.905, you must

obtain approval from MMS before you make major repairs of any damage unless you meet the requirements of § 250.900(c).

■ 13. Revise § 250.920 to read as follows:

§ 250.920 What are the MMS requirements for assessment of fixed platforms?

(a) You must document all wells, equipment, and pipelines supported by the platform if you intend to use either the A–2 or A–3 assessment category. Assessment categories are defined in API RP 2A–WSD, Section 17.3. If MMS objects to the assessment category you used for your assessment, you may need to redesign and/or modify the platform to adequately demonstrate that the platform is able to withstand the environmental loadings for the appropriate assessment category.

(b) You must perform an analysis check when your platform will have additional personnel, additional topside facilities, increased environmental or operational loading, or inadequate deck height your platform suffered significant damage (e.g., experienced damage to primary structural members or conductor guide trays or global structural integrity is adversely affected); or the exposure category changes to a more restrictive level (see Sections 17.2.1 through 17.2.5 of API RP 2A–WSD for a description of assessment initiators).

(c) You must initiate mitigation actions for platforms that do not pass the assessment process of API RP 2A–WSD. You must submit applications for your mitigation actions (e.g., repair, modification, decommissioning) to the Regional Supervisor for approval before you conduct the work.

(d) The MMS may require you to conduct a platform design basis check when the reduced environmental loading criteria contained in API RP 2A–WSD Section 17.6 are not applicable.

(e) By November 1, 2009, you must submit a complete list of all the platforms you operate, together with all the appropriate data to support the assessment category you assign to each platform and the platform assessment initiators (as defined in API RP 2A–WSD) to the Regional Supervisor. You must submit subsequent complete lists and the appropriate data to support the consequence-of-failure category every 5 years thereafter, or as directed by the Regional Supervisor.

(f) The use of Section 17, Assessment of Existing Platforms, of API RP 2A–WSD is limited to existing fixed structures that are serving their original approved purpose. You must obtain approval from the Regional Supervisor for any change in purpose of the platform, following the provisions of API RP 2A–WSD, Section 15, Re-use.

■ 14. Amend § 250.1007 by revising paragraph (a)(4) to read as follows:

§ 250.1007 What to include in applications.

(a) * * *

(4) A description of any additional design precautions you took to enable the pipeline to withstand the effects of water currents, storm or ice scouring, soft bottoms, mudslides, earthquakes, permafrost, and other environmental factors.

(i) If you propose to use unbonded flexible pipe, your application must include:

(A) The manufacturer's design specification sheet;

(B) The design pressure (psi);

(C) An identification of the design standards you used; and

(D) A review by a third-party independent verification agent (IVA) according to API Spec 17J (incorporated by reference as specified in § 250.198), if applicable.

(ii) If you propose to use one or more pipeline risers for a tension leg platform or other floating platform, your application must include:

(A) The design fatigue life of the riser, with calculations, and the fatigue point at which you would replace the riser;

(B) The results of your vortex-induced vibration (VIV) analysis;

(C) An identification of the design standards you used; and

(D) A description of any necessary mitigation measures such as the use of helical strakes or anchoring devices.

* * * * *

[FR Doc. E8–25720 Filed 10–29–08; 8:45 am]

BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0746; FRL–8735–7]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Revised Motor Vehicle Emission Budgets for the Parkersburg 8-Hour Ozone Maintenance Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the West Virginia State Implementation Plan (SIP). The revision amends the 8-hour ozone maintenance plan for the Parkersburg area. This revision amends the maintenance plans' 2009 and 2018 motor vehicle emissions budgets (MVEBs) by reallocating a portion of the plans' safety margins, which results in an increase in the MVEBs. The revised plan continues to demonstrate maintenance of the 8-hour national ambient air quality standard (NAAQS) for ozone. EPA is approving this SIP revision to the West Virginia maintenance plan for Parkersburg in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on December 29, 2008 without further notice, unless EPA receives adverse written comment by December 1, 2008. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0746 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: febbo.carol@epa.gov.*

C. *Mail:* EPA–R03–OAR–2008–0746, Carol Febbo, Chief, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No EPA–R03–OAR–2008–0746. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-

mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street, SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Megan Goold (215) 814–2027, or by e-mail at *goold.megan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On May 8, 2007 (72 FR 25967) EPA redesignated the Parkersburg area of West Virginia to attainment for the 8-hour ozone NAAQS. For the Parkersburg area, the redesignation included approval of an 8-hour ozone maintenance plan, identifying on-road MVEBs for VOCs and NO_X, which are ozone precursors, used for transportation planning and conformity purposes. Subsequently, after the SIP approval by EPA, West Virginia discovered that the MVEBs which were included in the previously approved maintenance plan did not provide a sufficient buffer to account for unforseen future growth or significant changes in the planning assumption data which was used in developing the original MVEBs in its September 2006 submission.

II. Summary of SIP Revision

2009 and 2018 Motor Vehicle Emission Budgets

On August 25, 2008, the State of West Virginia submitted to EPA a formal revision to its State Implementation Plan (SIP). The SIP revision proposes new MVEBs to reflect the reallocation of a portion of the differences (''safety margins'') between the total base year and total projected 2009 and 2018 emissions, thus producing an increase in the MVEBs. The base year is 2004 for the Parkersburg area. By increasing the MVEBs, the West Virginia Department of Environmental Protection (WVDEP) is ensuring that transportation conformity can be demonstrated in the Parkersburg area. The August 25, 2008 submittal, while increasing the MVEBs, still ensures maintenance of the NAAQS for ozone for the Parkersburg area.

Tables 1 and 2 and the discussion that follows describe the basis of the new MVEBs for the Parkersburg area.

TABLE 1—PARKERSBURG AREA REALLOCATION OF SAFETY MARGIN TO THE MVEBS

[Tons/day]

	2004 Base year	2009 Projection	2018 Projection
Current MVEBs in the Approved Maintenance Plan			
VOC	4.00	3.0	1.9
NO_X	5.66	4.1	2.0
Proposed MVEBs in the Revised Maintenance Plan			
VOC	4.00	3.8	2.4
NO_X	5.66	5.5	2.7

TABLE 2—PARKERSBURG AREA TOTAL EMISSIONS (POINT, AREA AND MOBILE) BEFORE AND AFTER REALLOCATION OF SAFETY MARGIN TO THE MVEBS

[Tons/day]

	2004 Base year	2009 Projection	2018 Projection
Current Total Emissions in the Approved Maintenance Plan			
VOC	16.7	14.0	13.6
NO_X	15.2	11.8	9.4
Proposed Total Emissions in the Revised Maintenance Plan			
VOC	16.7	14.8	14.1
NO_X	15.2	13.2	10.1

For the Parkersburg, West Virginia 8-hour ozone maintenance area addressed herein, the WVDEP recalculated the 2009 and 2018 MVEBs using revised planning data which became available after the original maintenance plan was submitted to EPA on September 8, 2006. The 2009 and 2018 MVEBs for VOCs and NO_X emissions listed above in

Table 1 under the Proposed MVEBs in the Revised Maintenance Plan section will serve as the new MVEBs for transportation conformity planning.

As shown in Table 1, above, WVDEP has proposed reallocating a portion of the previous safety margin into the MVEBs for both VOCs and NO_X. The remaining surplus emissions have been reserved as residual safety margins in the total maintenance budgets to ensure continued maintenance of the 8-hour ozone NAAQS.

To explain how the safety margins are determined and allocated, the VOC emissions for the Parkersburg area may be used as an example. In Table 2, listed under the Current Total Emissions in the Approved Maintenance Plan section, the total 2004 base year VOC emissions are 16.7 tons/day (tpd), which is the maximum amount of VOC emissions consistent with maintenance of the 8-hour ozone NAAQS. The total projected 2009 emissions are 14.0 tpd, which provides a 2.7 tpd VOC safety margin (*i.e.*, the ozone NAAQS would continue to be maintained if total VOC emissions increased as much as 2.7 tpd above the projected 2009 emissions of 14.0 tpd). In the Proposed Total Emissions in the Revised Maintenance Plan section, the total projected emissions for 2009 would be increased by 0.8 tpd through the increase in the allowable mobile emissions for VOC while still leaving a safety margin of 1.9 tpd. Therefore, even with the reallocation of some of the current safety margin into the MVEBs, the State of West Virginia has left a safety margin for any other unforeseen growth.

III. Final Action

EPA is approving West Virginia's August 25, 2008 SIP revision submittal which amends the 8-hour ozone maintenance plan for the Parkersburg area. These revisions amend the maintenance plans' 2009 and 2018 MVEBs to reflect the reallocation of a portion of the plans' safety margins which results in an increase in the MVEBs. EPA is approving this SIP revision to the maintenance plan for the Parkersburg area because the August 25, 2008 submittal continues to demonstrate maintenance of the 8-hour ozone NAAQS as even after reallocation of a portion of the safety margin a sufficient safety margin still exists to demonstrate continued attainment.

EPA notes that the DC Circuit issued a decision on July 11, 2008, vacating the Clean Air Interstate Rule (CAIR). *North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008).[1] EPA's CAIR modeling was included in the last Parkersburg maintenance plan effective June 17, 2007 (72 FR 25967, May 8, 2007) as a supplemental analysis however, EPA's approval of that maintenance plan was based on permanent and enforceable measures (as instructed in the Calcagni memorandum, September 4, 1992). These permanent and enforceable measures are sufficient to provide for continued maintenance even without any CAIR reductions. EPA did note in the approval that, in addition to permanent and enforceable measures, further emissions reductions in the nonattainment area (specifically Washington County, OH) are largely attributable to CAIR, but these reductions are not needed to demonstrate maintenance in the area. Therefore, EPA's approval of the August 25, 2008 SIP revision is not impacted by the DC Circuit Court decision as even without any CAIR reductions the area continues to demonstrate maintenance after reallocation of a portion of the safety margin.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment, since no significant adverse comments were received on the SIP revision at the State level. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on December 29, 2008 without further notice unless EPA receives adverse comment by December 1, 2008.

If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175(65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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

[1] EPA filed a petition for rehearing with the Court of Appeals for the District of Columbia Circuit on September 24, 2008.

agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

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 December 29, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to revise the MVEBs for the Parkersburg 8-hour Ozone Maintenance Plan may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 20, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (e) is amended by revising the entry for the 8-Hour Ozone Maintenance Plan for the Parkersburg-Marietta, WV-OH Area to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
8-Hour Ozone Maintenance Plan for the Parkersburg-Marietta, WV-OH Area.	Wood County	09/08/06	5/8/07; 72 FR 2967	
		08/25/08	10/30/08; [*Insert page number where the document begins*].	Reallocation of emissions from the existing ''safety margin'' to increase the available motor vehicle emission budgets for highway vehicles.
*	*	*	*	*

* * * * *

[FR Doc. E8–25662 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–0382, EPA–R03–OAR–2008–0113; FRL–8735–6]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Emission Reductions From Large Stationary Internal Combustion Engines and Large Cement Kilns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving State Implementation Plan (SIP) revisions submitted by the Virginia Department of Environmental Quality (VADEQ). These revisions require nitrogen oxides (NO_X) emission reductions from four large stationary internal combustion (IC) engines and a large cement kiln located in the Commonwealth of Virginia. The intended effect of this action is to approve permitted emission limits that enable Virginia to meet its remaining NO_X reduction obligations under the NO_X SIP Call.

DATES: *Effective Date:* This final rule is effective on December 1, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0382. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On August 21, 2008 (73 FR 49373), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of NO_X emission reductions from four large stationary IC engines and a large cement kiln located in the Commonwealth. The formal SIP revisions were submitted by VADEQ on February 26, 2007, March 5, 2007, March 12, 2007, March 19, 2007, and August 8, 2007. The SIP revision for each source consists of State operating permits that contain emission limits to ensure the Commonwealth meets its NO_X budget for these sectors as required under the NO_X SIP Call. Other specific requirements of the State operating permits and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

II. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

III. Final Action

EPA is approving State operating permits for four Transcontinental Gas Pipeline Stations (Stations 165, 170, 175, and 180) and a State operating permit for Roanoke Cement Corporation as a revision to the Virginia SIP. The NO_X emission reductions required by the permits address Virginia's remaining emission reduction obligations under the NO_X SIP Call.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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. Section 804, however, exempts from section 801 the

following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

C. Petitions for Judicial Review

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 December 29, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, pertaining to EPA approval of NO_X emission reductions from large stationary IC engines and large cement kilns in Virginia, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 20, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (d) is amended by adding the entries for Transcontinental Pipeline Station 165, Transcontinental Pipeline Station 170, Transcontinental Pipeline Station 175, Transcontinental Pipeline Station 180 and Roanoke Cement Corporation at the end of the table to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED SOURCE-SPECIFIC REQUIREMENTS

Source name	Permit/order or registration number	State effective date	EPA approval date	40 CFR part 52 citation
*	*	*	*	*
Transcontinental Pipeline Station 165.	Registration No. 30864	1/24/07	10/30/08 [Insert page number where the document begins].	
Transcontinental Pipeline Station 170.	Registration No. 30863	1/24/07	10/30/08 [Insert page number where the document begins].	
Transcontinental Pipeline Station 175.	Registration No. 40789	1/30/07	10/30/08 [Insert page number where the document begins].	
Transcontinental Pipeline Station 180.	Registration No. 40782	2/13/07	10/30/08 [Insert page number where the document begins].	
Roanoke Cement Corporation	Registration No. 20232	6/18/07	10/30/08 [Insert page number where the document begins].	

* * * * *

[FR Doc. E8–25668 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

42 CFR Part 73

RIN 0920–AA09

Possession, Use, and Transfer of Select Agents and Toxins

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Final rule; technical correction.

SUMMARY: This document contains a technical correction to the list of select agents and toxins regulated by the U.S. Department of Health and Human Services (HHS), as well as those biological agents and toxins regulated by both HHS and the U.S. Department of Agriculture (USDA) published on October 16, 2008, in the **Federal Register** (73 FR 61363). This correction inserts ''Reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight segments (Reconstructed 1918 Influenza virus)'' that was inadvertently omitted from the list of agents and toxins regulated by only HHS.

DATES: This correction is effective on November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Robbin Weyant, Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Rd., MS A–46, Atlanta, GA 30333. *Telephone:* (404) 718–2000.

SUPPLEMENTARY INFORMATION: On October 17, 2008, the Centers for Disease Control and Prevention (CDC), HHS published in the **Federal Register** (73 FR 61363) ''Possession, Use, and Transfer of Select Agents and Toxins'' which completed the biennial review and republication of the lists of biological agents and toxins regulated by the HHS, as well as those biological agents and toxins regulated by USDA. Reconstructed 1918 Influenza virus (Reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight segments) was inadvertently omitted from the list of agents regulated by HHS. The amendment in this document corrects that omission and does not have a substantive change to the list made final in the October 17, 2008 rule.

List of Subjects in 42 CFR Part 73

Biologics, Incorporation by reference, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: October 24, 2008.

Michael O. Leavitt,

Secretary.

■ For the reasons stated in the preamble, we have amended 42 CFR part 73 as follows:

PART 73—SELECT AGENTS AND TOXINS

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 42 U.S.C. 262a; sections 201–204, 221 and 231 of Title II of Public Law No. 107–188, 116 Stat. 637 (42 U.S.C. 262a).

■ 2. In § 73.3(b), add ''Reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments (Reconstructed 1918 Influenza virus)'' after ''Monkeypox virus''.

[FR Doc. E8–25883 Filed 10–29–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA–8047]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

Previously, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Region IV				
Alabama: Grove Hill, Town of, Clarke County.	010039	June 3, 1976, Emerg; September 4, 1985, Reg; October 16, 2008, Susp.	Oct. 16, 2008 ...	Oct. 16, 2008.
Mississippi:				
George County, Unincorporated Areas	280223	May 2, 1975, Emerg; August 16, 1988, Reg; October 16, 2008, Susp.	.....*do	Do.
Lucedale, City of, George County	280056	April 24, 1975, Emerg; April 15, 1986, Reg; October 16, 2008, Susp.	.....do	Do.
Tunica County, Unincorporated Areas ..	280236	September 5, 1974, Emerg; July 3, 1990, Reg; October 16, 2008, Susp.	.....do	Do.
Tunica, Town of, Tunica County	280196	January 28, 1974, Emerg; January 5, 1978, Reg; October 16, 2008, Susp.	.....do	Do.
Kentucky:				
Lee County, Unincorporated Areas	210135	July 9, 1975, Emerg; September 27, 1985, Reg; October 16, 2008, Susp.	.....do	Do.
Beattyville, City of, Lee County	210136	September 17, 1973, Emerg; July 3, 1978, Reg; October 16, 2008, Susp.	.....do	Do.
Tennessee:				
Dyer County, Unincorporated Areas	470284	February 18, 1975, Emerg; March 1, 1982, Reg; October 16, 2008, Susp.	.....do	Do.
Dyersburg, City of, Dyer County	470047	May 2, 1975, Emerg; March 1, 1982, Reg; October 16, 2008, Susp.	.....do	Do.
Trimble, Town of, Dyer County	470223	May 30, 1986, Emerg; June 4, 1987, Reg; October 16, 2008, Susp.	.....do	Do.
Lavergne, City of, Rutherford County ...	470167	September 8, 1975, Emerg; June 15, 1984, Reg; October 16, 2008, Susp.	.....do	Do.
Rutherford County, Unincorporated Areas.	470165	January 30, 1975, Emerg; June 15, 1984, Reg; October 16, 2008, Susp.	.....do	Do.
Smyrna, Town of, Rutherford County ...	470169	November 7, 1974, Emerg; March 16, 1983, Reg; October 16, 2008, Susp.	.....do	Do.
North Carolina:				
Bald Head Island, Village of, Brunswick County.	370442	February 26, 1986, Emerg; May 15, 1986, Reg; October 16, 2008, Susp.	.....do	Do.
Chowan County, Unincorporated Areas	370301	August 25, 1977, Emerg; July 3, 1985, Reg; October 16, 2008, Susp.	.....do	Do.
Edenton, Town of, Chowan County	370062	November 14, 1973, Emerg; September 15, 1977, Reg; October 16, 2008, Susp.	.....do	Do.
Indian Trail, Town of, Union County	370235	June 14, 1976, Emerg; March 21, 1980, Reg; October 16, 2008, Susp.	.....do	Do.
Lake Park, Village of, Union County	370520	August 17, 1999, Emerg; August 17, 1999, Reg; October 16, 2008, Susp.	.....do	Do.
Martin County, Unincorporated Areas ...	370155	December 18, 1975, Emerg; July 16, 1991, Reg; October 16, 2008, Susp.	.....do	Do.
Marvin, Village of, Union County	370514	December 28, 1998, Emerg; December 28, 1998, Reg; October 16, 2008, Susp.	.....do	Do.
Mineral Springs, Town of, Union County	370529	May 17, 2000, Emerg; May 17, 2000, Reg; October 16, 2008, Susp.	.....do	Do.
Monroe, City of, Union County	370236	April 21, 1975, Emerg; January 19, 1983, Reg; October 16, 2008, Susp.	.....do	Do.
Stallings, Town of, Union County	370472	April 5, 1994, Emerg; April 5, 1994, Reg; October 16, 2008, Susp.	.....do	Do.
Union County, Unincorporated Areas ...	370234	August 9, 1974, Emerg; July 18, 1983, Reg; October 16, 2008, Susp.	.....do	Do.
Waxhaw, Town of, Union County	370473	December 28, 1998, Emerg; December 28, 1998, Reg; October 16, 2008, Susp.	.....do	Do.
Weddington, Town of, Union County	370518	May 3, 1999, Emerg; May 3, 1999, Reg; October 16, 2008, Susp.	.....do	Do.
Wesley Chapel, Village of, Union County.	370525	March 12, 2000, Emerg; March 12, 2000, Reg; October 16, 2008, Susp.	.....do	Do.
Williamston, Town of, Martin County	370157	October 2, 1974, Emerg; August 19, 1987, Reg; October 16, 2008, Susp.	.....do	Do.
Wingate, Town of, Union County	370365	February 12, 1982, Emerg; February 12, 1982, Reg; October 16, 2008, Susp.	.....do	Do.

*do = Ditto.

Code for reading third column: Emerg—Emergency; Reg—Regular; Susp—Suspension.

Dated: October 17, 2008.

Edward L. Connor,

Acting Federal Insurance Administrator, National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–25879 Filed 10–29–08; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 02–278 and 05–338; FCC 08–239]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005

AGENCY: Federal Communications Commission.

ACTION: Final rule; clarification.

SUMMARY: In this document, the Commission addresses certain issues raised in petitions for reconsideration and/or clarification of the Report and Order implementing the Junk Fax Prevention Act of 2005. The Commission believes the clarifications provided will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).

DATES: Effective October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Erica McMahon, Consumer & Governmental Affairs Bureau at (202) 418–0346 (voice), or e-mail *Erica.McMahon@fcc.gov.*

SUPPLEMENTARY INFORMATION:

This is a summary of the Commission's *Order on Reconsideration,* FCC 08–239, adopted on October 8, 2008, and released on October 14, 2008. The Order on Reconsideration addresses certain issues raised in petitions for reconsideration and/or clarification filed in response to the Commission's *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005,* CG Docket Nos. 02–278 and 05–338, Report and Order and Third Order on Reconsideration, document FCC 06–42 (*Junk Fax Order*), published at 71 FR 25967, May 3, 2006. Copies of document FCC 08–239 and any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Document FCC 08–239 and any subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at their Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). Document FCC 08–239 can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/policy.*

Paperwork Reduction Act of 1995 Analysis

Document FCC 08–239 does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Synopsis

1. In document FCC 08–239, the Commission clarifies that: (1) Facsimile numbers compiled by third parties on behalf of the facsimile sender will be presumed to have been made voluntarily available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement, or Internet site; (2) reasonable steps to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than direct contact with the recipient; and (3) a description of the facsimile sender's opt-out mechanism on the first Web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the first page of the Web site. The Commission believes these clarifications will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).

Junk Fax Prevention Act of 2005

2. On April 6, 2006, as required by the Junk Fax Prevention Act, the Commission released the *Junk Fax Order* amending its rules on unsolicited facsimile advertisements. In so doing, the Commission adopted the requirements of that statute virtually verbatim. As relevant here, the Junk Fax Prevention Act allows a sender that has an established business relationship (EBR) with the recipient to send an unsolicited facsimile advertisement if the sender obtained the number of the facsimile machine through: (1) The voluntary communication of such number, within the context of the EBR, from the recipient of the facsimile advertisement, or (2) a directory, advertisement, or site on the Internet to which the recipient *voluntarily agreed* to make available its facsimile number for public distribution. For this second category of facsimile numbers, the Commission found that it would be unduly burdensome for senders of facsimile advertisements to verify that the recipient voluntarily agreed to make the facsimile number public in every instance. As a result, the Commission concluded that ''a facsimile number obtained from the *recipient's own* directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements'' at that number. The Commission noted, however, that if a sender obtains the facsimile number from sources of information compiled by third parties—such as membership directories and commercial databases, the sender ''must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient.''

3. The Junk Fax Prevention Act also requires that all unsolicited facsimile advertisements include an opt-out notice that instructs recipients on how to notify senders that they do not wish to receive future facsimile advertisements. Among other requirements, the opt-out notice must identify a ''cost-free'' mechanism by which recipients can transmit their opt-out requests. The Commission concluded that, if a sender designates a Web site as its cost free opt-out mechanism, a description of the opt-out mechanism and procedures must be included ''clearly and conspicuously *on the first page of the Web site.*'' The Commission also clarified that, in accordance with the Junk Fax

Prevention Act, if there are several pages to the facsimile, the first page of the advertisement must contain the opt-out notice. In so doing, the Commission declined to find that the ''first page'' notice requirement was satisfied by including the notice on a cover page. Rather, the Commission required that the opt-out notice appear on the first page of the advertisement itself. Finally, the Commission declined to limit the time period during which a request to opt out from receiving unsolicited facsimile advertisements remains in effect. The Commission concluded that requiring consumers to repeat their opt-out requests to potentially hundreds of senders of unsolicited facsimile advertisements would be overly burdensome to recipients. Therefore, once an opt-out request has been received, the sender is prohibited from transmitting facsimile advertisements to that number until the sender obtains the prior express permission of the recipient to resume sending facsimile advertisements.

Petitions for Reconsideration

4. On June 2, 2006, two petitions for reconsideration and clarification were filed in response to the *Junk Fax Order.* Specifically, the Direct Marketing Association (DMA) seeks clarification that the *Junk Fax Order* does not prohibit the use of third-party agents to perform services that an organization would otherwise be permitted to conduct internally. In addition, DMA urges the Commission to make clear that when a sender does elect to use facsimile numbers collected independently from a third party source such as a membership directory, that ''reasonable steps'' to verify the number was provided voluntarily may include measures that do not involve direct contact with the intended recipient. Finally, DMA requests that the Commission reconsider the decision not to limit the time period for which an opt-out request remains in effect.

5. Leventhal Senter and Lerman PLLC (LS&L), on behalf of certain unnamed broadcast clients, seeks reconsideration or clarification of two issues relating to the opt-out notice. First, LS&L requests that the Commission clarify that the requirement that a clear and conspicuous description of the opt-out mechanism appear on the Web site's first page is met when ''a dedicated opt-out page [is] specified by URL in the opt-out notice'' that appears in the facsimile advertisement. In addition, LS&L suggests that a link could be included on the Web site's homepage to direct recipients to the appropriate internal Web page. Second, LS&L requests that a properly formatted opt-out notice included on a facsimile cover page complies with the requirement that such opt-out notice appear on the ''first page of the advertisement.''

Established Business Relationship

Facsimile Numbers Obtained From the Recipient's Own Directory, Advertisement or Internet Site

6. Consistent with the Commission's conclusion in the *Junk Fax Order,* the Commission reiterates that facsimile numbers compiled on behalf of the facsimile sender will be presumed to have been voluntarily made available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement or Internet site. In so doing, the Commission agrees with DMA that it did not limit this presumption to only those situations in which the sender compiles this information through ''in-house'' employees. Rather, it is the source from which the facsimile number is obtained, and not the identity of the compiler, that provides evidence of whether the recipient intended to make that number available for public distribution. Therefore, no additional verification that the recipient has voluntarily made available his or her facsimile number is required if the number is obtained from the recipient's own directory, advertisement or Internet site. However, the Commission cautions that a sender that uses a third party to compile facsimile numbers will be liable for the errors of its third-party agent or contractor. The Commission also reiterates that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in the recipient's own directory, advertisement or Web site does not alone entitle a sender to transmit a facsimile advertisement to that number.

Reasonable Steps to Verify That the Recipient Has Voluntarily Made Available a Facsimile Number

7. The Commission clarifies that ''reasonable steps'' under its rules to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than calling or e-mailing the recipient directly. The Commission cited these verification methods in the *Junk Fax Order* as examples that satisfy this requirement. The Commission did not, however, limit parties in this context only to means of direct contact with the recipient.

8. The Commission agrees with DMA that it is possible that the circumstances attending the collection of a facsimile number can provide sufficient evidence that the number has been provided voluntarily for public distribution without the necessity of contacting the recipient. For example, the recipient may expressly agree at the point of collection to allow for public disclosure of the facsimile number. The Commission cautions, however, that should a complaint arise on this issue, the facsimile sender has the burden to demonstrate that the circumstances surrounding the acquisition of the facsimile number reasonably indicate that the recipient agreed to make the facsimile number available for public distribution.

Notice of Opt-Out Opportunity

Location of the Opt-Out Mechanism on the Web site's First Page

9. The Commission clarifies that a facsimile sender satisfies the requirement to provide clear and conspicuous notice of a cost-free mechanism for transmitting opt-out requests when the opt-out notice directs the recipient to a dedicated Web page that allows the recipient to opt-out of future facsimile advertisements. The Commission's rules require that all facsimile advertisements include an opt-out notice by which recipients can inform senders that they do not wish to receive future unsolicited advertisements. The notice must include a domestic telephone number and facsimile number for the recipient to transmit an opt-out request. If neither the required telephone number nor facsimile number is a toll free number, a separate cost-free mechanism must be provided for the recipient to transmit the opt-out request. In the *Junk Fax Order,* the Commission noted that, if the sender designates a Web site as its cost-free opt-out mechanism, a description of the mechanism must be included clearly and conspicuously on the first page of the Web site.

10. The Commission clarifies that a description of the facsimile sender's opt-out mechanism on the first Web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the ''first page'' of the Web site. In addition, a clear and conspicuous link should be provided on the Web site's homepage to direct recipients to the appropriate internal opt-out Web page. The Commission agrees with LS&L, however, that it did not intend to mandate that the entire opt-out mechanism must appear on the

homepage of every sender of unsolicited facsimile advertisements. Rather, the intent of this requirement is to provide a reasonable means for recipients to locate the facsimile sender's opt-out mechanism and make requests to avoid future unwanted facsimiles. The Commission believes this interpretation of the ''first'' Web page requirement adequately ensures that recipients can locate the opt-out mechanism while providing flexibility to facsimile senders in designing their Web sites in the most cost-effective manner to comply with this requirement.

Facsimile Cover Page

11. The Commission declines to reconsider its decision that the first page of the facsimile advertisement must contain the opt-out notice. In so doing, the Commission notes that the Junk Fax Prevention Act requires that ''the notice is clear and conspicuous and *on the first page of the unsolicited advertisement.*'' Specifically, the Commission declines to find that placement of the opt-out notice on a cover sheet that accompanies the facsimile advertisement satisfies this requirement. The Commission specifically addressed this issue in the *Junk Fax Order,* and petitioners provide no new information or evidence that leads the Commission to now reconsider this conclusion.

Duration of Opt-Out Requests

12. The Commission declines to reconsider its decision not to limit the duration for which a request to opt-out from receiving unsolicited facsimile advertisements remains in effect. Here too the Commission directly addressed this issue in the *Junk Fax Order,* and petitioners provide no new evidence or arguments on reconsideration that lead us to reconsider this finding. The Commission has considered arguments that facsimile numbers may change hands over time and that those who make the opt-out request could, at some point, no longer be the same parties associated with those telephone numbers. The Commission has concluded, however, that these concerns are outweighed by the potential burdens imposed on those recipients that would otherwise be forced to repeat their opt-out requests to potentially hundreds of facsimile senders. The Commission disagrees with DMA's contention that opt-out requests from facsimile recipients should be limited in duration in the same manner as do-not-call requests. The Commission notes that, unlike the rules on telephone solicitations, once an EBR has been established for purposes of allowing the transmission of facsimile advertisements, it remains in effect indefinitely until the recipient affirmatively opts-out from receiving future advertisements.

13. In contrast, the Commission's rules limit the duration of an EBR exemption in the case of telephone solicitations to no longer than 18 months after a purchase or transaction or three months following an application or inquiry. Thus, the EBR will expire automatically in the case of telephone solicitations without any further action by the consumer. In addition, recipients of facsimile advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions. The Commission believes that protecting recipients from the direct costs imposed by unwanted facsimile transmissions is best achieved by declining to limit the duration of an opt-out request.

Regulatory Flexibility Analysis

The Commission notes that no Final Regulatory Flexibility Analysis is necessary for the document FCC 08–239, as it is not making any changes to the Commission's rules.

Congressional Review Act

The Commission will send a copy of document FCC 08–239 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Pursuant to sections 1–4, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 227, and 303(r); § 1.429 of the Commission's rules, 47 CFR 1.429; and § 64.1200 of the Commission's rules, 47 CFR 64.1200, the *Order on Reconsideration* in CG Docket Nos. 02–278 and 05–338 is adopted.

Petitions for reconsideration and/or clarification filed by the Direct Marketing Association and Leventhal Senter and Lerman PLLC in CG Docket Nos. 02–278 and 05–338 are denied in part and granted in part. The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Order on Reconsideration, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–25801 Filed 10–29–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93–177; FCC 08–228]

An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this proceeding the Commission permits the use of computer modeling techniques to verify that directional AM antennas perform as authorized. The new rules reduce the time and expense associated with the license application for a directional AM station. The changes, consistent with the Commission's streamlining initiatives, reduce the regulatory burden upon directional AM stations to the extent possible while maintaining the integrity of the service.

DATES: Effective December 1, 2008, except for the amendments to §§ 73.61, 73.68, 73.151, and 73.155 which contain information collection requirements that have not been approved by Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554, *http://www.fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Audio Division, Media Bureau (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Report and Order* in MM Docket No. 93–177, adopted September 24, 2008, and released September 26, 2008. The new rules adopted here were proposed in an earlier *Further Notice of Proposed Rule Making* in this proceeding [*See* 66 FR 20779, April 25, 2001]. The final rules incorporate comments received in response to the *Further Notice of Proposed Rule Making.* The complete text of this *Second Report and Order* 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, Best Copy and Printing, Inc., (800) 378–3160, 445 12th Street, SW., Room CY–402, Washington, DC 20554. The complete text is also available on the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–08–228A1.pdf.*

Synopsis of Second Report and Order

1. Introduction. This proceeding is part of a broad-based initiative to simplify the Commission's licensing procedures for radio stations. The *Report and Order* in this proceeding [*See* 66 FR 20752, April 25, 2001] simplified traditional proof of performance requirements for a directional AM station. The *Further Notice of Proposed Rulemaking* sought comment on the use of moment method computer modeling to demonstrate that certain AM directional antennas perform as authorized. This *Second Report and Order* permits AM broadcasters to use computer modeling techniques in place of a traditional proof of performance based on field strength measurements, which are time-consuming and expensive.

2. AM proof of performance requirements. Directional AM stations use antennas which suppress radiated field in some directions and enhance it in others. In order to control interference between stations and assure adequate community coverage, directional AM stations must undergo extensive ''proofs of performance'' to demonstrate that the antenna system operates as authorized. An antenna proof of performance establishes whether the radiation pattern of an AM station is in compliance with the station's authorization. An AM station must perform a full proof to verify the pattern shape when a new directional antenna system is authorized. Partial proofs, which require fewer measurements, are occasionally necessary to show that an array continues to operate properly. This *Second Report and Order* allows most directional AM stations to use computer modeling in place of the traditional proof of performance, which is based on field strength measurements taken many miles from the antenna. In contrast to the traditional method, a moment method proof relies upon internal measurements to verify that the antenna is operating properly.

The new rules are based on a proposal made by an *ad hoc* coalition of radio broadcasters, equipment manufacturers, and broadcast consulting engineers. Comments filed by the *ad hoc* coalition reflected a strong consensus in favor of allowing the use of moment method techniques to verify the performance of AM directional antennas. In addition, the coalition's comments pointed out some of the limitations inherent in traditional field strength proofs.

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking* in this proceeding. The Commission sought written public comment on the proposals in the *Further Notice of Proposed Rulemaking,* including comment on the IRFA. None were received. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[2]

Need For and Objectives of the Rules: This *Second Report and Order* adopts rules permitting the use of computer modeling techniques based on moment method analysis to verify AM directional antenna performance. Adoption of such techniques will reduce the substantial costs associated with licensing for directional AM stations. These rules also advance the Commission's regulatory requirements to the minimum necessary to achieve our policy objectives of controlling interference and assuring adequate community coverage.

Legal Basis: Authority for the actions proposed in this *Second Report and Order* may be found in sections 4(i), 4(j), 303, 308, 309, 316 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 308, 309, 316 and 319.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply: The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government jurisdiction.''[4] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[5] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[6]

The rules adopted in this *Second Report and Order* will apply to those AM radio broadcasting licensees and potential licensees that operate with directional antennas. The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[7] Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.'' According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of May 1, 2008, 13,457 (about 96 percent) of 13,977 radio stations in the United States have revenues of $6.5 million or less. AM stations constitute 4,776 of the radio station total, and approximately 40 percent of AM stations use directional antennas. Consequently, we estimate that 1,910 AM stations may be affected by the new rules. Using the 96 percent figure to estimate the number of small businesses among directional AM stations, we conclude that approximately 1,834 of the affected AM stations are small businesses. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[8] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law No. 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996.

[2] *See* 5 U.S.C. 604.

[3] 5 U.S.C. 603(b)(3).

[4] 5 U.S.C. 601(6).

[5] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[6] 15 U.S.C. 632.

[7] *See* NAICS Code 515112.

[8] ''[Business concerns] are affiliates of each other when onebusiness concern controls or has the power to control the other or a third party or parties controls or has the power to control both.'' 13 CFR 121.103(a)(1).

radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Description of Projected Recording, Recordkeeping, and Other Compliance Requirements: In order to control interference between stations and assure adequate community coverage, directional AM stations must undergo extensive ''proofs of performance'' when initially constructed, and from time to time thereafter, to verify conformance with authorized operating parameters. The new proof of performance techniques adopted here, which are optional, will substantially reduce the compliance burden for licensees of directional AM stations and for Commission staff. The new compliance requirements associated with the rule changes are less onerous than our existing proof of performance requirements. The periodic recertification required for stations opting to use the new proof of performance techniques is the only new record keeping involved. We believe this requirement does not represent a significant burden, and is more than offset by the efficiency of the new procedures.

Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered: The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[9]

The rules adopted in the *Second Report and Order* offer alternative procedures that will greatly reduce the compliance burden for directional AM stations. Directional AM stations are not required to use these new procedures, however. Previous rules concerning AM directional antenna performance verification remain in effect, and an AM station may continue to use the old rules if these are more advantageous. By offering a cost-effective and efficient new means of performance verification, but not requiring its use, we have increased the options available to all directional AM stations for verifying antenna performance. The additional flexibility afforded by the new rules will be particularly advantageous to small businesses.

Paperwork Reduction Act Analysis

The *Second Report and Order* contains new and modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it contains new and modified ''information collection burdens for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and OMB in a separate **Federal Register** to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In regard to the proposed new information collection requirements, pursuant to the Small Business Paperwork Relief Act of 2002,[10] we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In regard to the new and modified information collection requirements adopted herein, we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In the *Second Report and Order*, we have assessed the effects of the new rules for directional AM performance verification adopted herein, and find that these new rules, which are optional, would greatly reduce the information collection burden for licensees.

Report to Congress

The Commission will send a copy of the *Second Report and Order and Second Further Notice of Proposed Rulemaking,* including the FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[11] In addition, the Commission will send a copy of the *Second Report and Order and Second Further Notice of Proposed Rulemaking,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order and Second Further Notice of Proposed Rulemaking,* including the FRFA (or summaries thereof), will also be published in the **Federal Register**.[12]

List of Subjects

Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rules Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 to read as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Amend § 73.61 by revising paragraphs (a) and (b) to read as follows:

§ 73.61 AM directional antenna field strength measurements.

(a) Each AM station using a directional antenna with monitoring point locations specified in the instrument of authorization must make field strength measurements as often as necessary to ensure that the field at each of those points does not exceed the value specified in the station authorization. Additionally, stations not having an approved sampling system must make the measurements once each calendar quarter at intervals not exceeding 120 days. The provision of this paragraph supersedes any schedule specified on a station license issued prior to January 1, 1986. The results of the measurements are to be entered into the station log pursuant to the provisions of § 73.1820.

[9] 5 U.S.C. 603(c)(1) through (c)(4).

[10] Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

[11] *See* 5 U.S.C. 801(a)(1)(A).

[12] *See* 5 U.S.C. 604(b).

(b) If the AM license was granted on the basis of field strength measurements performed pursuant to § 73.151(a), partial proof of performance measurements using the procedures described in § 73.154 must be made whenever the licensee has reason to believe that the radiated field may be exceeding the limits for which the station was most recently authorized to operate.

* * * * *

■ 3. Amend § 73.68 by revising paragraph (a), redesignating paragraphs (b) through (e) as paragraphs (c) through (f), and by adding a new paragraph (b) to read as follows:

§ 73.68 Sampling systems for antenna monitors.

(a) Each AM station permittee authorized to construct a new directional antenna system which will be subject to a proof of performance based on field strength measurements, as described in § 73.151(a) or (b), must install the sampling system in accordance with the following specifications:

(1) Devices used to extract or sample the current and the transmission line connecting the sampling elements to the antenna monitor must provide accurate and stable signals to the monitor (*e.g.*, rigidly mounted and non-rotatable loops and all system components protected from physical and environmental disturbances).

(2) Sampling lines for directional antennas may be of different lengths provided the phase difference of signals at the monitor are less than 0.5 degrees between the shortest and longest cable lengths due to temperature variations to which the system is exposed.

(3) Other configurations of sampling systems may be used upon demonstration of stable operation to the FCC.

(b) An AM station permittee authorized to construct a directional antenna system which will be subject to a proof of performance based on moment method modeling, as described in § 73.151(c), shall install a sampling system conforming to the requirements set forth in that section.

* * * * *

■ 4. Amend § 73.151 by adding introductory text and by adding paragraph (c) to read as follows:

§ 73.151 Directional Antenna Performance Verification.

The performance of a directional antenna may be verified either by field strength measurement or by computer modeling and sampling system verification.

(a) * * *

* * * * *

(c) *Computer modeling and sample system verification of modeled parameters to establish operation of a directional antenna consistent with the theoretical pattern.* Each element of the directional array shall be modeled by use of a method of moments computer program, using the physical characteristics of each element to establish a model that does not violate any of the internal constraints of the computer program. Only arrays consisting of series-fed elements may have their performance verified by computer modeling and sample system verification.

(1) A matrix of impedance measurements at the base and/or feed point of each element in the array, with all other elements shorted and/or open circuited at their respective measurement locations, shall be made. The physical model of the individual antenna elements used in the computer program may be varied to match the measured impedance matrix, but the actual spacings and orientations of the array elements must be used. Towers may be modeled using individual vertical wires to represent them, or with multiple wires representing their leg and cross-member sections. The resulting model description (consisting of the length, radius, and number of segments of each wire for arrays using vertical wire sections to represent the towers, or the length, end-point coordinates, and radius of each wire used to represent leg and cross-member sections for arrays using detailed tower structure representations) as well as the assumed input feed and base region stray reactances shall be used to generate the drive impedances and sample system parameter values for the operating directional antenna pattern parameters.

(i) For arrays using vertical wires to represent each tower, the radii of cylinders shall be no less than 80 percent and no more than 150 percent of the radius of a circle with a circumference equal to the sum of the widths of the tower sides.

(ii) For arrays using multiple wires to represent leg and cross-member sections, the individual legs of the tower may be modeled at their actual diameters with appropriate interconnecting segments representing cross-members at regular intervals.

(iii) No less than one segment for each 10 electrical degrees of the tower's physical height shall be used for each element in the array.

(iv) Base calculations shall be made for a reference point at ground level or within one electrical degree elevation of the actual feed point.

(v) For uniform cross-section towers represented by vertical wires, each wire used for a given tower shall be between 75 to 125 percent of the physical length represented.

(vi) For self-supporting towers, stepped-radius wire sections may be employed to simulate the physical tower's taper, or the tower may be modeled with individual wire sections representing the legs and cross members.

(vii) The lumped series inductance of the feed system between the output port of each antenna tuning unit and the associated tower shall be no greater than 10 μH unless a measured value from the measurement point to the tower base with its insulator short circuited is used.

(viii) The shunt capacitance used to model base region effects shall be no greater than 250 pF unless the measured or manufacturer's stated capacitance for each device other than the base insulator is used. The total capacitance of such devices shall be limited such that in no case will their total capacitive reactance be less than five times the magnitude of the tower base operating impedance without their effects being considered.

(ix) The orientation and distances among the individual antenna towers in the array shall be confirmed by a post-construction certification by a land surveyor (or, where permitted by local regulation, by an engineer) licensed or registered in the state or territory where the antenna system is located.

(2)(i) The computer model, once verified by comparison with the measured base impedance matrix data, shall be used to determine the appropriate antenna monitor parameters. The moment method modeled parameters shall be established by using the verified moment method model to produce tower current distributions that, when numerically integrated and normalized to the reference tower, are identical to the specified field parameters of the theoretical directional antenna pattern. The samples used to drive the antenna monitor may be current transformers or voltage sampling devices at the outputs of the antenna matching networks or sampling loops located on the towers. If sample loops are used, they shall be located at the elevation where the current in the tower would be at a minimum if the tower were detuned in the horizontal plane, as determined by the moment method model parameters used to determine the antenna monitor parameters. Sample loops may be employed only when the towers are

identical in cross-sectional structure, including both leg and cross member characteristics; if the towers are of unequal height, the sample loops shall be mounted identically with respect to tower cross members at the appropriate elevations above the base insulator. If the tower height used in the model is other than the physical height of the tower, the sampling loop shall be located at a height that is the same fraction of the total tower height as the minimum in tower current with the tower detuned in the model. Sample lines from the sensing element to the antenna monitor must be equal in both length (within one electrical degree) and characteristic impedance (within two ohms), as established by impedance measurements, including at the open-circuit resonant frequency closest to carrier frequency to establish length, at frequencies corresponding to odd multiples of ⅛ wavelength immediately above and below the open circuit resonant frequency closest to carrier frequency, while open circuited, to establish characteristic impedance, and at carrier frequency or, if necessary, at nearby frequencies where the magnitude of the measured impedance is no greater than 200 ohms with the sampling devices connected. Samples may be obtained from current transformers at the output of the antenna coupling and matching equipment for base-fed towers whose actual electrical height is 120 degrees or less, or greater than 190 electrical degrees. Samples may be obtained from base voltage sampling devices at the output of the antenna coupling and matching equipment for base-fed towers whose actual electrical height is greater than 105 degrees. Samples obtained from sample loops located as described above can be used for any height of tower. For towers using base current or base voltage sampling derived at the output of the antenna coupling and matching equipment, the sampling devices shall be disconnected and calibrated by measuring their outputs with a common reference signal (a current through them or a voltage across them, as appropriate) and the calibration must agree within the manufacturer's specifications. A complete description of the sampling system, including the results of the measurements described in this paragraph, shall be submitted with the application for license.

(ii) Proper adjustment of an antenna pattern shall be determined by correlation between the measured antenna monitor sample indications and the parameters calculated by the method of moments program, and by correlation between the measured matrix impedances for each tower and those calculated by the method of moments program. The antenna monitor sample indications must be initially adjusted to agree with the moment method model within +/−5 percent for the field ratio and +/−3 degrees in phase. The measured matrix impedances must agree with the moment method model within +/−2 ohms and +/−4 percent for resistance and reactance.

(3) Reference field strength measurement locations shall be established in directions of pattern minima and maxima. On each radial corresponding to a pattern minimum or maximum, there shall be at least three measurement locations. The field strength shall be measured at each reference location at the time of the proof of performance. The license application shall include the measured field strength values at each reference point, along with a description of each measurement location, including GPS coordinates and datum reference.

■ 5. Add new § 73.155 to read as follows:

§ 73.155 Periodic Directional Antenna Performance Recertification.

A station licensed with a directional antenna pattern pursuant to a proof of performance using moment method modeling and internal array parameters as described in § 73.151(c) shall recertify the performance of that directional antenna pattern at least once within every 24 month period.

(a) Measurements shall be made to verify the continuing integrity of the antenna monitor sampling system.

(1) For towers using base current or base voltage sampling derived at the output of the antenna coupling and matching equipment, the sampling devices shall be disconnected and calibrated by measuring their outputs with a common reference signal (a current through them or a voltage across them, as appropriate) and the calibration must agree with the manufacturer's specifications.

(2) For towers using base current or base voltage sampling derived at the output of the antenna coupling and matching equipment, sampling line measurements shall be made to verify the open-circuit resonant frequency closest to carrier frequency, to establish length, and also at frequencies corresponding to odd multiples of ⅛ wavelength immediately above and below the open-circuit resonant frequency closest to carrier frequency, while open circuited, to verify their characteristic impedance. The frequencies measured must be the same as were measured in the most recent proof of performance and must demonstrate that the sampling lines continue to meet the requirements of § 73.151(c) with regard to their length and characteristic impedance.

(3) For towers having sampling loops, measurements shall be made at carrier frequency or, if necessary, at nearby frequencies where the magnitude of the measured impedance is no greater than 200 ohms with the sampling loops connected. The frequencies measured must be the same as were measured in the most recent proof of performance and the measured impedances must agree within +/−2 ohms and +/−4 percent resistance and reactance of the proof values.

(b) Field strength measurements shall be made at the reference field strength measurement locations that were established by the most recent proof of performance. If locations have become inaccessible or their readings contaminated by localized electromagnetic environmental changes, new locations that meet the requirements of the moment method proof of performance rules in § 73.151(c)(3) shall be established to replace them.

(c) The results of the periodic directional antenna performance recertification measurements shall be retained in the station's public inspection file.

[FR Doc. E8–25802 Filed 10–29–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0808051052–81365–02]

RIN 0648–AW85

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Referendum Procedures for a Potential Gulf of Mexico Grouper and Tilefish Individual Fishing Quota Program

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

ACTION: Final rule; statement of procedure.

SUMMARY: NMFS issues this final rule to provide information concerning the procedures, schedule, and eligibility requirements NMFS will use in

conducting a referendum for an individual fishing quota (IFQ) program for the Gulf of Mexico (Gulf) commercial grouper and tilefish fisheries. If the IFQ program, as developed by the Gulf of Mexico Fishery Management Council (Council), is approved through the referendum process, the Council may choose to submit the IFQ program to the Secretary of Commerce (Secretary) for review, approval, and implementation. The intended effect of this rule is to implement the referendum consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: This final rule is effective December 1, 2008.

ADDRESSES: Copies of supporting documentation for this final rule, which includes a regulatory impact review (RIR) and a Regulatory Flexibility Act Analysis (RFAA), are available from Susan Gerhart, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, 727–824–5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery in the exclusive economic zone (EEZ) of the Gulf is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Act by regulations at 50 CFR part 622.

Background

The Council first considered an IFQ program for the Gulf grouper fishery in 2004. At that time, the Council anticipated future action was needed to further control effort in the Gulf grouper fishery. At its October 2004 meeting, the Council requested NMFS publish a control date to discourage speculative participation in the grouper fishery for the purpose of developing a catch history. The Council chose October 15, 2004, as the control date. NMFS published the control date in the **Federal Register** on November 16, 2004 (69 FR 67106), and requested public comment.

The Council is currently developing Amendment 29 to the FMP, which includes a multi-species IFQ program as the preferred management approach to address overcapacity issues and to rationalize effort in the Gulf commercial grouper and tilefish fisheries. A Public Hearing Draft of Amendment 29 is available on the Council's website at *http://www.gulfcouncil.org*.

Section 303A of the Magnuson-Stevens Act specifies general requirements for limited access privilege (LAP) programs implemented in U.S. marine fisheries. A LAP is defined as a Federal limited access permit that provides a person the exclusive privilege to harvest a specific portion of a fishery's total allowable catch. This definition includes exclusive harvesting privileges allocated to participants under IFQ programs.

Section 303A(c)(6)(D) of the Magnuson-Stevens Act outlines specific requirements for IFQ program proposals developed by the Council. The Magnuson-Stevens Act requires such program proposals, as ultimately developed, be approved through referenda before they may be submitted for review and implementation by the Secretary. The Magnuson-Stevens Act also mandates the Secretary publish referendum guidelines to determine procedures for initiating, conducting, and deciding IFQ program referenda, as well as voting eligibility requirements. These procedures and guidelines are intended to ensure referenda conducted on IFQ program proposals are fair and equitable and will provide the Council the flexibility to define IFQ program referenda voting eligibility requirements on a fishery-specific basis, yet within the constraints of the Magnuson-Stevens Act and other applicable law. NMFS published proposed guidelines in the **Federal Register** on April 23, 2008 (73 FR 21893), and requested public comment.

On September 4, 2008, NMFS published a proposed rule to implement the referendum procedures for a potential Gulf commercial grouper and tilefish IFQ program and requested public comment through October 6, 2008 (73 FR 51617, September 4, 2008).

Comments and Responses

NMFS received eleven individual comment letters and one letter signed by 42 individuals, with comments falling into three general categories. Several comments were in favor of the referendum, some comments opposed the eligibility criteria for voting in the Gulf grouper and tilefish referendum, and other comments opposed a potential IFQ program. Those comments that expressed opposition to the IFQ program itself fall outside the scope of this rulemaking. The purpose of this rulemaking is to establish the procedures, schedule, and eligibility requirements to conduct a referendum for a potential IFQ program. Opportunities for public comment on the IFQ program proposal contained in Amendment 29 will be available during the proposed rule stage if the referendum is approved. Following is a summary of the comments NMFS received and NMFS' respective responses.

Comment 1: The eligibility criteria and procedures for conducting the referendum are fair and equitable and meet other mandates of the Magnuson-Stevens Act. NMFS is urged to conduct the referendum in December so that an implementation date of no later than January 1, 2010, can be accomplished.

Response: NMFS determined the criteria for conducting the referendum were fair and equitable. In making this determination, NMFS concluded that: 1) The Council's referendum criteria are rationally connected to and further the objectives of the proposed IFQ program, 2) referendum voting eligibility requirements are designed to prevent any one person or single entity from obtaining an excessive share of the voting privileges, 3) the criteria enable validating a participants eligibility, and 4) the referendum can be administered in a fair and equitable manner within a reasonable time period.

NMFS' proposed timeline to conduct the referendum is consistent with the guidelines. NMFS will mail referendum ballots to eligible voters as soon as practicable after the final referendum rule is published. Eligible voters must submit their ballots to be received by NMFS no later than 30 days from the postmark date on the envelope containing the ballots provided by NMFS. NMFS will tally the votes and post the results within 60 days of receiving the ballots. If the referendum is approved, the Council may submit the IFQ program proposal contained in Amendment 29 to the FMP to NMFS for review, approval, and implementation. If Amendment 29 is approved by the Secretary, the expected implementation date would be January 1, 2010.

Comment 2: The proposed minimum landing requirement of 8,000 lb (3,629 kg) average is unfair, and all individuals who fish for grouper should be eligible to vote. Every permit holder should be entitled to vote, even if no grouper or tilefish were landed during the qualifying time period. Those poised to benefit from the IFQ program would be the only people allowed to vote. This heavily skews the outcome.

Response: Section 303A(c)(6)(D) of the Magnuson-Stevens Act states, ''For multi-species permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum.'' The Council interprets

''substantially fished'' to mean a substantial contribution to overall fishery production in total harvest. The Council indicated in its referendum initiation request letter that a potential participant's annual harvest, in combination with maintaining a high level of harvest during the qualifying time period, is the most straight-forward, readily accessible, and accurate means of identifying whether a participant has substantially fished for grouper or tilefish species. Under the 8,000–lb (3,629–kg) criterion, individuals eligible to vote in the referendum account for 89 percent of grouper and tilefish landings during the qualifying time period.

Purpose of this Final Rule and the Referendum

NMFS, in accordance with the provisions of section 303A(c)(6)(D) of the Magnuson-Stevens Act, will conduct a referendum to determine whether Amendment 29, as ultimately developed by the Council, should be submitted to the Secretary for review, and possible approval and implementation. The determination will be based on a majority vote of eligible voters. The primary purpose of this final rule is to notify potential participants in the referendum, and members of the public, of the procedures, schedule, and eligibility requirements that NMFS will use in conducting the referendum. The procedures and eligibility criteria used for the purposes of conducting the referendum are independent of the procedures and eligibility requirements in the proposed IFQ program for the Gulf commercial grouper and tilefish fisheries contained in Amendment 29 to the FMP. The proposed IFQ program is being developed by the Council through the normal plan amendment and rulemaking processes and involves extensive opportunities for public review and comment during Council meetings and public comment on any proposed rule.

Referendum Process

Will the Referendum Be Conducted in a Fair and Equitable Manner?

The Magnuson-Stevens Act requires the Secretary to conduct referenda for potential IFQ programs in a fair and equitable manner. NMFS' referendum guidelines outline criteria that NMFS must consider when reviewing the Council's referendum initiation request letter and supporting analyses to ensure the referendum will be conducted in a fair and equitable manner and is consistent with the national standards and other provisions of the Magnuson-Stevens Act, and other applicable law. NMFS has reviewed these documents from the Council and has concluded that the referendum criteria are consistent with the guidelines.

Who Will Be Eligible to Vote in the Referendum?

Section 303A(c)(6)(D) of the Magnuson-Stevens Act establishes criteria regarding eligibility of persons who may vote in the referendum. For Gulf fisheries managed with multi-species permits, such as the Gulf commercial grouper and tilefish fisheries, the Magnuson-Stevens Act states that those participants who have substantially fished the species considered for the IFQ program will be eligible to vote in the referendum. The Council's referendum initiation request letter defined ''substantially fished'' as ''only those commercial reef fish permit holders, with active or renewable permits (within 1 year of the grace period immediately following expiration), who have combined average annual grouper and tilefish landings from logbooks during the qualifying years of at least 8,000 lb (3,629 kg) (per permit).'' The qualifying years selected by the Council are 1999 through 2004, with an allowance for dropping one year. Therefore, NMFS will use landings data from logbooks submitted to and received by the Science and Research Director, Southeast Fisheries Science Center by December 31, 2006, for the years 1999 through 2004, with the allowance for dropping one year, as the sole basis to determine those permit holders that meet the Council's eligibility criterion and will be eligible to vote in the referendum.

Will Votes Be Weighted?

The Council is assigning one vote for each permit associated with qualifying landings from the years 1999 through 2004, with no additional vote weighting based on catch history.

How Will Votes Be Conducted?

On or about December 1, 2008, NMFS will mail eligible voters a ballot for each permit associated with qualifying landings from the years 1999 through 2004. NMFS will mail the ballots and associated explanatory information, via certified mail return receipt requested, to the address of record indicated in NMFS' permit database for eligible permit holders. The completed ballot must be mailed to Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701. A referendum ballot must be received at that address by 4:30 p.m., eastern time, no later than 30 days after the postmark date on the envelope containing the ballots provided by NMFS; ballots received after that deadline will not be considered in determining the outcome of the referendum. Although it will not be required, voters may want to consider submitting their ballots by registered mail.

How Will the Outcome of the Referendum Be Determined?

Vote counting will be conducted by NMFS. Approval or disapproval of the referendum will be determined by a majority (i.e., a number greater than half of a total) of the votes cast. NMFS will prepare a media release announcing the results of the referendum and will distribute the release to all Gulf reef fish permitees, including dealers, and other interested parties within 60 days of the deadline for receiving the ballots from eligible voters. The results will also be posted on NMFS' Southeast Regional Office's website at *http://sero.nmfs.noaa.gov*.

What Will Happen After the Referendum is Conducted?

NMFS will present the results of the referendum at the April 13–17, 2009, Council meeting. If the referendum fails to approve the proposed IFQ program, the Council may consider an alternative management approach to control effort in the Gulf commercial grouper and tilefish fisheries, or the Council may modify the proposed IFQ program and request a new referendum. According to the guidelines, any request from the Council to initiate a new referendum in the same fishery must include an explanation of the substantive changes to the proposed IFQ program or the changes in the fishery that would warrant initiation of an additional referendum.

If the referendum is approved, the Council is authorized, if it so decides, to submit Amendment 29 and proposed regulations to NMFS for review and possible approval and implementation of an IFQ program for the Gulf commercial grouper and tilefish fisheries. The proposed IFQ program was developed through the normal Council process that involved extensive opportunities for industry and public review and input at various Council meetings. The public would have additional opportunities to comment during public comment periods on Amendment 29 and the proposed regulations.

Summary Information About the Potential IFQ Program

The current management of Gulf commercial grouper and tilefish fisheries is based on a traditional command and control approach. This management approach has resulted in overcapitalization of the commercial grouper and tilefish fisheries which has caused increased derby fishing conditions and in some years has led to closures of these fisheries prior to the end of the fishing year. The purpose of implementing an IFQ program for the commercial grouper and tilefish fisheries is to rationalize effort and reduce overcapacity in the fleet. Actions in Amendment 29 include: Initial eligibility for participation in the IFQ program, initial apportionment of IFQ shares, IFQ share categories, multi-use allocation and trip allowances, transfer eligibility requirements, IFQ share ownership caps, IFQ allocation ownership caps, a procedure to accommodate adjustments to the commercial quota, establishment and structure of an appeals process, a ''use it or lose it'' policy for IFQ shares, a cost recovery plan, and approval of landing sites. The Council has selected its preferred alternatives for each of these actions through the normal Council process. If the referendum is approved, the Council, if it so decides, may continue with the submission of Amendment 29 to the Secretary for review and possible approval and implementation. More information on Amendment 29, including Frequently Asked Questions about the proposed IFQ program, may be found on NMFS' Southeast Regional Office's website at *http://sero.nmfs.noaa.gov/sf/Amendment29.htm*.

Classification

The Administrator, Southeast Region, NMFS, determined that this action is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, no initial or final regulatory flexibility analysis is required and none has been prepared. Copies of the RIR and RFAA are available (see **ADDRESSES**).

IFQ program referenda conducted under section 303A(c)(6)(D)(iv) of the Magnuson-Stevens Act are exempt from the Paperwork Reduction Act.

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

Dated: October 24, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E8–25938 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 211

Thursday, October 30, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0935; Directorate Identifier 2008–NE–28–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca Arriel 2B and 2B1 Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Several cases of loss of internal components from the Hydro Mechanical Unit (HMU) low fuel pressure switch Hydra-Electric part number (P/N) 9 550 17 956 0 into the fuel system, have been reported on Arriel 2 engines.

The loss of internal components from the low fuel pressure switch into the fuel system may lead to a rupture of the HP–LP pumps drive shaft shear pin, and thus to a possible uncommanded in-flight shutdown (IFSD). On a single-engine helicopter, an uncommanded IFSD results in an emergency autorotation landing and in certain conditions may lead to an accident.

We are proposing this AD to prevent forced autorotation landing, or an accident.

DATES: We must receive comments on this proposed AD by December 1, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *james.lawrence@faa.gov;* telephone (781) 238–7176; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0935; Directorate Identifier 2008–NE–28–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2008–0077, dated April 28, 2008 (and corrected May 6, 2008) (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Several cases of loss of internal components from the HMU low fuel pressure switch Hydra-Electric P/N 9 550 17 956 0 into the fuel system, have been reported on Arriel 2 engines.

The loss of internal components from the low fuel pressure switch into the fuel system may lead to a rupture of the HP–LP pumps drive shaft shear pin, and thus to a possible uncommanded IFSD. On a single-engine helicopter, an uncommanded IFSD results in an emergency autorotation landing and in certain conditions may lead to an accident.

The evaluation of this condition prompts the issuance of this AD, which requires the following actions for the HMUs installed on Arriel 2 single-engine applications in order to:

- Verify the part number of the low fuel pressure switch;
- If installed, replace the Hydra-Electric low fuel pressure switch P/N 9 550 17 956 0 (with either of two different P/N low fuel pressure switches, referenced in the MCAI).
- In case a Hydra-Electric switch P/N 9 550 17 956 0 is installed or may have been installed on the HMU, verify that no parts are found in the chamber of the HMU body where the base of the low fuel pressure switch has been installed.

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

Relevant Service Information

Turbomeca has issued Mandatory Service Bulletin No. 292 73 2826, dated March 13, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of France, and is approved for operation in the United States. Pursuant to our bilateral

agreement with France, they have notified us of the unsafe condition described in the EASA AD and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require a one-time inspection for affected low fuel pressure switches, for evidence of an affected switch previously installed and inspection for switch parts missing or fallen into the HMU well.

Difference Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. We have proposed to not reference the P/Ns of the serviceable low pressure switch as the MCAI does, in order to follow FAA policies. This difference is described in a separate paragraph of the proposed AD. This requirement, if ultimately adopted, will take precedence over the actions in the MCAI.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 414 products installed on helicopters of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $256 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $139,104. Our cost estimate is exclusive of possible warranty coverage.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Turbomeca: Docket No. FAA–2008–0935; Directorate Identifier 2008–NE–28–AD.

Comments Due Date

(a) We must receive comments by December 1, 2008.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to Turbomeca Arriel 2B and 2B1 turboshaft engines. These engines are installed on, but not limited to, Eurocopter France AS350B3 and EC130 B4 helicopters.

Reason

(d) European Aviation Safety Agency (EASA) AD No. 2008–0077, dated March 13, 2006 (and corrected May 6, 2008), states:

Several cases of loss of internal components from the Hydro Mechanical Unit (HMU) low fuel pressure switch Hydra-Electric part number (P/N) 9 550 17 956 0 into the fuel system, have been reported on Arriel 2 engines.

The loss of internal components from the low fuel pressure switch into the fuel system may lead to a rupture of the HP–LP pumps drive shaft shear pin, and thus to a possible uncommanded in-flight shutdown (IFSD). On a single-engine helicopter, an uncommanded IFSD results in an emergency autorotation landing and in certain conditions may lead to an accident.

We are issuing this AD to prevent forced autorotation landing, or an accident.

Actions and Compliance

(e) Unless already done, do the following actions.

(1) No later than September 30, 2009, perform a one-time inspection of the HMU, using paragraph 2 of Turbomeca Mandatory Service Bulletin (MSB) No. 292 73 2826, dated March 13, 2008, to identify the low fuel pressure switch installed on the adjusted HMU.

(2) If a Hydra-Electric low fuel pressure switch, part number (P/N) 9 550 17 956 0 is installed:

(i) Inspect the low fuel pressure switch and chamber of the HMU body.

(ii) If any parts from the low fuel pressure switch are missing or found in the HMU chamber, replace the HMU with a new or overhauled HMU equipped with a serviceable low fuel pressure switch.

(iii) If not, replace only the low fuel pressure switch with a serviceable low fuel pressure switch.

(3) If a low fuel pressure switch other than a Hydra-Electric low fuel pressure switch, P/N 9 550 17 956 0 is installed, and that is the only type of low fuel pressure switch that has been installed since new, repair, or overhaul, no further action is required.

(4) If a Hydra-Electric switch, P/N 9 550 17 956 0, has been or may have been installed previously, and the conditions of paragraph (e)(3) of this AD are not met:

(i) Inspect the chamber of the HMU body.

(ii) If any parts are found in the HMU chamber, replace the HMU with a new or overhauled HMU equipped with a serviceable low fuel pressure switch.

FAA AD Difference

(f) This AD differs from the Mandatory Continuing Airworthiness Information (MCAI) and/or service information, by not referencing the P/Ns of the serviceable low fuel pressure switch, and, defining a serviceable low fuel pressure switch, for the purpose of this AD.

Definition

(g) For the purpose of this AD, a serviceable low fuel pressure switch is a switch that has a P/N other than P/N 9 550 17 956 0.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested, using the procedures found in 14 CFR 39.19.

Related Information

(i) Refer to MCAI EASA AD 2008–0077, dated April 28, 2008 (and corrected May 6, 2008), for related information.

(j) Contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *james.lawrence@faa.gov*; telephone (781) 238–7176; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on October 23, 2008.

Peter A. White,

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

[FR Doc. E8–25887 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1118; Directorate Identifier 2007–NM–318–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. The existing AD currently requires reviewing the airplane maintenance records to determine whether an engine has been removed from the airplane since the airplane was manufactured. For airplanes on which an engine has been removed, the existing AD also requires an inspection of the aft engine mount to determine if the center link assembly is correctly installed, and follow-on actions if necessary. This proposed AD would require the same actions for airplanes on which the engine has not been previously removed. This proposed AD results from reports indicating that operators found that the center link assembly for the aft engine mount was reversed on several airplanes that had not had an engine removed since delivery. We are proposing this AD to prevent increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane.

DATES: We must receive comments on this proposed AD by December 15, 2008.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6432; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1118; Directorate Identifier 2007–NM–318–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On January 21, 2003, we issued AD 2003–03–01, amendment 39–13025 (68 FR 4367, January 29, 2003), for all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes. That AD requires reviewing the airplane maintenance records to determine whether an engine has been removed from the airplane since the airplane was manufactured. For airplanes on which an engine has been removed, that AD requires an inspection of the aft engine mount to determine if the center link assembly is correctly installed, and follow-on actions if necessary. That AD resulted from reports indicating that operators found that the center link assembly for the aft engine mount was reversed on several airplanes. We issued that AD to prevent increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2003–03–01, the manufacturer informed us that it is possible that some center links were incorrectly installed in an aft engine mount before the airplane was delivered. In AD 2003–03–01 inspection of the aft engine mounts was required only for airplanes that had an engine change after the airplane was delivered to the operator. The inspection is now necessary for all airplanes, line numbers 1 through 1277 inclusive.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 737–71A1462, Revision 3, dated May 20, 2004. The procedures in Revision 3 of the service bulletin are essentially the same as those in Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002. We referred to Revision 1 of the service bulletin as the appropriate source of service information for accomplishing the actions required by AD 2003–03–01. However, Revision 3 of the service bulletin also specifies inspecting to determine if the center link assembly is installed correctly on any installed engine that has not been removed from

the airplane since the airplane's delivery. Revision 3 of the service bulletin also specifies repeating the inspection during each subsequent engine change for each aft engine mount. Finally, Revision 3 also specifies that adding permanent part marks on the center link assembly and the hanger fitting ends the need for the repetitive inspections. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to develop on other airplanes of the same type design. For this reason, we are proposing this AD, which would supersede AD 2003–03–01 and would retain the requirements of the existing AD. This proposed AD would also require the same actions for airplanes on which the engine has not been previously removed. This proposed AD would also require accomplishing the actions specified in the service bulletin described previously, except as discussed under ''Difference Between the Proposed AD and the Service Bulletin.''

Difference Between the Proposed AD and the Service Bulletin

Boeing Alert Service Bulletin 737–71A1462, Revision 3 specifies contacting the part manufacturer (CFMI) for more instructions if damage is found to the engine mounting lugs and the adjacent engine turbine rear frame. (Damage includes cracking, yielding, buckling, and wear.) However, this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization (DOA) Organization whom we have authorized to make those findings.

Clarification of Certain Actions

Revision 3 of the service bulletin specifies repeating the inspection during each subsequent engine change for each aft engine mount. This proposed AD does not specify a repetitive inspection but instead specifies in paragraph (n), ''Parts Installation,'' that no person may install an engine on any airplane unless the center link assembly of the aft engine mount is found to be installed correctly.

Revision 3 of the service bulletin also specifies that adding permanent part marks on the center link assembly and the hanger fitting ends the need for the repetitive inspections. As noted above, this proposed AD would not include a repetitive inspection requirement. In addition, because the affected parts are rotable, the repetitive inspections referred to in the service bulletin would be terminated only as long as the engine stays on the airplane.

Changes to Existing AD

This proposed AD would retain the requirements of AD 2003–03–01. Since AD 2003–03–01 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2003–03–01	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (f).
Paragraph (b)	Paragraph (g).
Paragraph (c)	Paragraph (h).
Paragraph (d)	Paragraph (i).
Paragraph (e)	Paragraph (m).
Paragraph (f)	Paragraph (n).

We have also removed Note 1 of the existing AD and re-numbered subsequent notes accordingly. We have also revised Note 2 and Note 3 of the existing AD (Note 1 and Note 2 of this proposed AD) to provide a more up-to-date definition of a general visual inspection and a detailed inspection.

Boeing Commercial Airplanes has received a DOA. We have revised paragraph (i) of this AD (paragraph (d) of AD 2003–03–01) to delegate the authority to approve an alternative method of compliance for any repair required by this proposed AD to an Authorized Representative for the Boeing Commercial Airplanes DOA rather than a Designated Engineering Representative (DER). We have also simplified paragraph (i) of this AD by referring to the ''Alternative Methods of Compliance (AMOCs)'' paragraph (o) of this proposed AD for repair methods, which includes a reference to the DOA.

Costs of Compliance

There are about 1,277 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 500 airplanes of U.S. registry. The average labor rate is $80 per work hour. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Fleet cost
Maintenance records review (required by AD 2003–03–01)	1	$0	$80	$40,000
Inspection for correct installation of center link assembly (new proposed action)	1	0	80	40,000

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–13025 (68 FR 4367, January 29, 2003) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2008–1118; Directorate Identifier 2007–NM–318–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by December 15, 2008.

Affected ADs

(b) This AD supersedes AD 2003–03–01.

Applicability

(c) This AD applies to all Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from reports indicating that operators found that the center link assembly for the aft engine mount was reversed on several airplanes that had not had an engine removed since delivery. We are issuing this AD to prevent increased structural loads on the aft engine mount, which could result in failure of the aft engine mount and consequent separation of the engine from the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of the Requirements of AD 2003–03–01

Review of Maintenance Records

(f) Within 90 days after February 13, 2003 (the effective date of AD 2003–03–01), review the airplane maintenance records to determine whether either engine has been removed since the airplane's date of manufacture. If neither engine has been removed since the airplane's date of manufacture, no further action is required by this paragraph; however paragraph (n) of this AD continues to apply.

Inspection To Determine if Center Link Assembly Is Installed Correctly

(g) For any installed engine that is found to have been removed from the airplane since the airplane's date of manufacture: Within 90 days after February 13, 2003, do a one-time general visual inspection to determine if the center link assembly of the aft engine mount is installed correctly, per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002; or Revision 3, dated May 20, 2004. If the center link assembly is installed correctly, as specified in the service bulletin, no further action is required by paragraph (g), (h), or (i) of this AD for that engine; however paragraph (n) of this AD continues to apply.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Follow-on and Corrective Actions

(h) For any center link assembly that is found installed incorrectly during the inspection required by paragraph (g) of this AD: Before further flight, do the actions in paragraphs (h)(1), (h)(2), and (h)(3) of this AD, per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 1, dated November 7, 2002; or Revision 3, dated May 20, 2004; except that it is not necessary to submit a report of findings to the airplane manufacturer.

(1) Remove the center link assembly and install it correctly.

(2) Perform a detailed inspection of the engine mounting lugs and engine turbine rear frame for cracking, yielding, buckling, or wear damage.

(3) Perform a detailed inspection of the hardware for the aft engine mount; including the center link assembly, right link assembly, aft mount hanger assembly, and link pins; for cracking, yielding, buckling, or wear damage.

Note 2: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

Repair

(i) If any cracking, yielding, buckling, or wear damage is found during the inspections required by paragraphs (h)(2) and (h)(3) of this AD: Before further flight, replace the discrepant part with a new or serviceable part, or repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with the procedures specified in paragraph (o) of this AD.

New Requirements of This AD

Inspection of Engines That Have Not Been Removed

(j) For all airplanes identified in Boeing Alert Service Bulletin 737–71A1462, Revision 3, dated May 20, 2004: For any installed engine that has not been removed from the airplane since the airplane's date of manufacture, within 90 days after the effective date of this AD, do a detailed inspection to determine if the center link assembly of the aft engine mount is installed correctly, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 3, dated May 20, 2004.

Follow-on and Corrective Actions

(k) For any center link assembly that is found installed incorrectly during any inspection required by paragraph (j) of this AD: Before further flight, do the actions required by paragraphs (k)(1), (k)(2), and (k)(3) of this AD, per the Accomplishment Instructions of Boeing Alert Service Bulletin 737–71A1462, Revision 3, dated May 20, 2004, except that it is not necessary to submit a report of findings to the airplane manufacturer.

(1) Remove the center link assembly and install it correctly.

(2) Perform a detailed inspection of the engine mounting lugs and engine turbine rear frame for cracking, yielding, buckling, or wear damage.

(3) Perform a detailed inspection of the hardware for the aft engine mount; including the center link assembly, right link assembly, aft mount hanger assembly, and link pins; for cracking, yielding, buckling, or wear damage.

Repair

(l) If any cracking, yielding, buckling, or wear damage is found during the inspections required by paragraphs (k)(2) and (k)(3) of this AD, and Boeing Alert Service Bulletin 737–71A1462, Revision 3, dated May 20, 2004, specifies to contact Boeing or the part

manufacturer: Before further flight, replace the discrepant part (*e.g.*, parts with cracking, yielding, buckling, and wear damage) with a new or serviceable part, or repair using a method approved in accordance with the procedures specified in paragraph (o) of this AD.

Credit for Actions Done Using Previous Service Information

(m) Inspections and corrective actions done before the effective date of this AD in accordance with a service bulletin listed in Table 1 of this AD are acceptable for compliance with the corresponding requirements of this AD.

TABLE 1—PREVIOUS SERVICE BULLETINS

Boeing Alert Service Bulletin	Revision	Date
737–71A1462 ..	Original ..	Aug. 29, 2002.
737–71A1462 ..	1	Nov. 7, 2002.
737–71A1462 ..	2	May 29, 2003.

Parts Installation

(n) As of the effective date of this AD, no person may install an engine on any airplane unless the inspections specified in paragraph (g) or (j) of this AD are accomplished and the center link assembly of the aft engine mount is found to be installed correctly.

Alternative Methods of Compliance (AMOCs)

(o)(1) The Manager, Seattle Aircraft Certification Office (ACO) FAA, ATTN: Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6432; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

Issued in Renton, Washington, on October 10, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25903 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1119; Directorate Identifier 2008–NM–112–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker F.28 Mark 0070 and 0100 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Several reports have been received about roll control problems due to frozen moisture on the aileron pulleys that are located in the LH [left-hand] and RH [right-hand] Main Landing Gear (MLG) wheel bays on the centre wing rear spar, under the wing to fuselage fairings. Investigation revealed that improper sealing of the aerodynamic seals of the Wing-to-Fuselage Fairings can cause rain- or washwater and de-icing fluids to leak onto the affected aileron pulleys. Exposure of the aileron pulleys to the leaked moisture in freezing condition can result in restricted aileron control movement (partly jammed) and/or higher control forces. This condition, if not corrected, could lead to partial loss of control of the aircraft. * * *

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by December 1, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1119; Directorate Identifier 2008–NM–112–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On February 15, 2008, we issued AD 2008–04–22, Amendment 39–15394 (73 FR 10650, February 28, 2008). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2008–04–22, new reports of problems due to freezing moisture in the same area addressed by AD 2008–04–22 have been received. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008–0079, dated April 24, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Several reports have been received about roll control problems due to frozen moisture on the aileron pulleys that are located in the LH [left-hand] and RH [right-hand] Main Landing Gear (MLG) wheel bays on the centre wing rear spar, under the wing to fuselage fairings. Investigation revealed that improper sealing of the aerodynamic seals of the Wing-to-Fuselage Fairings can cause rain- or washwater and de-icing fluids to leak onto the affected aileron pulleys. Exposure of the aileron pulleys to the leaked moisture in freezing condition can result in restricted aileron control movement (partly jammed) and/or higher control forces. This condition, if not corrected, could lead to partial loss of control of the aircraft. To address this unsafe condition, Fokker Services originally introduced SBF100–53–101 which was made mandatory through CAA Netherlands (CAA–NL) AD NL–2005–013 [which corresponds to FAA AD 2008–04–22, amendment 39–15394] with a compliance time of 12 months after November 1, 2005.

Following this, new reports of problems due to freezing moisture in the same area have been received. This has prompted Fokker Services to publish SBF100–53–107, which introduces an additional one-time inspection [for deviations] of the aerodynamic seals of the Wing-to-Fuselage Fairings and the application of an improved sealing of the aerodynamic seal by means of a fillet seam between the upper left and right fairings and the fuselage skin.

For the reasons described above, this EASA AD supersedes CAA–NL AD NL–2005–013 and requires an additional one-time inspection [for deviations] and application of improved sealing.

This action retains the inspection in AD 2008–04–22. Doing the additional inspection terminates the requirement to do the inspection required by the existing AD. The additional inspection for deviations includes inspecting for fit between the left-hand and right-hand wing-to-fuselage fairings and the fuselage skin; inspecting for damage to the aerodynamic seal on the fairings; inspecting for fit of the aerodynamic seal to the fuselage; and related investigative and corrective actions if necessary. The related investigative actions include inspecting the aerodynamic seal for damage (including wear); inspecting the abrasion resistant coating for damage (including wear); and re-inspecting for fit. The corrective actions include installing a new seal, restoring the protective coating, correcting the position of the fairing, and sealing the gaps between the fairings and the surrounding structure. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Fokker Services B.V. has issued Fokker Service Bulletin SBF100–53–107, dated February 26, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 7 products of U.S. registry. We also estimate that it would take about 3 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,680, or $240 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15394 (73 FR 10650, February 28, 2008) and adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2008–1119; Directorate Identifier 2008–NM–112–AD.

Comments Due Date

(a) We must receive comments by December 1, 2008.

Affected ADs

(b) The proposed AD supersedes AD 2008–04–22, Amendment 39–15394.

Applicability

(c) This AD applies to Fokker F.28 Mark 0070 and 0100 airplanes, certificated in any category.

Subject

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

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Several reports have been received about roll control problems due to frozen moisture on the aileron pulleys that are located in the LH [left-hand] and RH [right-hand] Main Landing Gear (MLG) wheel bays on the centre wing rear spar, under the wing to fuselage fairings. Investigation revealed that improper sealing of the aerodynamic seals of the Wing-to-Fuselage Fairings can cause rain- or washwater and de-icing fluids to leak onto the affected aileron pulleys. Exposure of the aileron pulleys to the leaked moisture in freezing condition can result in restricted aileron control movement (partly jammed) and/or higher control forces. This condition, if not corrected, could lead to partial loss of control of the aircraft. To address this unsafe condition, Fokker Services originally introduced SBF100–53–101 which was made mandatory through CAA Netherlands (CAA–NL) AD NL–2005–013 [which corresponds to FAA AD 2008–04–22] with a compliance time of 12 months after November 1, 2005.

Following this, new reports of problems due to freezing moisture in the same area have been received. This has prompted Fokker Services to publish SBF100–53–107, which introduces an additional one-time inspection [for deviations] of the aerodynamic seals of the Wing-to-Fuselage Fairings and the application of an improved sealing of the aerodynamic seal by means of a fillet seam between the upper left and right fairings and the fuselage skin.

For the reasons described above, this EASA AD supersedes CAA–NL AD NL–2005–013 and requires an additional one-time inspection [for deviations] and application of improved sealing.

This action retains the inspection in AD 2008–04–22. Doing the additional inspection terminates the requirement to do the inspection required by the existing AD. The additional inspection for deviations includes inspecting for fit between the left-hand and right-hand wing-to-fuselage fairings and the fuselage skin; inspecting for damage to the aerodynamic seal on the fairings; inspecting for fit of the aerodynamic seal to the fuselage; and related investigative and corrective actions if necessary. The related investigative actions include inspecting the aerodynamic seal for damage (including wear); inspecting the abrasion resistant coating for damage (including wear); and re-inspecting for fit. The corrective actions include installing a new seal, restoring the protective coating, correcting the position of the fairing, and sealing the gaps between the fairings and the surrounding structure.

Restatement of Certain Requirements of AD 2008–04–22

(f) Unless already done: Within 12 months after April 3, 2008 (the effective date of AD 2008–04–22), inspect the wing-to-fuselage fairings for indications of incorrect fit, damage, or wear, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–53–101, dated September 30, 2005 (''the service bulletin''). Doing the inspection required by paragraph (g) of this AD terminates the actions required by this paragraph.

(1) If no indications of incorrect fit, damage, or wear are found, no further action is required by this paragraph.

(2) If any incorrect fit, damage, or wear is found, before next flight, do related investigative actions and applicable corrective actions in accordance with the Accomplishment Instructions of the service bulletin.

New Requirements of This AD: Actions and Compliance

(g) Unless already done: Within 12 months after the effective date of this AD, inspect for deviations of the aerodynamic seal of the wing-to-fuselage fairings and the fuselage skin, do all applicable related investigative and corrective actions, and apply a fillet seam between the fairings and the fuselage skin, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–53–107, dated February 26, 2008. Do all applicable related investigative and corrective actions before further flight. Accomplishment of this inspection terminates the actions required by paragraph (f) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, ANM–116, International Branch, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *ATTN:* Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2008–0079, dated April 24, 2008; Fokker Service Bulletin SBF100–53–101, dated September 30, 2005; and Fokker Service Bulletin SBF100–53–107, dated February 26, 2008; for related information.

Issued in Renton, Washington, on October 10, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25890 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0661; Airspace Docket No. 08–AAL–19]

RIN 2120–AA66

Proposed Establishment of Colored Federal Airway; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Colored Federal Airway Blue 7 (B–7), in Alaska. This action would add to the Instrument Flight Rules (IFR) airway and route structure in Alaska by providing IFR connectivity between Bethel, AK and Cape Newenham, AK. The FAA is proposing this action to enhance safety and improve the management of air traffic operations in the State of Alaska.

DATES: Comments must be received on or before December 15, 2008.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; *telephone:* (202) 366–9826. You must identify FAA Docket No. FAA–2008–0661 and Airspace Docket No. 08–AAL–19 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group,

Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2008–0661 and Airspace Docket No. 08–AAL–19) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2008–0661, Airspace Docket No. 08–AAL–19.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Colored Federal Airway B–7 between Bethel and Cape Newenham, AK. This action would add to the IFR airway and route structure in Alaska by providing IFR connectivity between Bethel, AK and Cape Newenham, AK. The FAA is proposing this action to improve the management of air traffic operations in the State of Alaska and to enhance safety.

Colored Federal Airways are published in paragraph 6009 of FAA Order 7400.9R, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Colored Federal Airways listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation, as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority because it proposes to create a Federal Airway within the State of Alaska and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007 and effective September 15, 2007, is amended as follows:

Paragraph 6009(d) Blue Federal Airways

* * * * *

B–7 [New]

From Oscarville, AK, NDB; to the Cape Newenham, AK, NDB.

* * * * *

Issued in Washington, DC, on October 22, 2008.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E8–25940 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 4, 7, 10, 102, 134 and 177

[USCBP–2007–0100]

RIN 1505–AB49

Uniform Rules of Origin for Imported Merchandise

AGENCIES: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking; re-opening of comment period.

SUMMARY: This document re-opens the period within which comments may be submitted in response to the proposed rule to amend the Customs and Border Protection (''CBP'') regulations to establish uniform rules governing CBP determinations of the country of origin of imported merchandise. The proposed rule was published in the **Federal Register** on July 25, 2008 (73 FR 43385) with comments due on or before September 23, 2008. The comment period was extended by a notice published in the **Federal Register** on September 8, 2008 (73 FR 51962), to October 23, 2008. This notice re-opens the comment period to afford interested parties an opportunity to consider the impact, if any, of the proposed rule on the country of origin of their goods in view of the publication of a final rule document in today's **Federal Register** which sets forth technical corrections to §§ 102.20 and 102.21 of the CBP regulations (19 CFR 102.20 and 102.21).

DATES: Comments on the proposed rule must be received on or before December 1, 2008.

ADDRESSES: You may submit comments, identified by docket number, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2007–0100.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC 20001–4501.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC 20001–4501. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Monika Brenner, Valuation and Special Programs, Office of International Trade, 202–572–8835; Heather K. Pinnock, Tariff Classification and Marking, Office of International Trade, 202–572–8828.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. See **ADDRESSES** above for information on how to submit comments.

Background

CBP published a notice of proposed rulemaking in the **Federal Register** (73 FR 43385) on July 25, 2008, proposing to amend the CBP regulations to establish uniform rules of origin for imported merchandise. The proposed rule would extend application of the country of origin rules codified in 19 CFR part 102. Those rules have proven to be more objective and transparent and provide greater predictability in determining the country of origin of imported merchandise than the system of case-by-case adjudication they would replace. The proposed change also will aid an importer's exercise of reasonable care. In addition, the document proposes to amend the country of origin rules applicable to pipe fitting and flanges, printed greeting cards, glass optical fiber, and rice preparations. Finally, the proposed rule would amend the textile regulations set forth in § 102.21 to make corrections so that the regulations reflect the language of section 334(b)(5) of the Uruguay Round Agreements Act.

The notice of proposed rulemaking invited the public to comment on the proposal. Comments on the proposed rule were requested on or before September 23, 2008. In response to the proposed rule published in the **Federal Register**, CBP received correspondence from several parties requesting an extension of the comment period. In a notice published in the **Federal Register** on September 8, 2008 (73 FR 51962), CBP provided an additional 30 days for interested parties to submit comments on the proposed rule until October 23, 2008.

Re-Opening of Comment Period

As a result of modifications to the Harmonized Tariff Schedule of the United States (HTSUS) in 2007, certain tariff provisions have been added or removed, and certain goods have been transferred, for tariff classification purposes, to different or newly-created provisions. CBP is publishing a document in today's **Federal Register** which sets forth technical corrections to §§ 102.20 and 102.21 of the CBP regulations (19 CFR 102.20 and 102.21) in order to align the regulations with the current version of the HTSUS. The technical corrections to the tariff shift rules set forth in that document will enable parties to properly evaluate the impact, if any, of the proposed rule on the country of origin of their goods. Accordingly, in order to afford parties the opportunity to enhance their review of the proposed rule and provide meaningful comment in light of the technical corrections to §§ 102.20 and 102.21, the decision has been made to re-open the comment period on the proposed rule. Comments are now due on or before December 1, 2008.

Dated: October 23, 2008.

Harold M. Singer,

Director, Regulations and Disclosure Law Division, Regulations and Rulings, Office of International Trade.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade and Tariff Policy), Office of Tax Policy, United States Treasury Department.

[FR Doc. E8–25731 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–14–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0746; FRL–8735–8]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Revised Motor Vehicle Emission Budgets for the Parkersburg 8-Hour Ozone Maintenance Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of West Virginia for the purpose of amending the 8-hour ozone maintenance plan for the Parkersburg area. This revision amends the maintenance plans' 2009 and 2018 motor vehicle emissions budgets (MVEBs) by reallocating a portion of the plans' safety margins which results in an increase in the MVEBs. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by December 1, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0746 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: febbo.carol@epa.gov.*

C. *Mail:* EPA–R03–OAR–2008–0746, Carol Febbo, Chief, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2008–0746. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street, SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Megan Goold, (215) 814–2027, or by e-mail at *goold.megan@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final rule, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: October 20, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–25660 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–1014]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before January 28, 2009.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map

(FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1014, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov*.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or (e-mail) *bill.blanton@dhs.gov*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

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

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Decatur County, Georgia, and Incorporated Areas				
Flint River	Approximately 2.4 miles downstream of U.S. Route 27.	None	+90	Unincorporated Areas of Decatur County, City of Bainbridge.
	Approximately 2.9 miles upstream of Calhoun Street	None	+98	
Flint River/Lake Seminole	At the confluence with Butlers Creek	None	+81	Unincorporated Areas of Decatur County.
	At Georgia/Florida state line	None	+81	
Big Slough Tributary	Approximately 1,450 feet downstream of Thomasville Road.	None	+105	Unincorporated Areas of Decatur County, City of Bainbridge.
	Approximately 440 feet downstream of Lake Douglas Road.	None	+107	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Bainbridge

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	

Maps are available for inspection at City Hall, 107 Broad Street, Bainbridge, GA 39817.

Unincorporated Areas of Decatur County

Maps are available for inspection at Decatur County Planning Department, 309 Airport Road, Bainbridge, GA 39817.

Seminole County, Georgia, and Incorporated Areas

Chattahoochee River	At Lake Seminole	None	+81	Unincorporated Areas of Seminole County.
	Approximately 1.6 miles upstream of State Highway 91.	None	+97	
Lake Seminole/Spring Creek	Flooding area bound by Cypress Pond Road to the north, Georgia/Florida state line to the west and south, and the Seminole/Decatur county boundary to the east.	None	+81	Unincorporated Areas of Seminole County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Seminole County

Maps are available for inspection at County Courthouse, 200 S. Knox Avenue, Donalsonville, GA 39845.

Vigo County, Indiana, and Incorporated Areas

Sugar Creek	Approximately 2,000 feet downstream of Conrail	None	+469	Town of West Terre Haute, Unincorporated Areas of Vigo County.
	Approximately 1,280 feet downstream of Conrail	None	+470	
Wabash River	Approximately 1,214 feet upstream of Interstate Highway 70.	None	+470	Town of West Terre Haute, Unincorporated Areas of Vigo County.
	At U.S. Highway 40	None	+472	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of West Terre Haute

Maps are available for inspection at Town Hall, 500 National Avenue, West Terre Haute, IN 47885.

Unincorporated Areas of Vigo County

Maps are available for inspection at County Annex Building, 121 Oak Street, Terre Haute, IN 47807.

Branch County, Michigan, and Incorporated Areas

Cold Creek	Upstream side of Jonesville Road	None	+963	Township of Girard.
	Approximately 150 feet upstream of Gorbell Road	None	+964	
Coldwater River	Upstream side of E Fenn Road	None	+959	Township of Ovid.
	Approximately 350 feet upstream of E Fenn Road	None	+960	
County Drain 40	Approximately 0.5 mile downstream of S Wood Road	None	+989	Township of Ovid.
	Downstream side of S Wood Road	None	+990	
County Drain 40	Approximately 0.8 mile north of Dorrance Road and 0.5 mile west of N Fremont Road.	None	+981	Township of Quincy.
	Approximately 0.5 mile north of Dorrance Road and 0.5 mile west of N Fremont Road.	None	+981	
Craig Lake	Entire shoreline of Craig Lake	None	+927	Township of Girard.
Little Swan Creek	Downstream side of Lindley Road	None	+872	Township of Matteson.
	Approximately 0.4 mile upstream of Butz Road	None	+892	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 1,100 feet downstream of W Colon Rd	None	+892	
	Approximately 350 feet upstream of Langwell Road	None	+907	
Matteson Lake	Entire shoreline of Matteson Lake	None	+892	Township of Matteson.
Morrison Lake	Entire shoreline of Morrison Lake	None	+927	Township of Girard.
Sauk River	Upstream side of Fox Road	None	+983	Township of Quincy.
	Approximately 50 feet upstream of Fox Road	None	+983	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Girard

Maps are available for inspection at Township Hall, 1009 Marshall Road, Coldwater, MI 49036.

Township of Matteson

Maps are available for inspection at Township Hall, M–86 & Athens Road, Bronson, MI 49028.

Township of Ovid

Maps are available for inspection at Township Hall, 114 West Front Street, Ovid, MI 49036.

Township of Quincy

Maps are available for inspection at Quincy Public Library, 11 North Main Street, Quincy, MI 49082.

Dakota County, Minnesota, and Incorporated Areas

Cannon River	At downstream county boundary with Goodhue County.	+801	+800	City of Northfield, City of Randolph, Unincorporated Areas of Dakota County.
	At upstream county boundary with Rice County	+895	+897	
Chub Creek	Approximately 1,200 feet upstream of confluence with Cannon Creek.	+862	+864	City of Randolph, Unincorporated Areas of Dakota County.
	Approximately 500 feet upstream of Hamburg Avenue	None	+969	
Chub Lake	Entire shoreline	None	+969	Unincorporated Areas of Dakota County.
Dutch Creek	At confluence with Chub Creek	None	+957	Unincorporated Areas of Dakota County.
	Approximately 7,000 feet upstream of 305th Street West.	None	+981	
Hazelwood Creek	At confluence with Dutch Creek	None	+965	Unincorporated Areas of Dakota County.
	Approximately 4,875 feet upstream of 280th Street West.	None	+1103	
Minnesota River	Approximately 2,300 feet upstream of confluence with Mississippi River.	None	+714	City of Burnsville, City of Eagan, City of Mendota Heights.
	At upstream county boundary with Scott County	+719	+717	
Mississippi River	Approximately 16,300 feet downstream of downstream county boundary with Goodhue County.	+689	+688	City of Hastings, City of Inver Grove Heights, City of Lilydale, City of Mendota, City of Mendota Heights, City of Rosemount, City of South St. Paul, Unincorporated Areas of Dakota County.
	Approximately 10,200 feet upstream of Interstate Highway 35.	None	+714	
Mud Creek	At confluence with Chub Creek	None	+920	Unincorporated Areas of Dakota County.
	Approximately 1,670 feet upstream of 320th Street West.	None	+1005	
North Branch Chub Creek	At confluence with Chub Creek	None	+896	Unincorporated Areas of Dakota County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 4,150 feet upstream of intersection of Denmark Avenue/255th Street West.	None	+983	
North Branch Vermillion River.	Approximately 900 feet upstream of confluence with Vermillion River.	None	+850	Unincorporated Areas of Dakota County.
	Approximately 3,150 feet upstream of Station Trail	None	+942	
Pine Creek	At county boundary with Goodhue County	None	+862	Unincorporated Areas of Dakota County.
	Approximately 6,200 feet upstream of Emery Avenue	None	+915	
South Branch Vermillion River.	Approximately 50 feet downstream of 200th Street East.	None	+848	Unincorporated Areas of Dakota County.
	Approximately 4,970 feet upstream of Denmark Avenue.	None	+961	
Tributary No. 1 to Chub Creek.	At confluence with Chub Creek	None	+900	Unincorporated Areas of Dakota County.
	Approximately 2,570 feet upstream of Denmark Avenue.	None	+943	
Tributary No. 1 to North Branch Chub Creek.	At confluence with North Branch Chub Creek	None	+897	Unincorporated Areas of Dakota County.
	At divergence from Tributary No. 1 to Chub Creek	None	+921	
Tributary No. 1 to North Branch Vermillion River.	At confluence with North Branch Vermillion River	None	+860	Unincorporated Areas of Dakota County.
	Approximately 3,300 feet upstream of confluence with North Branch Vermillion River.	None	+885	
Tributary No. 1 to South Branch Vermillion River.	At confluence with South Branch Vermillion River	None	+865	Unincorporated Areas of Dakota County.
	Approximately 3,800 feet upstream of Darkhorse Lane.	None	+949	
Tributary No. 1 to Vermillion River.	At confluence with Vermillion River	+792	+793	City of Hastings, Unincorporated Areas of Dakota County.
	Approximately 3,525 feet upstream of 225th Street East.	None	+985	
Tributary No. 1A to Vermillion River.	At confluence with Tributary No. 1 to Vermillion River	None	+805	Unincorporated Areas of Dakota County.
	Approximately 2,300 feet upstream of Kendel Avenue	None	+816	
Tributary No. 1B to Vermillion River.	At confluence with Tributary No. 1 to Vermillion River	None	+806	Unincorporated Areas of Dakota County.
	Approximately 2,760 feet upstream of Knox Path	None	+812	
Tributary No. 1C to Vermillion River.	At confluence with Tributary No. 1 to Vermillion River	None	+845	Unincorporated Areas of Dakota County.
	Approximately 2,680 feet upstream of Inga Avenue	None	+869	
Tributary No. 2 to Chub Creek.	At confluence with Chub Creek	None	+929	Unincorporated Areas of Dakota County.
	Approximately 1,250 feet upstream of 280th Street West.	None	+944	
Tributary No. 2 to North Branch Vermillion River.	At confluence with North Branch Vermillion River	None	+870	Unincorporated Areas of Dakota County.
	Approximately 1,750 feet upstream of Blaine Avenue	None	+918	
Tributary No. 2 to South Branch Vermillion River.	At confluence with South Branch Vermillion River	None	+873	Unincorporated Areas of Dakota County.
	Approximately 1,240 feet upstream of Blaine Avenue	None	+877	
Tributary No. 2 to Trout Brook.	At confluence with Trout Brook	None	+869	Unincorporated Areas of Dakota County.
	Approximately 4,800 feet upstream of 260th Street East.	None	+968	
Tributary No. 2 to Vermillion River.	At confluence with Vermillion River	+826	+825	Unincorporated Areas of Dakota County.
	Approximately 1,420 feet upstream of Goodwin Avenue.	None	+883	
Tributary No. 2A to North Branch Vermillion River.	At confluence with Tributary No. 2 to North Branch Vermillion River.	None	+894	Unincorporated Areas of Dakota County.
	Approximately 3,220 feet upstream of confluence with Tributary No. 2 to North Branch Vermillion River.	None	+923	
Tributary No. 3 to North Branch Vermillion River.	At confluence with North Branch Vermillion River	None	+884	Unincorporated Areas of Dakota County.
	Approximately 2,870 feet upstream of confluence with North Branch Vermillion River.	None	+943	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Tributary No. 3 to South Branch Vermillion River.	At confluence with South Branch Vermillion River	None	+882	City of Hampton, Unincorporated Areas of Dakota County.
	Approximately 300 feet upstream of Northfield Boulevard.	None	+926	
Tributary No. 3 to Trout Brook.	At confluence with Trout Brook	None	+883	Unincorporated Areas of Dakota County.
	Approximately 2,740 feet upstream of 240th Street East.	None	+1025	
Tributary No. 3 to Vermillion River.	At confluence with Vermillion River	+829	+828	Unincorporated Areas of Dakota County.
	Approximately 9,720 feet upstream of 180th Street East.	None	+894	
Tributary No. 4 to North Branch Vermillion River.	At convergence with North Branch Vermillion River	None	+921	Unincorporated Areas of Dakota County.
	At divergence from North Branch Vermillion River	None	+930	
Tributary No. 4 to South Branch Vermillion River.	At confluence with South Branch Vermillion River	None	+888	Unincorporated Areas of Dakota County.
	Approximately 9,220 feet upstream of confluence with South Branch Vermillion River.	None	+904	
Tributary No. 4 to Trout Brook.	At confluence with Trout Brook	None	+909	Unincorporated Areas of Dakota County.
	Approximately 1,900 feet upstream of 240th Street East.	None	+936	
Tributary No. 4 to Vermillion River.	At confluence with Vermillion River	+840	+838	Unincorporated Areas of Dakota County.
	Approximately 550 feet upstream of 210th Street East	None	+910	
Tributary No. 4A to Vermillion River.	At confluence with Tributary No. 4 to Vermillion River	None	+854	Unincorporated Areas of Dakota County.
	Approximately 5,100 feet upstream of confluence with Tributary No. 4 to Vermillion River.	None	+908	
Tributary No. 5 to South Branch Vermillion River.	At confluence with South Branch Vermillion River	None	+899	Unincorporated Areas of Dakota County.
	Approximately 3,950 feet upstream of confluence with South Branch Vermillion River.	None	+913	
Tributary No. 5 to Trout Brook.	At confluence with Trout Brook	None	+942	Unincorporated Areas of Dakota County.
	Approximately 2,700 feet upstream of 250th Street East.	None	+988	
Tributary No. 5 to Vermillion River.	At confluence with Vermillion River	+864	+863	Unincorporated Areas of Dakota County.
	Approximately 1,500 feet upstream of 170th Street West.	None	+934	
Tributary No. 5A to Vermillion River.	At confluence with Tributary No. 5 to Vermillion River	None	+883	Unincorporated Areas of Dakota County.
	Approximately 4,560 feet upstream of confluence with Tributary No. 5 to Vermillion River.	None	+923	
Tributary No. 5B to Vermillion River.	At confluence with Tributary No. 5 to Vermillion River	None	+899	Unincorporated Areas of Dakota County.
	Approximately 2,600 feet upstream of Biscayne Avenue.	None	+940	
Tributary No. 5C to Vermillion River.	At confluence with Tributary No. 5 to Vermillion River	None	+899	Unincorporated Areas of Dakota County.
	Approximately 3,500 feet upstream of 170th Street West.	None	+951	
Tributary No. 6 to Vermillion River.	At confluence with Vermillion River	+871	+870	Unincorporated Areas of Dakota County.
	Approximately 8,700 feet upstream of 210th Street West.	None	+890	
Tributary No. 6A to Vermillion River.	At confluence with Tributary No. 6 to Vermillion River	None	+877	City of Farmington, Unincorporated Areas of Dakota County.
	Approximately 4,700 feet upstream of 210th Street West.	None	+892	
Tributary No. 6B to Vermillion River.	At confluence with Tributary No. 6 to Vermillion River	None	+879	Unincorporated Areas of Dakota County.
	Approximately 6,170 feet upstream of confluence with Tributary No. 6 to Vermillion River.	None	+887	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Trout Brook	Approximately 9,450 feet downstream of 260th Street East.	None	+851	Unincorporated Areas of Dakota County.
	Approximately 3,600 feet upstream of 240th Street East.	None	+982	
Vermillion River	Approximately 620 feet downstream of Vermillion Street/U.S. Highway 61.	+783	+781	City of Farmington, City of Hastings, City of Vermillion, Unincorporated Areas of Dakota County.
	At county boundary with Scott County	+1009	+1010	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Burnsville

Maps are available for inspection at City Hall, 100 Civic Center Parkway, Burnsville, MN 55337.

City of Eagan

Maps are available for inspection at City Hall, 3830 Pilot Knob Road, Eagan, MN 55122.

City of Farmington

Maps are available for inspection at City Hall, 430 Third Street, Farmington, MN 55024.

City of Hampton

Maps are available for inspection at City Hall, 5320 Lincoln Street, Hampton, MN 55031–0128.

City of Hastings

Maps are available for inspection at City Hall, 101 Fourth Street East, Hastings, MN 55033–1955.

City of Inver Grove Heights

Maps are available for inspection at City Hall, 8150 Barbara Avenue, Inver Grove Heights, MN 55077.

City of Lilydale

Maps are available for inspection at City Hall, 1011 Sibley Memorial Highway, Lilydale, MN 55118–5109.

City of Mendota

Maps are available for inspection at City Hall, 1313 Sibley Memorial Highway, Mendota, MN 55150–0688.

City of Mendota Heights

Maps are available for inspection at City Hall, 1011 Victoria Curve, Mendota Heights, MN 55118.

City of Northfield

Maps are available for inspection at City Hall, 801 Washington Street, Northfield, MN 55057.

City of Randolph

Maps are available for inspection at City Hall, 4365 292nd Street East, Randolph, MN 55065–0068.

City of Rosemount

Maps are available for inspection at City Hall, 2875 145th Street West, Rosemount, MN 55068–4997.

City of South St. Paul

Maps are available for inspection at City Hall, 125 Third Avenue North, South St. Paul, MN 55075.

City of Vermillion

Maps are available for inspection at City Hall, 105 Main Street East, Vermillion, MN 55085–0067.

Unincorporated Areas of Dakota County

Maps are available for inspection at County Administration Center, 1590 Highway 55, Hastings, MN 55033–2343.

Hinds County, Mississippi, and Incorporated Areas

Allen Creek Tributary	500 Feet Upstream of Hampstead Road	None	+318	City of Clinton
	750 Feet Upstream of Woodstone Place.	None	+337	
Bakers Creek	At Mount Moriah Road	None	+145	Unincorporated Areas of Hinds County.
	250 Feet Upstream of Railroad.	None	+205	
Bakers Creek Tributary 1	9,200 Feet Upstream of Confluence with Bakers Creek.	None	+151	Unincorporated Areas of Hinds County.
	12,000 Feet Upstream of Confluence with Bakers Creek.	None	+157	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Bakers Creek Tributary 2–1 ..	1,050 Feet Upstream of Confluence with Bakers Creek Tributary 2.	None	+262	Unincorporated Areas of Hinds County.
	5,200 Feet Upstream of Confluence with Bakers Creek Tributary 2.	None	+288	
Big Black River	4,600 Feet Upstream of Confluence with Fourteenmile Creek.	None	+118	Unincorporated Areas of Hinds County.
	1,600 Feet Upstream of Confluence with Bogue Falia Creek.	None	+154	
Big Creek	150 Feet Upstream of State HWY 18	None	+362	Unincorporated Areas of Hinds County.
	1,150 Feet Upstream of State HWY 18	None	+364	
Big Creek Tributary 1	300 Feet Upstream of Terry Road	None	+268	Unincorporated Areas of Hinds County.
	6,700 Feet Upstream of Gary Road	None	+310	
Bitter Creek	200 Feet Downstream of Learned Oakley Road	None	+178	Town of Learned, Unincorporated Areas of Hinds County.
	8,000 Feet Upstream of Learned Oakley Road	None	+195	
Bogue Chitto Creek	At County Boundary	None	+193	Unincorporated Areas of Hinds County.
	3,200 Feet Downstream of Natchez Trace Parkway ...	None	+246	
	400 Feet Upstream of U.S. HWY 49	None	+284	
	50 Feet Downstream of Hilda Road	None	+320	
Bogue Chitto Creek Tributary 10.	4,500 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+210	Unincorporated Areas of Hinds County.
	9,900 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+215	
Bogue Chitto Creek Tributary 11.	3,600 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+200	Unincorporated Areas of Hinds County.
	5,150 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+213	
Bogue Chitto Creek Tributary 12.	3,400 Feet Downstream of Carsley Road	None	+200	Unincorporated Areas of Hinds County.
	1,000 Feet Upstream of Carsely Road	None	+223	
Bogue Chitto Creek Tributary 13.	2,800 Feet Upstream of Carsley Road	None	+198	Unincorporated Areas of Hinds County.
	100 Feet Upstream of Carsley Road	None	+213	
Bogue Chitto Creek Tributary 14.	500 Feet Downstream of Springdale Road	None	+200	Unincorporated Areas of Hinds County.
	1,500 Feet Upstream of Springdale Road	None	+211	
Bogue Chitto Creek Tributary 15.	1,525 Feet Downstream of Springdale Road	None	+195	Unincorporated Areas of Hinds County.
	200 Feet Downstream of County Boundary	None	+204	
Bogue Chitto Creek Tributary 2.	3,400 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+261	Unincorporated Areas of Hinds County.
	300 Feet Downstream of Northside Drive	None	+272	
Bogue Chitto Creek Tributary 3.	1,500 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+268	Unincorporated Areas of Hinds County.
	3,700 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+281	
Bogue Chitto Creek Tributary 4.	600 Feet Downstream of Confluence with Bogue Chitto Creek.	None	+275	Unincorporated Areas of Hinds County.
	3,250 Feet Upstream of Northside Drive	None	+330	
Bogue Chitto Creek Tributary 5.	275 Feet Upstream of Northside Drive	None	+283	Unincorporated Areas of Hinds County.
	100 Feet Upstream of Richardson Road	None	+289	
Bogue Chitto Creek Tributary 6.	1,200 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+293	Unincorporated Areas of Hinds County.
	4,850 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+324	
Bogue Chitto Creek Tributary 6–1.	375 Feet Upstream of Confluence with Bogue Chitto Creek Tributary 6.	None	+302	Unincorporated Areas of Hinds County.
	1,350 Feet Upstream of Confluence with Bogue Chitto Creek Tributary 6.	None	+310	
Bogue Chitto Creek Tributary 7.	1,100 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+244	Unincorporated Areas of Hinds County.
	300 Feet Upstream of U.S. HWY 49	None	+286	
Bogue Chitto Creek Tributary 8.	1,300 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+236	Unincorporated Areas of Hinds County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	7,300 Feet Upstream of County Line Road	None	+290	
Bogue Chitto Creek Tributary 8–1.	1,450 Feet Upstream of Confluence with Bogue Chitto Creek Tributary 8.	None	+257	Unincorporated Areas of Hinds County.
	250 Feet Upstream of U.S. HWY 49	None	+275	
Bogue Chitto Creek Tributary 9.	5,500 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+222	Unincorporated Areas of Hinds County.
	6,500 Feet Upstream of Railroad	None	+305	
Bogue Chitto Creek Tributary 9–1.	1,700 Feet Downstream of U.S. HWY 49	None	+228	Unincorporated Areas of Hinds County.
	700 Feet Upstream of Golf Club Road	None	+247	
Bogue Chitto Creek Tributary 9–2.	1,600 Feet Downstream of MacLean Road	None	+247	Unincorporated Areas of Hinds County.
	2,400 Feet Upstream of MacLean Road	None	+256	
Bogue Chitto Creek Tributary 9–3.	1,000 Feet Upstream of MacLean Road	None	+258	Unincorporated Areas of Hinds County.
	4,850 Feet Upstream of Railroad	None	+291	
Bogue Chitto Creek Tributary 9–4.	500 Feet Downstream of Billy Bell Road	None	+273	Unincorporated Areas of Hinds County.
	5,700 Feet Upstream of Railroad	None	+322	
Chestnut Creek Tributary 1	200 Feet Downstream of County Boundary	None	+269	Unincorporated Areas of Hinds County.
	3,150 Feet Upstream of County Boundary	None	+288	
Chestnut Creek Tributary 3	At County Boundary	None	+291	Unincorporated Areas of Hinds County.
	4,500 Feet Upstream of County Boundary	None	+306	
Fleetwood Creek	400 Feet Downstream of I–20	None	+202	Unincorporated Areas of Hinds County.
	2,400 Feet Upstream of Confluence with Fleetwood Creek Tributary 4.	None	+248	
Fleetwood Creek Tributary 1	1,700 Feet Upstream of Confluence with Fleetwood Creek.	None	+221	Unincorporated Areas of Hinds County.
	7,900 Feet Upstream of Confluence with Fleetwood Creek.	None	+240	
Fleetwood Creek Tributary 2	2,250 Feet Upstream of Confluence with Fleetwood Creek.	None	+228	Unincorporated Areas of Hinds County.
	350 Feet Upstream of Private Farm Road	None	+250	
Fleetwood Creek Tributary 3	1,250 Feet Upstream of Confluence with Fleetwood Creek.	None	+229	Unincorporated Areas of Hinds County.
	7,900 Feet Upstream of Confluence with Fleetwood Creek.	None	+256	
Fleetwood Creek Tributary 4	200 Feet Upstream of Confluence with Fleetwood Creek.	None	+242	Unincorporated Areas of Hinds County.
	3,600 Feet Upstream of Confluence with Fleetwood Creek.	None	+254	
Fourteenmile Creek	9,450 Feet Downstream of Newman Road	None	+119	Unincorporated Areas of Hinds County.
	400 Feet Upstream of Old Port Gibson Road	None	+226	
Fourteenmile Creek Tributary 1.	650 Feet Downstream of Smith Station Road	None	+135	Unincorporated Areas of Hinds County.
	10,650 Feet Upstream of Smith Station Road	None	+157	
Fourteenmile Creek Tributary 2.	1,800 Feet Downstream of U.S. HWY 18	None	+224	Unincorporated Areas of Hinds County.
	1,400 Feet Downstream of Dry Grove Road	None	+252	
French Creek Tributary 1	1,550 Feet Downstream of U.S. HWY 80	None	+301	City of Clinton.
	1,700 Feet Upstream of U.S. HWY 80	None	+316	
French Creek Tributary 2	1,100 Feet Upstream of Confluence with French Creek Tributary 1.	None	+302	City of Clinton.
	50 Feet Upstream of Clinton Blvd	None	+329	
French Creek Tributary 3	1,450 Feet Upstream of Confluence with French Creek.	None	+300	City of Clinton, City of Jackson.
	3,450 Feet Upstream of Confluence with French Creek.	None	+308	
French Creek Tributary 4	1,600 Feet Upstream of Confluence with French Creek.	None	+309	City of Jackson.
	1,700 Feet Upstream of Norman Road	None	+339	
French Creek Tributary 5	300 Feet Upstream of HWY 80	None	+326	City of Jackson.
	1,000 Feet Upstream of HWY 80	None	+327	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Hanging Moss Creek Tributary 1.	1,100 Feet Upstream of Confluence with Hanging Moss Creek.	None	+328	City of Jackson, Unincorporated Areas of Hinds County.
	3,200 Feet Upstream of Confluence with Hanging Moss Creek.	None	+338	
Hanging Moss Creek Tributary 2.	400 Feet Downstream of Graven Road	None	+338	Unincorporated Areas of Hinds County.
	3,500 Feet Upstream of Graven Road	None	+355	
Hanging Moss Creek Tributary 3.	500 Feet Upstream of Confluence with Hanging Moss Creek.	None	+334	Unincorporated Areas of Hinds County.
	4,900 Feet Upstream of Confluence with Hanging Moss Creek.	None	+355	
Hanging Moss Creek Tributary 5–1.	250 Feet Downstream of Beasley Road	None	+314	City of Jackson.
	950 Feet Upstream of Westwind Road	None	+344	
Harris Creek	6,700 Feet Upstream of Old HWY 51	None	+280	Unincorporated Areas of Hinds County.
	6,500 Feet Upstream of Stubbs Road	None	+333	
Harris Creek Tributary 1	700 Feet Upstream of Confluence with Harris Creek	None	+301	Unincorporated Areas of Hinds County.
	6,700 Feet Upstream of Green Gable Road	None	+333	
Jackson Creek	5,500 Feet Upstream of Confluence with Bakers Creek.	None	+150	Unincorporated Areas of Hinds County.
	2,200 Feet Upstream of U.S. HWY 467	None	+204	
Limekiln Creek	7,100 Feet Upstream of Confluence with Bakers Creek.	None	+204	Unincorporated Areas of Hinds County.
	At County Boundary	None	+245	
Limekiln Creek Tributary 1	4,100 Feet Upstream of Confluence with Limekiln Creek.	None	+211	Unincorporated Areas of Hinds County.
	14,800 Feet Upstream of Confluence with Limekiln Creek.	None	+236	
Limekiln Creek Tributary 1–1	2,000 Feet Downstream of Stigger Road	None	+214	Unincorporated Areas of Hinds County.
	6,800 Feet Upstream of Stigger Road	None	+233	
Limekiln Creek Tributary 2	400 Feet Downstream of U.S. HWY 49	None	+219	Unincorporated Areas of Hinds County.
	2,900 Feet Upstream of Confluence with Limekiln Creek Tributary 2–1.	None	+242	
Limekiln Creek Tributary 2–1	100 Feet Downstream of Railroad	None	+234	Unincorporated Areas of Hinds County.
	400 Feet Upstream of Lanewood Road	None	+258	
Limekiln Creek Tributary 3	4,000 Feet Upstream of Confluence with Limekiln Creek.	None	+226	Unincorporated Areas of Hinds County.
	300 Feet Downstream of County Boundary	None	+236	
Lindsey Creek	600 Feet Downstream of Norrell Road	None	+244	City of Clinton, Unincorporated Areas of Hinds County.
	700 Feet Upstream of Natchez Trace Parkway	None	+270	
	550 Feet Downstream of Neal Street	None	+312	
	200 Feet Upstream of Oak Hill Circle	None	+330	
Lindsey Creek Tributary 1	4,350 Feet Upstream of Confluence with Lindsey Creek.	None	+245	Unincorporated Areas of Hinds County.
	5,900 Feet Upstream of Confluence with Lindsey Creek.	None	+258	
Lindsey Creek Tributary 3	2,000 Feet Upstream of Confluence with Lindsey Creek.	None	+277	Unincorporated Areas of Hinds County.
	150 Feet Upstream of I–20	None	+295	
Little Bakers Creek	1,100 Feet Downstream of Private Farm Road	None	+213	Town of Bolton, Unincorporated Areas of Hinds County.
	200 Feet Upstream of Railroad	None	+281	
Little Bakers Creek Tributary 1.	1,800 Feet Upstream of Confluence with Little Bakers Creek.	None	+220	Unincorporated Areas of Hinds County.
	2,600 Feet Upstream of I–20	None	+239	
Little Bakers Creek Tributary 2.	700 Feet Upstream of Confluence with Little Bakers Creek.	None	+230	Unincorporated Areas of Hinds County.
	5,400 Feet Upstream of Confluence with Little Bakers Creek.	None	+262	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Little Bakers Creek Tributary 3.	400 Feet Upstream of Williamson Road	None	+254	Unincorporated Areas of Hinds County.
	900 Feet Upstream of I–20	None	+268	
Little Bakers Creek Tributary 3–1.	500 Feet Upstream of Williamson Road	None	+254	Unincorporated Areas of Hinds County, City of Clinton.
	4,250 Feet Upstream of Williamson Road	None	+280	
Little Bakers Creek Tributary 4.	1,500 Feet Upstream of Confluence with Little Bakers Creek.	None	+254	Unincorporated Areas of Hinds County.
	5,900 Feet Upstream of Confluence with Little Bakers Creek.	None	+270	
Little Bakers Creek Tributary 5.	950 Feet Upstream of Confluence with Little Bakers Creek.	None	+268	City of Clinton.
	2,700 Feet Upstream of Confluence with Little Bakers Creek.	None	+280	
Little Bakers Creek Tributary 6.	500 Feet Upstream of Confluence with Little Bakers Creek.	None	+271	City of Clinton.
	1,500 Feet Upstream of Railroad	None	+291	
Little Creek	400 Feet Downstream of Flowers Road	None	+310	Unincorporated Areas of Hinds County.
	100 Feet Upstream of Flowers Road	None	+310	
Lynch Creek	150 Feet Downstream of Bonita Drive	*362	+355	City of Jackson.
	300 Feet Downstream of Flag Chapel Road	*366	+363	
	1,350 Feet Upstream of Flag Chapel Road	None	+377	
Lynch Creek Tributary 5–1	1,050 Feet Upstream of Confluence with Lynch Creek	None	+335	City of Jackson.
	4,150 Feet Upstream of Confluence with Lynch Creek	None	+352	
McDonald Creek	600 Feet Downstream of HWY 18	None	+212	Unincorporated Areas of Hinds County.
	200 Feet Upstream of Dry Grove Road	None	+247	
Patrol Creek	1,000 Feet Upstream of Confluence with Lindsey Creek.	None	+268	City of Clinton.
	2,900 Feet Upstream of Confluence with Lindsey Creek.	None	+268	
Pearl River Tributary 1	500 Feet Downstream of Railroad	None	+260	Unincorporated Areas of Hinds County.
	2,300 Feet Upstream of Railroad	None	+299	
Pearl River Tributary 2	1,000 Feet Downstream of Railroad	None	+265	Unincorporated Areas of Hinds County.
	2,600 Feet Upstream of I–55	None	+330	
Rhodes Creek	15,000 Feet Upstream of North Siwell Road	None	+391	Unincorporated Areas of Hinds County.
	16,000 Feet Upstream of North Siwell Road	None	+396	
Rhodes Creek Tributary 1	3,150 Feet Upstream of Confluence with Rhodes Creek.	None	+258	Unincorporated Areas of Hinds County.
	2,000 Feet Upstream of Confluence with Rhodes Creek.	None	+271	
Rhodes Creek Tributary 4	2,800 Feet Upstream of Confluence with Rhodes Creek.	None	+275	Unincorporated Areas of Hinds County.
	1,150 Feet Upstream of Dac Road	None	+338	
Rhodes Creek Tributary 5	2,300 Feet Upstream of Confluence with Rhodes Creek.	None	+293	Unincorporated Areas of Hinds County.
	3,900 Feet Upstream of Confluence with Rhodes Creek.	None	+299	
Rhodes Creek Tributary 6	2,100 Feet Upstream of Confluence with Rhodes Creek.	None	+295	Unincorporated Areas of Hinds County.
Robertson Creek	2,800 Feet Upstream of Confluence with Rhodes Creek.	None	+299	Unincorporated Areas of Hinds County.
	1,900 Feet Upstream of Flowers Road	None	+306	
Smith Creek Tributary 4	200 Feet Upstream of Wells Road	None	+263	Unincorporated Areas of Hinds County.
	5,500 Feet Upstream of Wells Road	None	+312	
Snake Creek	4,000 Feet Upstream of U.S. HWY 18	None	+283	Unincorporated Areas of Hinds County.
	5,600 Feet Upstream of Confluence with Snake Creek Tributary 1.	None	+313	
Snake Creek Tributary 1	450 Feet Downstream of Midway Road	None	+306	Unincorporated Areas of Hinds County.
	1,050 Feet Upstream of Midway Road	None	+317	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Straight Fence Creek	10,500 Feet Upstream of Confluence with Bogue Chitto Creek.	None	+203	Unincorporated Areas of Hinds County.
	750 Feet Downstream of Williamson Road	None	+241	
Straight Fence Creek Tributary 1.	750 Feet Downstream of McGuffee Road	None	+217	Unincorporated Areas of Hinds County.
	200 Feet Downstream of Clinton-Tinnin Road	None	+240	
Straight Fence Creek Tributary 1–1.	700 Feet Downstream of McGuffee Road	None	+217	Unincorporated Areas of Hinds County.
	600 Feet Upstream of McGuffee Road	None	+226	
Straight Fence Creek Tributary 2.	800 Feet Downstream of McGuffee Road	None	+217	Unincorporated Areas of Hinds County.
	2,000 Feet Upstream of Confluence with Straight Fence Creek Tributary 2–1.	None	+238	
Straight Fence Creek Tributary 2–1.	1,350 Feet Upstream of Confluence with Straight Fence Creek Tributary 2.	None	+235	Unincorporated Areas of Hinds County.
	3,400 Feet Upstream of Confluence with Straight Fence Creek Tributary 2.	None	+242	
Straight Fence Creek Tributary 3.	3,800 Feet Upstream of Confluence with Straight Fence Creek.	None	+218	Unincorporated Areas of Hinds County.
	100 Feet Downstream of Jimmy Williams Road	None	+254	
Straight Fence Creek Tributary 3–1.	300 Feet Upstream of Confluence with Straight Fence Creek Tributary 3.	None	+245	Unincorporated Areas of Hinds County.
	2,800 Feet Upstream of McGuffee Road	None	+263	
Straight Fence Creek Tributary 4.	1,000 Feet Upstream of Confluence with Straight Fence Creek.	None	+222	Unincorporated Areas of Hinds County.
	1,500 Feet Upstream of Noah Johnson Road	None	+247	
Straight Fence Creek Tributary 5–1.	900 Feet Upstream of Confluence with Straight Fence Creek Tributary 5.	None	+246	Unincorporated Areas of Hinds County.
	3,050 Feet Upstream of Confluence with Straight Fence Creek Tributary 5.	None	+259	
Straight Fence Creek Tributary 6.	200 Feet Downstream of Williamson Road	None	+252	Unincorporated Areas of Hinds County.
	4,300 Feet Upstream of Confluence with Straight Fence Creek Tributary 6–2.	None	+259	
Straight Fence Creek Tributary 6–1.	1,600 Feet Upstream of Confluence with Straight Fence Creek Tributary 6.	None	+245	Unincorporated Areas of Hinds County.
	5,350 Feet Upstream of Confluence with Straight Fence Creek Tributary 6.	None	+257	
Straight Fence Creek Tributary 6–2.	400 Feet Upstream of Confluence with Straight Fence Creek Tributary 6.	None	+258	Unincorporated Areas of Hinds County.
	1,300 Feet Upstream of Confluence with Straight Fence Creek Tributary 6.	None	+265	
Straight Fence Creek Tributary 7.	1,900 Feet Downstream of Pinehaven Place	None	+264	City of Clinton, Unincorporated Areas of Hinds County.
	100 Feet Downstream of Pinehaven Road	None	+285	
Stream B	400 Feet Upstream of Joe Cocker Road	None	+236	Unincorporated Areas of Hinds County.
	500 Feet Downstream of County Boundary	None	+263	
Stream B Tributary 1	1,400 Feet Upstream of Confluence with Stream B	None	+250	Unincorporated Areas of Hinds County.
	2,800 Feet Upstream of Confluence with Stream B	None	+260	
Stream B Tributary 2	200 Feet Downstream of Clincy Road	None	+248	Unincorporated Areas of Hinds County.
	At County Boundary	None	+258	
Straight Fence Creek Tributary 5.	2,800 Feet Upstream of Confluence with Straight Fence Creek.	None	+236	Unincorporated Areas of Hinds County.
	6,800 Feet Upstream of Confluence with Straight Fence Creek.	None	+274	
Terrell Creek	600 Feet Downstream of Fairchilds Road	None	+169	Unincorporated Areas of Hinds County.
	2,000 Feet Upstream of Unnamed Field Road	None	+194	
Town Creek	1,300 Feet Upstream of I–220	None	+350	City of Jackson.
	4,400 Feet Upstream of Forest Road	None	+369	
Town Creek Tributary 2	100 Feet Upstream of Michael Avalon Street	None	+328	City of Jackson.
	700 Feet Upstream of Michael Avalon Street	None	+328	
Trahon Creek Tributary 3	250 Feet Upstream of Lake Catherine Dam	None	+325	City of Jackson.
Turkey Creek	2,000 Feet Downstream of Mt Moriah Road	None	+167	Unincorporated Areas of Hinds County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	4,200 Feet Upstream of U.S. HWY 467	None	+244	
Turkey Creek Tributary 1	2,000 Feet Upstream of Confluence with Turkey Creek.	None	+206	Unincorporated Areas of Hinds County.
	4,200 Feet Upstream of U.S. HWY 467	None	+235	
Turkey Creek Tributary 2	5,000 Feet Upstream of Confluence with Turkey Creek.	None	+227	Unincorporated Areas of Hinds County, Town of Terry.
	4,200 Feet Upstream of Natchez Trace Parkway	None	+245	
Twelvemile Creek	8,000 Feet Upstream of Confluence with Fourteenmile Creek.	None	+155	Unincorporated Areas of Hinds County.
	3,400 Feet Upstream of Confluence with Fourteenmile Creek.	None	+178	
Vaughn Creek	6,500 Feet Downstream of Volley Campbell Road	None	+286	Town of Terry, Unincorporated Areas of Hinds County.
	2,800 Feet Upstream of Volley Campbell Road	None	+308	
Vaughn Creek Tributary 1	4,200 Feet Upstream of Confluence with Vaughn Creek.	None	+272	Unincorporated Areas of Hinds County.
	300 Feet Upstream of Jack Johnson Road	None	+291	
Vaughn Creek Tributary 1–1	2,700 Feet Upstream of Confluence with Vaughn Creek Tributary 1.	None	+281	Unincorporated Areas of Hinds County.
	3,500 Feet Upstream of Confluence with Vaughn Creek Tributary 1.	None	+285	
Vaughn Creek Tributary 3	1,600 Feet Upstream of Confluence with Vaughn Creek.	None	+292	Unincorporated Areas of Hinds County.
	2,000 Feet Upstream of Confluence with Vaughn Creek Tributary 3.	None	+301	
	650 Feet Upstream of Jack Johnson Road	None	+314	
	5,500 Feet Upstream of Confluence with Vaughn Creek Tributary 3.	None	+320	
Vaughn Creek Tributary 3–2	1,000 Feet Upstream of Confluence with Vaughn Creek Tributary 3.	None	+308	Unincorporated Areas of Hinds County.
	150 Feet Upstream of Cassidy Road	None	+317	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Clinton

Maps are available for inspection at Clinton City Hall, 300 Jefferson Street, Clinton, MS 39056.

City of Jackson

Maps are available for inspection at Department of Public Works, 200 South President Street, Jackson, MS 39205.

Town of Bolton

Maps are available for inspection at Bolton Town Hall, 202 Bolton-Raymond Road, Bolton, MS 39041.

Town of Learned

Maps are available for inspection at 521 Cherry Street, Learned, MS 39154.

Town of Terry

Maps are available for inspection at Terry Town Hall, 315 Cunningham Avenue, Terry, MS 39170.

Unincorporated Areas of Hinds County

Maps are available for inspection at Hinds County Permit and Zoning Office, 127 West Main Street, Raymond, MS 39154.

Dutchess County, New York, and Incorporated Areas

East Branch Wappinger Creek Reach 1.	Approximately 665 feet upstream of New York State Route 82.	None	+282	Town of Washington.
	Approximately 1,529 feet upstream of New York State Route 82.	None	+283	
Fishkill Creek	Approximately 300 feet upstream of confluence with Hudson River.	+8	+7	Town of Beekman, City of Beacon, Town of East Fishkill, Town of Fishkill, Town of Union Vale, Village of Fishkill.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
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	Just downstream of Clubhouse Lane	+487	+488	
Maritje Kill	Approximately 30 feet upstream of Railroad	+8	+10	Town of Hyde Park.
	Approximately 4,230 feet upstream of Crum Elbow Road.	None	+252	
Rhinebeck Kill	Approximately 1.07 miles upstream of State Route 9G	None	+165	Town of Red Hook.
	Approximately 1.08 miles upstream of State Route 9G	None	+165	
Saw Kill	At Linden Avenue	None	+183	Village of Red Hook.
	Approximately 937 feet upstream of Linden Avenue	None	+183	
Sprout Creek #2	Approximately 80 feet downstream of County Route 90.	None	+565	Town of Washington.
	Just upstream of County Route 90	None	+566	
Stony Creek	Approximately 0.55 mile downstream of Mill Street	None	+75	Town of Red Hook.
	Approximately 0.59 mile downstream of Mill Street	None	+75	
Swamp River Reach 1	At confluence with Tenmile River	+364	+362	Town of Dover.
	Approximately 600 feet above confluence with Tenmile River.	+366	+365	
Swamp River Reach 2	Approximately 0.52 mile upstream of Kitchen Road	None	+424	Town of Dover.
	Approximately 0.59 mile upstream of Kitchen Road	None	+424	
Sylan Lake Outlet	At confluence with Fishkill Creek	+294	+293	Town of East Fishkill.
	Approximately 950 feet upstream of confluence with Fishkill Creek.	+294	+293	
Tenmile River	At county boundary	+287	+292	Town of Dover, Town of Amenia.
	Approximately 2,824 feet upstream of Railroad	None	+388	
Wells Brook	At confluence with Tenmile River	+375	+373	Town of Dover.
	Approximately 800 feet upstream of confluence with Tenmile River.	+375	+374	
Whaley Lake Stream	At confluence with Fishkill Creek	+350	+351	Town of Beekman.
	Approximately 500 feet upstream of confluence with Fishkill Creek.	+350	+351	
Whortlekill Creek Reach 1	At confluence with Fishkill Creek	+233	+234	Town of East Fishkill.
	Approximately 1,800 feet upstream of confluence with Fishkill Creek.	+233	+234	

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+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Beacon

Maps are available for inspection at Beacon City Hall, 1 Municipal Center, Beacon, NY.

Town of Amenia

Maps are available for inspection at Amenia Town Hall, 36B Mechanic Street, Amenia, NY.

Town of Beekman

Maps are available for inspection at Beekman Town Hall, 4 Main Street, Poughquag, NY.

Town of Dover

Maps are available for inspection at Dover Town Hall, 126 East Duncan Hill Road, Dover Plains, NY.

Town of East Fishkill

Maps are available for inspection at East Fishkill Town Hall, 330 Route 376, Hopewell Junction, NY.

Town of Fishkill

Maps are available for inspection at Fishkill Town Hall, 807 Route 52, Fishkill, NY.

Town of Hyde Park

Maps are available for inspection at Hyde Park Town Hall, 4383 Albany Post Road, Hyde Park, NY.

Town of Red Hook

Maps are available for inspection at Red Hook Town Hall, 7340 South Broadway, Red Hook, NY.

Town of Union Vale

Maps are available for inspection at Union Vale Town Hall, 249 Duncan Road, LaGrangeville, NY.

Town of Washington

Maps are available for inspection at Washington Town Hall, 10 Reservoir Drive, Washington, NY.

Village of Fishkill

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Maps are available for inspection at Fishkill Village Hall, 1095 Main Street, Fishkill, NY.				
Village of Red Hook				
Maps are available for inspection at Red Hook Village Hall, 7467 South Broadway, Red Hook, NY.				
Hanson County, South Dakota, and Incorporated Areas				
James River	1,050 feet upstream from 262nd St	None	+1215	Unincorporated Areas of Hanson County.
	540 feet upstream from Interstate 90	None	+1223	

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+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Hanson County

Maps are available for inspection at P.O. Box 500, Alexandria, SD 57311.

Roane County, Tennessee, and Incorporated Areas				
Caney Creek	143 feet downstream of confluence Postoak Creek	None	+746	Unincorporated Areas of Roane County.
	2,087 feet upstream of confluence with Tennessee River.	+745	+746	
Clinch River	2,372 feet upstream of confluence with Tennessee River.	+746	+747	City of Oak Ridge, City of Harriman, Unincorporated Areas of Roane County.
	964 feet downstream of confluence with Young Creek	+746	+747	
Clinch River	144 feet downstream of confluence with Caney Creek East.	+748	+748	Unincorporated Areas of Roane County.
	6.3 miles upstream up SH 95	None	+796	
Emory River	1,463 feet upstream of confluence with Clinch River	+746	+747	City of Kingston, Unincorporated Areas of Roane County.
	600 feet upstream of confluence with Swan Pond Creek.	+748	+748	
Smith Creek	3,150 feet upstream of confluence with Tennessee River.	+746	+747	Unincorporated Areas of Roane County, City of Kingston.
	411 feet downstream of Paint Rock Ferry Road	+746	+747	
Tennessee River	5,880 feet downstream of confluence with Caney Creek.	+745	+746	Unincorporated Areas of Roane County, City of Kingston.
	1,140 Feet upstream of confluence with Hines Creek	None	+750	
Whites Creek	2.6 miles downstream of confluence with Black Creek	None	+746	Unincorporated Areas of Roane County.
	1,900 feet upstream of confluence with Black Creek	None	+791	

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+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Harriman

Maps are available for inspection at 300 North Roane Street, Harriman, TN.

City of Kingston

Maps are available for inspection at 125 West Cumberland, Kingston, TN.

City of Oak Ridge

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Maps are available for inspection at 200 S Tulane Avenue, Oak Ridge, TN.				
Unincorporated Areas of Roane County				
Maps are available for inspection at 200 East Race Street, Kingston, TN.				
Potter County, Texas, and Incorporated Areas				
Dry Creek	Approximately 500 feet upstream from the intersection with Cliffside Road.	None	+3400	Unincorporated Areas of Potter County, City of Amarillo.
	Approximately 500 feet upstream from the intersection with W 335 North Loop.	None	+3428	
Dry Creek Overflow	Approximately 500 feet downstream from confluence with Dry Creek.	None	+3416	Unincorporated Areas of Potter County, City of Amarillo.
	Approximately 120 feet north of W 335 North Loop intersection.	None	+3437	
Playa 21 (T-Anchor Lake)	Approximately 570 feet east of Willow Street and SE 15th Avenue.	+3612	+3616	City of Amarillo.
Playa Lake 22	Approximately 3,500 feet north of SE 3rd Avenue and S Whitaker Road intersection.	+3588	+3593	City of Amarillo.
Playa Lake 24 (Martin Lake)	Approximately 650 feet north of Dale St. and Martin Rd. intersection.	+3628	+3631	City of Amarillo.
Playa Lake 26	Approximately 4,600 feet southwest of I–40 and Juett Attebury Road Intersection.	+3570	+3573	City of Amarillo, Unincorporated Areas of Potter County.
Playa Lake 27	Approximately 2,000 feet east of NE 18th Avenue and Hacienda Drive intersection.	+3545	+3548	City of Amarillo.
Playa Lake 28 (Airport Lake)	Approximately 1,350 feet NW of Amarillo Int. Airport runway.	+3585	+3590	City of Amarillo.
Playa Lake 34	Approximately 4,600 feet southwest of Highway 287 and S. Parsley Road intersection.	None	+3553	City of Amarillo, Unincorporated Areas of Potter County.
Playa Lake 61	Approximately 1,100 feet northeast from intersection of Parsley Road and railroad.	None	+3596	City of Amarillo, Unincorporated Areas of Potter County.

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+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Amarillo

Maps are available for inspection at 509 SE Seventh, Amarillo, TX 79101.

Unincorporated Areas of Potter County

Maps are available for inspection at 500 S. Fillmore, Amarillo, TX 79101.

Randall County, Texas, and Incorporated Areas				
Playa 20 (Gooch Lake)	Approximately 5,000 feet south of SE 34th Ave. and S. Manhattan St. intersection.	+3574	+3579	City of Amarillo.
Playa Lake 11	Approximately 500 feet south of the intersection of Bell St. and Attebury Dr.	None	+3646	City of Amarillo, Unincorporated Areas of Randall County.
Playa Lake 13	Approximately 2,500 feet southeast of the intersection of West 335 South LP and Valleyview Drive.	None	+3626	City of Amarillo, Unincorporated Areas of Randall County.
Playa Lake 14 (Diamond Horseshoe Lake).	Approximately 100 feet south of Winners Circle	+3657	+3658	City of Amarillo.
Playa Lake 16	Approximately 350 feet south of S. Hayden and SW 48th Ave. intersection.	+3626	+3633	City of Amarillo.
Playa Lake 19	Approximately 1,200 feet east of SW 42nd Ave. and S. Harrison St. intersection.	+3633	+3638	City of Amarillo.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Playa Lake 4	W CR 58 and Helium Road intersection	None	+3699	City of Amarillo, Unincorporated Areas of Randall County.
Playa Lake 5 (McDonald Lake).	Approximately 1,100 feet southeast of S. Coulter St. and SW 45th St. intersection.	+3688	+3687	City of Amarillo.
Playa Lake 7	Approximately 100 feet north of W. 77th Ave. and Cody Dr.	None	+3675	City of Amarillo, Unincorporated Areas of Randall County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Amarillo

Maps are available for inspection at 509 E. 7th Ave, Amarillo, TX 79105.

Unincorporated Areas of Randall County

Maps are available for inspection at 301 Hwy 60, Canyon, TX 79015.

Barron County, Wisconsin, and Incorporated Areas

Bear Creek	191 feet downstream of Main Street (Haugen)	None	+1198	Village of Haugen, Unincorporated Areas of Barron County.
	Just downstream of Bear Lake Dam	None	+1207	
Beaver Dam Lake	Entire Shoreline	None	+1233	City of Cumberland.
Big Moon Lake	Entire Shoreline	None	+1171	Unincorporated Areas of Barron County.
Buck Lake	Entire Shoreline	None	+1233	City of Cumberland, Unincorporated Areas of Barron County.
Devils Lake	Entire Shoreline	None	+1262	Unincorporated Areas of Barron County.
Duck Lake	Entire Shoreline	None	+1236	City of Cumberland, Unincorporated Areas of Barron County.
Frankenburg Slough	Entire Shoreline	None	+1040	Village of Cameron.
Granite Lake	Entire Shoreline	None	+1238	Unincorporated Areas of Barron County.
Lake Montanis	Entire Shoreline	None	+1119	City of Rice Lake, Unincorporated Areas of Barron County.
Little Sand Lake	Entire Shoreline	None	+1250	Unincorporated Areas of Barron County.
Lower Turtle Lake	Entire Shoreline	None	+1165	Unincorporated Areas of Barron County.
Lower/Upper Vermillion Lake	Entire Shoreline	None	+1184	Unincorporated Areas of Barron County.
Peterson Lake	Entire Shoreline	None	+1189	Unincorporated Areas of Barron County.
Poskin Lake	Entire Shoreline	None	+1157	Unincorporated Areas of Barron County.
Red Cedar River	6,000 feet downstream of State Hwy 48	+1125	+1126	Unincorporated Areas of Barron County.
	Outlet of Red Cedar Lake	None	+1177	
Red Cedar River Tributary 16	Confluence with Red Cedar River	+1113	+1112	City of Rice Lake, Unincorporated Areas of Barron County.
	750 feet upstream of U.S. Hwy 53	None	+1191	
Sand Lake	Entire Shoreline	None	+1226	Unincorporated Areas of Barron County.
Shallow Lake	Entire Shoreline	None	+1240	Unincorporated Areas of Barron County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Silver Lake	Entire Shoreline	None	+1258	Unincorporated Areas of Barron County.
Tuscobia Lake/Stump Lake	Entire Shoreline	None	+1129	Unincorporated Areas of Barron County.
Upper Turtle Lake	Entire Shoreline	None	+1174	Unincorporated Areas of Barron County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Cumberland

Maps are available for inspection at 1356 2nd Ave, Cumberland, WI 54829.

City of Rice Lake

Maps are available for inspection at 30 E Eau Claire St, Rice Lake, WI 54868.

Unincorporated Areas of Barron County

Maps are available for inspection at 330 East LaSalle Avenue, Barron, WI 54812.

Village of Cameron

Maps are available for inspection at 300 North First Street, Cameron, WI 54822.

Village of Haugen

Maps are available for inspection at 104 West 3rd Street, Haugen, WI 54841.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: October 22, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–25878 Filed 10–29–08; 8:45 am]

BILLING CODE 9110–12–P

Notices

Federal Register

Vol. 73, No. 211

Thursday, October 30, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Notice of Intent To Reinstate and Revise a Previously Approved Information Collection

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

AGENCY: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)and Office of Management and Budget (OMB) implementing regulations (5 CFR part 1320), this notice announces the Cooperative State Research, Education, and Extension Service's (CSREES) intention to request approval to reinstate and revise a previously approved information collection in support of authorizations to use the 4–H Club Name and/or Emblem.

DATES: Written comments on this notice must be received by December 29, 2008 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by [docket # and/or RIN #], by any of the following methods: *Federal eRulemaking Portal: http://regulations.gov.* Follow the instructions for submitting comments. *E-mail: jhitchcock@csrees.usda.gov; Mail:* Jason Hitchcock, Information Systems and Technology Management, USDA/CSREES, STOP 2216, 1400 Independence Avenue, SW., Washington, DC 20250–2216; *Hand Delivery/Courier:* Jason Hitchcock, Information Systems and Technology Management, USDA/CSREES, 800 9th Street, SW., Room 4217, Waterfront Centre, Washington, DC 20024; *Fax:* 202–720–0857.

FOR FURTHER INFORMATION CONTACT: Jason Hitchcock, (202) 720–4343. Information is also available at *http://www.national4-hheadquarters.gov/emblem/4h_name.htm.*

SUPPLEMENTARY INFORMATION:

Title: Application for Authorization to Use the 4–H Club Name and/or Emblem.

OMB Number: 0524–0034.

Current Expiration Date of Approval: March 31, 2009.

Type of Request: Intent to request approval to reinstate and revise an information collection.

Abstract: Use of the 4–H Club Name and/or Emblem is authorized by an Act of Congress (18 U.S.C. 707). Use of the 4–H Club Name and/or Emblem by anyone other than 4–H Clubs and those duly authorized by them, representatives of the United States Department of Agriculture, the land-grant colleges and universities, and persons authorized by the Secretary of Agriculture is prohibited by the provisions of 18 U.S.C. 707. The Secretary of Agriculture has delegated authority to the Administrator of CSREES to authorize others to use the 4–H Club Name and Emblem. The Administrator has promulgated regulations at 7 CFR part 8 that govern such use. The regulatory requirements for use of the 4–H Club Name and/or Emblem reflect the high standards of 4–H and its educational goals and objectives. Pursuant to provisions of 7 CFR part 8, anyone requesting authorization from the Administrator to use the 4–H Club Name and Emblem is asked to describe the proposed use in a formal application. The collection of this information is used to determine whether the applicant's proposed use will meet the regulatory requirements in 7 CFR part 8 and whether an authorization for use should be granted.

Need and Use of the Information: CSREES will collect information on the name of the individual, partnership, corporation, or association; the organizational address; the name of an authorized representative; the telephone number, facsimile number, website, and e-mail address; the proposed use of the 4–H Club Name and/or Emblem; a sample of the product showing proposed use of the 4–H Club Name and Emblem and list samples of products (i.e., mugs or shirts) or exhibits (i.e., educational brochures, posters, or publications) submitted; and the plan for sale or distribution of the product bearing the 4–H Club Name and/or Emblem. The information collected by CSREES will be used to determine if those applying to use the 4–H Name and/or Emblem meet the regulatory requirements. If the information is not collected, it would not be possible to ensure that the products, services, and materials meet the regulatory requirements as well as 4–H educational goals and objectives.

Estimate of Burden: Minimal changes have been proposed to this collection and the public reporting burden remains at the estimated average .5 hours per response.

Respondents: Individuals, households, businesses or other for-profit or not-for-profit institutions.

Estimated Number of Respondents: 60.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 30 hours.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions; (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.

Obtaining a Copy of the Information Collection: A copy of the information collection and related instructions may be obtained free of charge by contacting Jason Hitchcock by telephone, (202) 720–4343, or by e-mail, *jhitchcock@csrees.usda.gov.* Information also is available at *http://www.national4-hheadquarters.gov/emblem/4h_name.htm.*

Done in Washington, DC, this 24th day of October 2008.

Gale Buchanan,

Under Secretary, Research, Education, and Economics.

[FR Doc. E8–25858 Filed 10–29–08; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: This notice announces a public comment period on the information collection requests (ICRs) associated with the interpretation of statutory and regulatory provisions administered by Federal Crop Insurance Corporation (FCIC).

DATES: Written comments on this notice will be accepted until close of business December 29, 2008.

ADDRESSES: Interested persons are invited to submit written comments to William J. Murphy, Deputy Administrator, Insurance Services Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 1400 Independence Ave., SW., Stop 0805, Washington, DC 20250–0805. Comments titled ''Information Collection OMB 0563–0055'' may be sent via the Internet to: *William.Murphy@rma.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Heyward Baker, Director, Risk Management Services Division, Federal Crop Insurance Corporation, at the above address, telephone (202) 624–0737.

SUPPLEMENTARY INFORMATION:

Title: General Administrative Regulations; Interpretations of Statutory and Regulatory Provisions.

OMB Number: 0563–0055.

Expiration Date of Approval: March 31, 2009.

Type of Request: Extension of a currently approved information collection.

Abstract: FCIC is proposing to renew the currently approved information collection, OMB Number 0563–0055. It is currently up for renewal and extension for three years. FCIC is conducting a thorough review of information collections associated with providing an interpretation of statutory and regulatory provisions under this collection. The information collection requirements for this renewal package are necessary for FCIC to provide an interpretation of statutory and regulatory provisions upon request. This data is used to administer the provisions of 7 CFR part 400, subpart X in accordance with the Federal Crop Insurance Act, as amended.

We are asking the Office of Management and Budget (OMB) to extend its approval of our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public concerning this information collection activity. These comments will help us:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Respondents/Affected Entities: Parties affected by the information collection requirements included in this Notice are any applicant for crop insurance, a producer with a valid crop insurance policy, or a private insurance company with a reinsurance agreement with FCIC or their agents, loss adjusters, employees or contractors.

Estimated Annual Number of Respondents: 45.

Estimated Annual Number of Responses per Respondent: 3.5.

Estimated Annual Number of Responses: 156.

Estimated Total Annual Burden Hours on Respondents: 78.

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 in Washington, DC, on October 16, 2008.

Eldon Gould,

Manager, Federal Crop Insurance Corporation.

[FR Doc. E8–25857 Filed 10–29–08; 8:45 am]

BILLING CODE 3410–08–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Arlington, Virginia, Monday through Wednesday, November 17–19, 2008, at the times and location noted below.

DATES: The schedule of events is as follows:

Monday, November 17, 2008

10:30–Noon Planning and Evaluation Committee.

1:30–3 p.m. Technical Programs Committee.

3–4:30 Accessible Design in Education Ad Hoc Committee.

Tuesday, November 18, 2008

9–Noon Ad Hoc Committee Meetings (Closed to Public): Reports and discussion on public rights-of-way; acoustics; transportation vehicles; outdoor developed areas; airport terminal access; passenger vessels; and information and communications technologies.

2:30–5 p.m. Presentation from the Emergency Transportable Housing Committee.

Wednesday, November 19, 2008

9:30–10:30 a.m. Budget Committee.

10:30–Noon Ad Hoc Committee Meetings (Closed to Public): Continued from the previous day's session.

1:30–3 p.m. Board Meeting.

ADDRESSES: All meetings will be held at The Westin Arlington Gateway Hotel, 801 North Glebe Road, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Acting Executive Director, (202) 272–0010 (voice) and (202) 272–0082 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting, the Access Board will consider the following agenda items:

- Approval of the draft September 2008 Board Meeting Minutes.
- ADA/ABA Accessibility Guidelines; Federal Agency Updates.
- Planning and Evaluation Committee Report.
- Technical Programs Committee Report.
- Budget Committee Report.
- Information and Communications Technologies Ad Hoc Committee Report.
- Transportation Vehicles Ad Hoc Committee Report.
- Outdoor Developed Areas Ad Hoc Committee Report.
- Passenger Vessels Ad Hoc Committee Report.
- Public Rights-of-Way Ad Hoc Committee Report.
- Airport Terminal Access Ad Hoc Committee Report.
- Accessible Design in Education Ad Hoc Committee Report.
- Acoustics Ad Hoc Committee Report.
- Election Assistance Commission Report.

All meetings are accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be available at the Board meeting. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants.

Lisa B. Fairhall,

Deputy General Counsel.

[FR Doc. E8–25842 Filed 10–29–08; 8:45 am]

BILLING CODE 8150–01–P

COMMISSION ON CIVIL RIGHTS

Commission Meeting

U.S. Commission on Civil Rights. Friday, November 7, 2008. 624 Ninth Street, NW., Rm. 540, Washington, DC 20425, 9:30 a.m.

Meeting Agenda

I. Approval of Agenda.
II. Approval of Minutes.
- October 17, 2008 Meeting.

III. Announcements.
IV. Staff Director's Report.
V. Program Planning.
- Project Outline and Discovery Plan for FY 2009 Statutory Report.
- Policy for Commissioner Rebuttals to Concurring and Dissenting Statements in National Office Reports.

VI. State Advisory Committee Issues.
- Illinois SAC.
- Minnesota SAC.

VII. Future Agenda Items.
VIII. Adjourn.

Contact Person for Further Information: Lenore Ostrowsky, Acting Chief, Public Affairs Unit, (202) 376–8582.

Dated: October 28, 2008.

David Blackwood,

General Counsel.

[FR Doc. E8–26067 Filed 10–28–08; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance of the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration (ITA).

Title: Export Information Services Order Forms.

Form Number(s): ITA–4096P.

OMB Control Number: 0625–0143.

Type of Request: Regular submission.

Burden Hours: 1,506.

Number of Respondents: 9,035.

Average Hours per Response: 10 minutes.

Needs and Uses: The Commercial Service (CS) offers a variety of services to enable clients to begin exporting or to expand existing exporting efforts. The CS provides a standard set of services to assist clients with identifying potential overseas partners, establishing meeting programs with appropriate overseas business contacts and providing due diligence reports on potential overseas business partners. The CS also provides other export-related services considered to be of a ''customized nature'' because they do not fit into the standard set of CS export services, but are driven by unique business needs of individual clients.

Before the CS can provide export-related services to clients, specific information is required to determine the client's business objectives and needs. This information collection is designed to elicit such data so that appropriate services can be proposed and conducted to most effectively meet the client's exporting goals. Without these forms the CS is unable to provide services when requested by clients.

The CS requests approval to use the currently approved ''Company Information'' Form for International Partner Search Service (IPS), to include their new Gold Key Service (GKS), by adding a check-box to the form. These two services involve the identification of appropriate potential business partners and require the same type of information about a client's exporting and business needs, therefore one form will be used to meet both functions. The primary difference between IPS and GKS—GKS provides meetings between the clients and the appropriate potential partners that have been identified for them.

The CS would like approval to make slight modifications to the currently approved International ''Company Profile'' Form based upon recommendations from clients. The slight layout and text changes will make the form easier for clients to understand and complete.

CS also seeks approval to replace the currently approved ''Customized Market Research'' Form with a more general Customized Services Form that would be used for a wide variety of customized services, including Customized Market Research. We are moving towards providing more customized solutions to clients to better meet their needs and this change will allow flexibility to tailor our services to precisely meet their unique requirements. The standardized services such as GKS, ICP and IPS are appropriate for a number of clients, but they are not necessarily the best fit for every client. CS would like the flexibility to make slight modifications to the Customized Services Form based upon new client needs that may arise within the next three years and for which we cannot identify at this point in time. As economic and business conditions vary, clients needs may change, and being able to make modifications will allow CS to immediately obtain the information needed to assess the clients' needs, and provide the most effective and appropriate export-related services.

This information collection request also seeks approval to continue the use of the ''U.S. Supplier Search'' Form in which CS obtains information on the product and service needs of international buyers in order for CS to provide details on U.S. suppliers who produce or provide the required products or services.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer,Fax number (202) 395–5806 or via the Internet at *Wendy_L._Liberante@omb.eop.gov.*

Dated: October 24, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–25813 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 070404074–8894–03]

American Indian and Alaska Native Policy Statement

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of final policy statement.

SUMMARY: In preparation for the 2010 Census, the Bureau of the Census (Census Bureau) adopts the following American Indian and Alaska Native (AIAN) policy statement. This final policy outlines the principles to be followed in all Census Bureau interactions with federally recognized AIAN tribal governments. The policy affirms the unique government-to-government relationship that exists between AIAN tribal governments and the Census Bureau and is consistent with the AIAN policy statement adopted by the Department of Commerce (DOC) on March 30, 1995. The adoption of this policy satisfies a long-standing request from AIAN populations, and the Census Bureau believes it will encourage and facilitate greater cooperation from these populations during decennial censuses and help us to better communicate with and enumerate this difficult-to-count population. This Notice also summarizes comments received on the draft AIAN policy statement published in the **Federal Register** on May 23, 2007 (72 FR 28952) and the Census Bureau's response to these comments. The policy statement adopted in this Notice differs from the proposed policy statement as follows: (a) The Introduction section was modified in response to comments received; (b) the definition of Federally Recognized Indian Tribe was modified in response to comments; (c) the definition of trust responsibility was deleted after agency review; (d) the definition of American Indian or Alaska Native Tribal Government was modified after agency review; (e) proposed Policy Principle No. 2 is renumbered as Policy Principle No. 4; (f) proposed Policy Principle No. 3 is renumbered as Policy Principle No. 5; (g) proposed Policy Principle No. 4 was modified in response to comments and is renumbered as Policy Principle No. 2; (h) proposed Policy Principle No. 5 is renumbered as Policy Principle No. 6; (i) proposed Policy Principle No. 6 was modified in response to comments and is renumbered as Policy Principle No. 7; (j) proposed Policy Principle No. 7 is renumbered as Policy Principle No. 8; (k) proposed Policy Principle No. 8 is renumbered as Policy Principle No. 9; and (l) proposed Policy Principle No. 9 was modified in response to comments and is renumbered as Policy Principle No. 3.

DATES: *Effective Date:* This final policy will be effective on December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the final policy should be directed to Dee Alexander, Program Analyst, Decennial Management Division, Outreach and Promotions Branch, U.S. Census Bureau, Room 3H166, 4600 Silver Hill Road, Stop 7100, Washington, DC 20233–7100, telephone (301) 763–9335.

SUPPLEMENTARY INFORMATION:

Background

The government-to-government relationship with Native American tribal governments (adopted by previous administrations) was reaffirmed by President George W. Bush in a White House Memorandum dated September 23, 2004. Among other things, this memorandum directs the heads of executive agencies to continue to ensure that, to the greatest extent practicable and permitted by U.S. law, the agency's working relationship with federally recognized tribal governments fully respect the rights of self-government and self-determination due tribal governments. Pursuant to an earlier White House Memorandum of April 29, 1994, the DOC adopted an AIAN policy statement on March 30, 1995. The Census Bureau is now adopting the AIAN policy statement set forth in this notice, which is consistent with the previously cited Presidential Memoranda and the DOC policy statement.

This final policy statement is intended only for internal management purposes and does not create any right, benefit, or trust responsibility enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person. The Census Bureau believes that this final policy statement will contribute to the accuracy of the 2010 Decennial Census by improving communications and encouraging greater cooperation with difficult-to-count populations.

Summary of Comments Received in Response to the Draft American Indian and Alaska Native Policy Statement

The Census Bureau published a Notice and request for comments on a draft American Indian and Alaska Native (AIAN) policy statement in the **Federal Register** on May 23, 2007—(72 FR 28952). We received 13 comments in response to the draft AIAN policy statement. A summary of comments received and the Census Bureau's responses to these comments are presented below.

(1) One commenter suggested that the words ''executive orders'' be inserted in the Introduction section of the policy statement. The Census Bureau accepted this suggestion since it is consistent with the fundamental principles of the Federal Government's government-to-government relationship with federally recognized tribes that includes executive orders issued by the White House (*e.g.*, Executive Order 13175 of November 6, 2000—''Consultation and Coordination with Indian Tribal Governments'').

(2) One commenter suggested that the word ''political'' be inserted before the word ''status'' in the definition of *Federally Recognized Indian Tribes.* The Census Bureau accepted this suggestion and added the words ''and legal'' to this definition since both terms have been used to describe the relationship between the United States and AIAN populations (See, *e.g.*, White House Memorandum of September 23, 2004—''Government-to-Government Relations with Native American Tribal Governments'').

(3) One commenter suggested adding the words ''and individuals'' to the definition of *Trust Responsibility.* The Census Bureau has determined to delete this definition from its policy statement since it does not exercise trust responsibilities as that term is commonly used in treaties, statutes, executive orders, and regulations

governing the relationship between the United States and AIAN populations.

(4) Two commenters suggested inserting the words ''on and off reservations'' after the words ''AIAN areas'' in proposed Policy Principles No. 2, 5, and 6. For similar reasons, one commenter suggested inserting the phrase ''living in AIAN areas on and off reservations'' after the word ''resident'' in proposed Policy Principle No. 8. The commenter noted that the proposed policy statement mentions that special attention will be paid to those living in an AIAN area. The commenter asked the Census Bureau to consider the unique situations of tribal members who do not live in their tribal membership area or the geographic AIAN area as that term is used by the Census Bureau. ''American Indian and Alaska Native areas'' are very specialized terms used by the Census Bureau to describe the collection of data during decennial censuses. During Census 2000, this term was the subject of a single **Federal Register** Notice (*See*, 65 FR 39062). For the 2010 Census, we will make these terms the subject of separate **Federal Register** Notices (*See*, 73 FR 14203 and 73 FR 17303). The Census Bureau does not adopt the suggestion to modify the term ''AIAN areas'' since we believe the generic term is adequate for purposes of this Policy statement and is likely to generate less confusion with respect to the use and meaning of the term in other Census Bureau notices. However, the Census Bureau adopts the suggestion to insert the phrase ''living in AIAN areas'' after the word ''resident'' in proposed Policy Principle No. 8.

(5) A commenter suggested inserting the words ''and implementation'' after the word ''planning'' in proposed Policy Principle No. 3. The commenter stated that Principle No. 3 refers to planning only and should include tribal government's involvement in the implementation process. The Census Bureau accepted this suggestion since it is consistent with the Census Bureau's commitment and current practice to work in partnership with tribal governments when conducting census activities within tribal communities.

(6) One commenter suggested that the following text should be added to proposed Policy Principle No. 4. ''The Census Bureau acknowledges the trust relationship between the federal government and AIAN tribes as established by specific statues, treaties, court decisions, executive orders, regulations and policies.'' This commenter also suggested that proposed Policy Principle No. 4 should be given greater prominence by renumbering it as Policy Principle No. 2. The commenter recommends that the Census Bureau AIAN policy be restated so that it is consistent with DOC's AIAN policy and clarifies the Bureau's intent to consult with tribal nations prior to taking any action affecting tribes. The Census Bureau adopts these suggestions since they bring the Census Bureau's policy in alignment with the text of the DOC's AIAN Policy Statement.

(7) One commenter suggested adding the words ''tribal protocols'' after the word ''distinct'' to proposed Policy Principle No. 6 and another suggested adding the word ''values'' after the word ''cultural.'' The commenter stated that many tribal governments now have research protocols that govern data collection on their lands and from tribal members. Using tribal protocols will also mean that tribes will be aware of and plan for Census Bureau count activities. The Census Bureau accepts these suggestions since they are consistent with the other terms found in proposed Policy Principle No. 6.

(8) One commenter suggested adding the words ''and work'' after the word ''consult'' and the phrase ''and throughout the planning and implementation of policy, rules or'' after the word ''decisions'' to proposed Policy Principle No. 9 and renumber Policy Principle No. 9 as Policy Principle No. 3. The commenter stated further that these changes would make the Census Bureau AIAN policy consistent with DOC's AIAN policy and clarify the Bureau's intent to consult with tribal nations prior to taking any action affecting tribes. The Census Bureau adopts these suggestions since they are consistent with the Bureau's current practice regarding collaborative efforts with AIAN populations and combining the two principles results in a more streamlined statement.

(9) A commenter suggested inserting the words ''or regional or village corporation'' after the words ''including any Alaska Native village'' in the definition of *Federally Recognized Indian Tribe*. As the basis for this suggestion, the commenter cited the definition of *Federally recognized tribe* in the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) that includes the word ''regional'' and recognizes as tribes regional corporations established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). The Census Bureau does not adopt this suggestion because the definition in the proposed Policy Statement is consistent with the text in the definition for Indian tribe (or tribe) in the DOC AIAN Policy Statement on which the Census Bureau's Policy Statement is based.

(10) The Census Bureau received two comments that were outside the scope and nature of the AIAN policy statement. One comment expressed concern about the Local Update of Census Addresses (LUCA) program. The Census Bureau acknowledged the comment with a formal letter discussing a Census Bureau program change for the LUCA program. A second comment expressed general concerns about the AIAN policy statement, the LUCA program, and the AIAN Geographic Program. The Census Bureau acknowledged the comment with a formal letter.

Changes to Draft American Indian and Alaska Native Policy Statement as a Result of Public Comments and Further Agency Review

The Census Bureau makes the following changes to the draft AIAN policy statement.

(A) Section I—Introduction

Insert the words ''executive orders'' after the words ''court decisions'' so that the sentence now reads as follows: ''This relationship is based on the United States Constitution, federal treaties, policy, law, court decisions, executive orders, and the on-going political relationship among tribes and the federal government. The relationship results in a federal trust responsibility to federally recognized tribal governments.''

(B) Section II—Definitions

(i) Under the definition of *Federally Recognized Indian Tribe,* insert the words ''political and legal'' in front of the word ''status,'' so that the revised phrase now reads as follows: ''relationships established by the United States for indigenous people because of their political and legal status as AIAN tribes, Bands, Nations, Pueblos or communities.''

(ii) Modify the definition of American Indian and Alaska Native Tribal Government to read as follows: ''The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that the Secretary of the Interior recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians by annual notice in the **Federal Register** pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454, 108 Stat. 4791). The most recent annual notice (''Indian Entities Recognized and Eligible to Receive Services from the United States

Bureau of Indian Affairs'') was published in the **Federal Register** on April 4, 2008 (73 FR 18553). The Census Bureau is making this modification to clarify the process to be used to determine the tribal entities covered by the Bureau's AIAN policy statement.

(C) Section III—Policy Principles

(i) Policy Principle No. 2 is renumbered as Policy Principle No. 4.

(ii) Under proposed Policy Principle No. 3, insert the words ''and implementation'' after the word ''planning.'' The principle is renumbered as Policy Principle No. 5 and now reads as follows:

5. ''The Census Bureau recognizes and invites tribal governments involvement in the Census Bureau planning and implementation for censuses and surveys toward ensuring the most accurate counts and data for the AIAN population.''

(iii) Under proposed Policy Principle No. 4, at the beginning of the principle's text—insert the following sentence:

''The Census Bureau acknowledges the trust relationship between the federal government and AIAN Tribes as established by specific statutes, treaties, court decisions, executive orders, regulations, and policies.'' Proposed Policy Principle No. 4 is renumbered as Policy Principle No. 2 and now reads as follows:

2. ''The Census Bureau acknowledges the trust relationship between the federal government and AIAN Tribes as established by specific statutes, treaties, court decisions, executive orders, regulations, and policies. The Census Bureau's procedures for outreach, notice, and consultation will ensure involvement of AIAN tribal governments, to the extent practicable and permitted by law, before making decisions or implementing policies, rules, or programs that affect federally recognized governments.''

(iv) Proposed Policy Principle No. 5 is renumbered as Policy Principle No. 6.

(v) Under proposed Policy Principle No. 6, insert the words ''tribal protocols'' after the word ''distinct'' and insert the word ''values'' after the word ''cultural.'' Proposed Policy Principal No. 6 is renumbered as Policy Principle No. 7 and now reads as follows:

7. ''The Census Bureau recognizes that there are distinct tribal protocols, cultural values, practices, religious beliefs, traditions, climate conditions, as well as a tribe's authority over its land areas that must be considered and abided by when conducting any census survey in AIAN areas.''

(vi) Proposed Policy Principle No. 7 is renumbered as Policy Principle No. 8.

(vii) Under proposed Policy Principle No. 8, insert the phrase ''living in AIAN areas'' after the word ''resident.'' Proposed Policy Principle No. 8 is renumbered as Policy Principle No. 9 and now reads as follows:

9. ''The Census Bureau acknowledges its responsibility to provide accurate demographic and economic data on AIAN populations and their businesses. The Census Bureau will work with tribal governments and other partners to encourage the participation of every resident living in AIAN areas.

(viii). Under proposed Policy Principle No. 9:

(a) Insert the words ''and work'' after the word ''consult.''

(b) Add the phrase ''and throughout the planning and implementation of policy, rules or'' after the word ''decisions.''

(c) Renumber this Policy Principle as Policy Principle No. 3. This principle now reads as follows:

3. ''The Census Bureau will consult and work with AIAN tribal governments before making decisions and throughout the planning and implementation of policy, rules, or programs that may affect tribes to ensure that tribal rights and concerns are addressed. Consultation will provide, but is not limited to, mutually agreed-upon protocols for timely communication, coordination, cooperation, and collaboration.''

American Indian and Alaska Native Policy of the U.S. Census Bureau

Introduction

The U.S. Census Bureau hereby proclaims its American Indian and Alaska Native (AIAN) policy. This Policy outlines the principles to be followed in all Census Bureau interactions with federally recognized AIAN tribal governments. It reaffirms the unique government-to-government relationship that exists between AIAN tribal governments and the Census Bureau.

This relationship is based on the United States Constitution, federal treaties, policy, law, court decisions, executive orders, and the ongoing political relationship among tribes and the Federal Government. The relationship results in a federal trust responsibility to federally recognized tribal governments.

The foundation for this policy statement is the White House Memorandum of September 23, 2004, ''Government-to-Government Relations with Native American Tribal Governments'' and the AIAN policy of the U.S. Department of Commerce of March 30, 1995. This policy is for internal management only and does not grant or vest any right to any party in respect to any federal action not otherwise granted or vested by existing law or regulations.

Definitions

Federally Recognized Indian Tribe: Any AIAN, Band, Nation, Pueblo, or other organized group or community, including any Alaska Native village, as defined or established pursuant to the Alaska Native Claims Settlement Act (Title 43, United States Code (U.S.C.), Chapter 33, Section 1601 *et seq.*), acknowledged by the Federal Government to constitute a tribe with a government-to-government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for indigenous people because of their political and legal status as AIAN tribes, Bands, Nations, Pueblos, or communities.

American Indian and Alaska Native Tribal Government: The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that the Secretary of the Interior recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians by annual notice in the **Federal Register** pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454, 108 Stat. 4791). The most recent annual notice (''Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs'') was published in the **Federal Register** on April 4, 2008 (73 FR 18553).

Policy Principles

The following policy statements provide general guidelines to Census Bureau employees for actions dealing with AIAN governments.

(1) The Census Bureau recognizes the unique government-to-government relationship between the United States and federally recognized AIAN tribal governments, as affirmed by the September 23, 2004, White House Memorandum for the Heads of Executive Departments and Agencies and the AIAN policy of the DOC.

(2) The Census Bureau acknowledges the trust relationship between the federal government and AIAN tribes as established by specific statutes, treaties, court decisions, executive orders, regulation, and policies. The Census Bureau's procedures for outreach, notice, and consultation will ensure involvement of AIAN tribal

governments, to the extent practicable and permitted by law, before making decisions or implementing policies, rules, or programs that affect federally recognized tribal governments.

(3) The Census Bureau will consult and work with AIAN tribal governments before making decisions and throughout the planning and implementation of policy, rules, or programs that may affect tribes to ensure that tribal rights and concerns are addressed. Consultation will provide for, but is not limited to, mutually agreed-upon protocols for timely communication, coordination, cooperation, and collaboration.

(4) The Census Bureau recognizes each tribal government as a functioning governing body that the Census Bureau will work with to count and collect data, as accurately as possible, of all residents living in AIAN areas.

(5) The Census Bureau recognizes and invites tribal governments' involvement in the Census Bureau planning and implementation for censuses and surveys toward ensuring the most accurate counts and data for the AIAN population.

(6) The Census Bureau will continue its partnerships with tribal governments to enhance awareness of all censuses, surveys, and geography programs, particularly those including residents living in AIAN areas.

(7) The Census Bureau recognizes that there are distinct tribal protocols, cultural values, practices, religious beliefs, traditions, and climate conditions, as well as a tribe's authority over its land areas, that must be considered and abided by when conducting any census or survey in AIAN areas.

(8) The Census Bureau recognizes the importance of effective and efficient coordination with other federal agencies in the planning process of any census or survey that will include AIAN tribal governments.

(9) The Census Bureau acknowledges its responsibility to provide accurate demographic and economic data on AIAN populations and their businesses. The Census Bureau will work with tribal governments and other partners to encourage the participation of every resident living in AIAN areas.

Therefore, the Director of the Census Bureau hereby directs all directorates and their components (divisions, branches, and offices) to implement this policy by incorporating all of the above principles in their interactions with federally recognized AIAN tribal governments.

Executive Order 12866

This Notice has been determined to be not significant under Executive Order 12866.

Dated: October 21, 2008.

Steve H. Murdock,

Director, Bureau of the Census.

[FR Doc. E8–25848 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 54–2008]

Foreign–Trade Zone 38 – Spartanburg, South Carolina

Application for Subzone Status adidas Sales, Inc.

(Athletic Footwear and Apparel Distribution)

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the South Carolina State Ports Authority, grantee of FTZ 38, requesting special–purpose subzone status for the footwear and apparel warehousing and distribution facility of adidas Sales, Inc. (adidas), located in Spartanburg, South Carolina. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on October 20, 2008.

The adidas facility (1,959,293 sq. ft. /251 acres, 1,300 employees) is located at 685 Cedar Crest Road, Spartanburg, South Carolina. The facility is used for warehousing and distribution of foreign– origin apparel for the U.S. market and export. FTZ procedures would be utilized to support adidas' U.S.–based distribution activity. Finished apparel products to be admitted to the proposed subzone for distribution would include men's, boys', women's and girls' shoes, coats, suits, blouses, shirts, tops, jumpers, underwear, hosiery, pajamas, athletic wear, scarves, shawls, mufflers, gloves/ mittens, and infants' apparel. Certain textile fabrics (wool, cotton, man–made fiber) would also be distributed from the proposed subzone. Additional products that would be admitted to the proposed subzone for distribution are umbrellas, various instruments, sporting goods, sunglasses, cameras, jewelry, plates, leather goods, boxes, cases and paints. All foreign–origin apparel and textile products that are subject to quotas will be admitted to the proposed subzone under privileged foreign status (19 CFR § 146.41) or domestic (duty paid) status (19 CFR § 146.43). The applicant is not seeking manufacturing or processing authority with this request.

FTZ procedures would exempt adidas from customs duty payments on foreign products that are re–exported (about 2% of shipments). On domestic sales, duty payments would be deferred until the foreign merchandise is shipped from the facility and entered for U.S. consumption. Certain logistical/supply chain management savings would also be realized through subzone status. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Claudia Hausler of the FTZ Staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 29, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15–day period to January 13, 2009.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: Greenville U.S. Department of Commerce Export Assistance Center, Buck Mickel Center at Greenville Technical College, 216 S. Pleasantburg Drive, Suite 243, Greenville, South Carolina; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230–0002. For further information, contact Claudia Hausler at Claudia_Hausler@ita.doc.gov, or (202) 482–1379.

Dated: October 22, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–25950 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL52

Fisheries of the South Atlantic; Southeastern Data, Assessment, and Review (SEDAR); Atlantic red drum; Public Meeting

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

ACTION: Notice of SEDAR Workshops for Atlantic red drum.

SUMMARY: The SEDAR assessments of the Atlantic stock of red drum will consist of a series of three workshops: a Data Workshop, an Assessment Workshop, and a Review Workshop. This is the eighteenth SEDAR. See **SUPPLEMENTARY INFORMATION**.

DATES: The Data Workshop will take place February 9–13, 2009; the Assessment Workshop will take place June 1–5, 2009; the Review Workshop will take place August 24–28, 2009. See **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The Data Workshop will be held at the Hilton Garden Inn, 5265 International Boulevard, North Charleston, SC 29418; telephone: (800) 782–9444 or (843) 308–9330. The Assessment Workshop will be held at the Hilton Garden Inn, 5265 International Boulevard, North Charleston, SC 29418; telephone: (800) 782–9444 or (843) 308–9330. The Review Workshop will be held at the Doubletree Buckhead, Atlanta, 3342 Peachtree Road, NE, Atlanta, GA 30326; telephone: (800) 222–8733 or (404) 231–1234.

FOR FURTHER INFORMATION CONTACT: Dale Theiling, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Peer Review Evaluation Report documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils; the Atlantic and Gulf States Marine Fisheries Commissions; and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

SEDAR 18 Workshop Schedule:

February 9–13, 2009; SEDAR 18 Data Workshop

February 9, 2009: 1 p.m.- 8 p.m.; February 10–12, 2009: 8 a.m. - 8 p.m.; February 13, 2009: 8 a.m. - 1 p.m.

An assessment data set and associated documentation will be developed during the Data Workshop. Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

June 1–5, 2009; SEDAR 18 Assessment Workshop

June 1, 2009: 1 p.m. - 8 p.m.; June 2–4, 2009: 8 a.m. - 8 p.m.; June 5, 2009: 8 a.m. - 1 p.m.

Using datasets provided by the Data Workshop, participants will develop population models to evaluate stock status, estimate population benchmarks and Sustainable Fisheries Act criteria, and project future conditions. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters. Participants will prepare a workshop report, compare and contrast various assessment approaches, and determine whether the assessments are adequate for submission to the review panel.

August 24–28, 2009; SEDAR 18 Review Workshop

August 24, 2009: 1 p.m. - 8 p.m.; August 25–27, 2009: 8 a.m. - 8 p.m.; August 28, 2009: 8 a.m. - 1 p.m.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Peer Review Evaluation Report.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305 (c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Dated: October 27, 2008.

Tracey L. Thompson

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

[FR Doc. E8–25906 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Rules for Patent Maintenance Fees

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), 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 the revision of a continuing information collection, as required by the Paperwork Reduction Act of 1995,

Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before December 29, 2008.

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

- *E-mail: Susan.Fawcett@uspto.gov*. Include ''0651–0016 comment'' in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal Rulemaking Portal: http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Robert A. Clarke, Director, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7735; or by e-mail to *Robert.Clarke@uspto.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Under 35 U.S.C. 41 and 37 CFR 1.20(e)–(i) and 1.362–1.378, the United States Patent and Trademark Office (USPTO) charges fees for maintaining in force all utility patents based on applications filed on or after December 12, 1980. Payment of these maintenance fees is due at 3½, 7½, and 11½ years after the date the patent was granted. If the USPTO does not receive payment of the appropriate maintenance fee and any applicable surcharge within a grace period of six months following each of the above due dates (at 4, 8, or 12 years after the date of grant), the patent will expire at that time. After a patent expires, it is no longer enforceable. Maintenance fees are not required for design or plant patents, or for reissue patents if the patent being reissued did not require maintenance fees.

Payments of maintenance fees that are submitted during the six-month grace period before patent expiration must include the appropriate surcharge as indicated by 37 CFR 1.20(h). Submissions of maintenance fee payments and surcharges must include the relevant patent number and the corresponding United States application number in order to identify the correct patent and ensure proper crediting of the fee being paid.

If the USPTO refuses to accept and record a maintenance fee payment that was submitted prior to the expiration of a patent, the patentee may petition the Director to accept and record the maintenance fee under 37 CFR 1.377. This petition must be accompanied by the fee indicated in 37 CFR 1.17(g), which may be refunded if it is determined that the refusal to accept the maintenance fee was due to an error by the USPTO.

If a patent has expired due to nonpayment of a maintenance fee, the patentee may petition the Director to accept a delayed payment of the maintenance fee under 37 CFR 1.378. The Director may accept the payment of a maintenance fee after the expiration of the patent if the petitioner shows to the satisfaction of the Director that the delay in payment was unavoidable or unintentional. Petitions to accept unavoidably or unintentionally delayed payment must also be accompanied by the required maintenance fee and appropriate surcharge under 37 CFR 1.20(i). If the Director accepts the maintenance fee payment upon petition, then the patent is reinstated. If the USPTO denies a petition to accept delayed payment of a maintenance fee in an expired patent, the patentee may petition the Director to reconsider that decision under 37 CFR 1.378(e). This petition must be accompanied by the fee indicated in 37 CFR 1.17(f), which may be refunded if it is determined that the refusal to accept the maintenance fee was due to an error by the USPTO.

The rules of practice (37 CFR 1.33(d) and 1.363) permit applicants, patentees, assignees, or their representatives of record to specify a ''fee address'' for correspondence related to maintenance fees that is separate from the correspondence address associated with a patent or application. A fee address must be an address that is associated with a USPTO customer number. Customer numbers may be requested by using the Request for Customer Number form (PTO/SB/125), which is covered under OMB Control Number 0651–0035 ''Representative and Address Provisions.'' Maintaining a correct and updated address is necessary so that fee-related correspondence from the USPTO will be properly received by the applicant, patentee, assignee, or authorized representative. If a separate fee address is not specified for a patent or application, the USPTO will direct fee-related correspondence to the correspondence address of record.

The USPTO offers forms to assist the public with providing the information covered by this collection, including the information necessary to submit a patent maintenance fee payment (PTO/SB/45), to file a petition to accept an unavoidably or unintentionally delayed maintenance fee payment in an expired patent (PTO/SB/65 and PTO/SB/66), and to designate or change a fee address (PTO/SB/47). No forms are provided for the petitions under 37 CFR 1.377 and 1.378(e).

Customers may submit maintenance fee payments and surcharges incurred during the six-month grace period before patent expiration by using the Maintenance Fee Transmittal Form or by paying online through the USPTO Web site. However, to pay a maintenance fee after patent expiration, the maintenance fee payment and the appropriate surcharge must be filed together with a petition to accept unavoidably or unintentionally delayed payment. The USPTO accepts online maintenance fee payments by credit card, electronic funds transfer (EFT), or deposit account through the USPTO Web site. Otherwise, non-electronic payments may be made by check, credit card, or USPTO deposit account.

Customers may submit the other forms and petitions in this collection electronically through EFS–Web, the USPTO's online filing system. The USPTO also offers a special EFS–Web version of Form PTO/SB/66, which is used for the automatic processing and immediate rendering of a decision on a petition to accept an unintentionally delayed maintenance fee payment.

II. Method of Collection

By mail, facsimile, hand delivery, or electronically to the USPTO.

III. Data

OMB Number: 0651–0016.

Form Number(s): PTO/SB/45/47/65/66.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Estimated Number of Respondents: 470,397 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public approximately 20 seconds (0.006 hours) to 8 hours to complete this information, depending on the form or petition. This includes time to gather the necessary information, prepare the form or petition, and submit the completed request.

Estimated Total Annual Respondent Burden Hours: 33,426 hours per year.

Estimated Total Annual Respondent Cost Burden: $4,632,630 per year. The USPTO expects that the petitions included in this collection will be prepared by attorneys. Using the professional rate of $310 per hour for

associate attorneys in private firms, the USPTO estimates that the respondent cost burden for submitting these petitions will be approximately $1,904,330 per year. The USPTO expects that the other items in this collection will be prepared by paraprofessionals. Using the paraprofessional rate of $100 per hour, the USPTO estimates that the respondent cost burden for submitting the other items in this collection will be approximately $2,728,300 per year, for a total annual respondent cost burden of approximately $4,632,630.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Maintenance Fee Transmittal Transactions (PTO/SB/45)	5 minutes	204,005	16,320
Electronic Maintenance Fee Transactions	20 seconds	136,003	816
Petition to Accept Unavoidably Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(b)) (PTO/SB/65).	8 hours	172	1,376
Petition to Accept Unintentionally Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(c)) (PTO/SB/66).	1 hour	2,351	2,351
Petition to Accept Unintentionally Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(c)) (PTO/SB/66)—EFS–Web.	1 hour	800	800
Petition to Review Refusal to Accept Payment of Maintenance Fee Prior to Expiration of Patent (37 CFR 1.377).	4 hours	54	216
Petition for Reconsideration of Decision on Petition Refusing to Accept Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(e)).	8 hours	175	1,400
"Fee Address" Indication Form (PTO/SB/47)	5 minutes	126,837	10,147
Total		470,397	33,426

Estimated Total Annual Non-hour Respondent Cost Burden: $614,571,323. There are no capital start-up costs or maintenance costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of filing fees, postage costs, and recordkeeping costs.

This collection has filing fees in the form of patent maintenance fees, surcharges for late payment of maintenance fees, and petition fees. Under 37 CFR 1.20(e)–(g), the patent maintenance fees due at 3½ years, 7½ years, and 11½ years after the date of grant are $980, $2,480, and $4,110 respectively (discounted to $490, $1,240, and $2,055 for small entities). The surcharge under 37 CFR 1.20(h) for paying a maintenance fee during the six-month grace period following the above intervals is $130 ($65 for small entities). The surcharge under 37 CFR 1.20(i) for a petition to accept a maintenance fee after the six-month grace period for these intervals has expired is $700 where the delayed payment is shown to be unavoidable and $1,640 where the delayed payment is shown to be unintentional. The filing fee listed in 37 CFR 1.17(g) for a petition to review the refusal to accept the payment of a maintenance fee filed prior to the expiration of a patent is $200. The filing fee listed in 37 CFR 1.17(f) for a petition for reconsideration of the decision on a petition refusing to accept the delayed payment of a maintenance fee in an expired patent is $400. The USPTO estimates that the total filing costs associated with this collection will be $614,442,370 per year as calculated in the accompanying table.

Fee or surcharge	Estimated annual responses	Amount of fee or surcharge	Estimated annual filing costs
Patent maintenance fee at 3½ years	114,683	$980.00	$112,389,340.00
Patent maintenance fee at 3½ years (small entity)	31,479	490.00	15,424,710.00
Patent maintenance fee at 7½ years	95,973	2,480.00	238,013,040.00
Patent maintenance fee at 7½ years (small entity)	23,940	1,240.00	29,685,600.00
Patent maintenance fee at 11½ years	46,752	4,110.00	192,150,720.00
Patent maintenance fee at 11½ years (small entity)	9,611	2,055.00	19,750,605.00
Surcharge for paying maintenance fee during the six-month grace period	7,961	130.00	1,034,930.00
Surcharge for paying maintenance fee during the six-month grace period (small entity)	9,609	65.00	624,585.00
Petition to Accept Unavoidably Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(b))	172	700.00	120,400.00
Petition to Accept Unintentionally Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(c))	3,151	1,640.00	5,167,640.00
Petition to Review Refusal to Accept Payment of Maintenance Fee Prior to Expiration of Patent (37 CFR 1.377)	54	200.00	10,800.00
Petition for Reconsideration of Decision on Petition Refusing to Accept Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(e))	175	400.00	70,000.00
"Fee Address" Indication Form	126,837	0.00	0.00
Total	470,397		614,442,370.00

The public may submit the forms and petitions in this collection to the USPTO by mail through the United States Postal Service. If the submission is sent by first-class mail, the public may also include a signed certification of the date of mailing in order to receive credit for timely filing. The USPTO estimates that the average first-class postage cost for a mailed submission will be 42 cents, and that approximately 255,841 submissions per year may be

mailed to the USPTO, for a total postage cost of approximately $107,453 per year.

The recordkeeping costs for this collection are associated with submitting maintenance fee payments, forms, and petitions online through the USPTO Web site. It is recommended that customers who submit fee payments and documents online print and retain a copy of the acknowledgment receipt as evidence of the successful transaction. The USPTO estimates that it will take 5 seconds (0.001 hours) to print a copy of the acknowledgment receipt and that approximately 214,556 maintenance fee payments, forms, and petitions will be submitted online, for a total of 215 hours per year for printing this receipt. Using the paraprofessional rate of $100 per hour, the USPTO estimates that the recordkeeping cost associated with this collection will be approximately $21,500 per year.

The total non-hour respondent cost burden for this collection in the form of filing fees, postage costs, and recordkeeping costs is estimated to be $614,571,323 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.*, the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 24, 2008.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division.

[FR Doc. E8–25886 Filed 10–29–08; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Acquisition of Lands and Establishment of Airspace Contiguous to the Marine Corps Air Ground Combat Center, Twentynine Palms, CA

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to section (102)(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)), as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the Department of the Navy announces its intent to prepare an Environmental Impact Statement (EIS) to study alternatives for meeting Marine Corps Marine Expeditionary Brigade (MEB) sustained, combined arms, live-fire and maneuver training requirements. The proposed action is to request the withdrawal of federal public lands, acquire state and privately owned lands, and to seek the establishment of Special Use Airspace with the effect of expanding the Marine Corps Air Ground Combat Center (MCAGCC), Twentynine Palms, California. The Department of the Navy will prepare the EIS in cooperation with the Bureau of Land Management and Federal Aviation Administration.

DATES: All written, oral, or telephonic comments regarding the scope of issues that the Department of the Navy should consider during EIS preparation must be received before January 31, 2009. Three public scoping meetings have been scheduled and the meeting locations are as follows:

1. December 3, 2009, 5 p.m. to 9 p.m., Twentynine Palms, CA;
2. December 4, 2009, 5 p.m. to 9 p.m., Victorville, CA;
3. December 5, 2009, 5 p.m. to 9 p.m., Ontario, CA.

ADDRESSES: Written comments or requests for inclusion on the EIS mailing list may be submitted to Project Manager (*Attn:* Mr. Joseph Ross), Box 788104, Bldg 1554, Rm 138, MAGTFTC/MCAGCC, Twentynine Palms, CA 92278–8104. Public meeting locations are as follows:

1. Twentynine Palms Junior High School, Hay's Gym, 5798 Utah Trail, Twentynine Palms, CA;
2. Hilton Garden Inn Victorville, 12603 Mariposa Road, Victorville, CA;
3. Convention Center, 2000 E. Convention Center Way, Ontario, CA.

FOR FURTHER INFORMATION CONTACT: Project Manager (*Attn:* Mr. Joseph Ross), Box 788104, Bldg 1554, Rm 138, MAGTFTC/MCAGCC, Twentynine Palms, CA 92278–8104; *phone:* 760–830–3764; *e-mail: SMBPLMSWEBPAO@usmc.mil.*

SUPPLEMENTARY INFORMATION: Each of the three scoping meetings will consist of an informal, open house session with information stations staffed by Marine Corps representatives. Public comment forms will be available and gathered at the information stations, and a stenographer will be available to take oral comments for inclusion in the record. Details of the meeting locations will be announced in local newspapers. Additional information concerning meeting times and the proposed alternatives will be available on the EIS Web site located at *http://www.29palms.usmc.mil/las.*

The meetings are designed to solicit input from agencies and the affected public regarding issues or interests that should be studied or the reasonable alternatives that should be considered for study to meet Marine Corps Marine Expeditionary Brigade (MEB) sustained, combined arms, live-fire and maneuver training requirements. The public is welcome to comment orally or by written comment forms at the meeting; or, by sending a letter to Mr. Joe Ross, Project Manager, 29Palms Proposed Training Land/Airspace Acquisition Project, MAGTFTC/MCAGCC, Bldg 1554, Box 788104, Twentynine Palms, CA 92278–8104; by an e-mail to *SMBPLMSWEBPAO@usmc.mil;* or by voice mail at 760–830–3764.

The EIS will consider alternatives for the proposed acquisition of training land and accompanying Special Use Airspace sufficient to meet the training requirements for three MEB battalions, as a Ground Combat Element, and a correspondingly sized Air Combat Element to simultaneously maneuver for 48–72 hours, using combined-arms and live fire with their supporting Logistics Combat Element and Command Element. To meet MEB training requirements which utilize weapons systems and platforms currently and foreseeable in the Marine Corps inventory, more contiguous military range land and airspace than is now available for training anywhere in the United States would be required.

The requirement for MEB training reflects a shift in doctrine that emerged in the 1990s that placed the MEB as the premier fighting force that would be deployed to world crises in the foreseeable future. The Marine Corps studied locations nationwide that might meet the training requirements and concluded that the Southwest Region

range complex is the best location to meet them. This study further determined that expansion at MCAGCC would be necessary to meet the sustained MEB training requirement for a three battalion Ground Combat Element to maneuver to a single objective. MCAGCC is the Marine Corps' service-level training facility for Marine Air Ground Task Force training, the place through which nearly all Marine Corps units rotate for training before deployment.

The Marine Corps is studying various alternatives to meet MEB training requirements at MCAGCC Twentynine Palms, CA. At this time, it is anticipated that the EIS will evaluate five action alternatives and the No Action Alternative. The EIS will also consider any other reasonable alternatives that are subsequently identified during scoping or the preparation of the document. The Marine Corps will also evaluate opportunities for co-use of the land, as part of the evaluation of alternatives. The following is a summary of the alternatives that are currently proposed to be studied in the Environmental Impact Statement.

Alternative 1 would add approximately 188,000 acres to the West of the base and approximately 22,000 acres to the South of the base, and accompanying Special Use Airspace. During a MEB training exercise, three battalions would begin movement in a westerly direction from different starting positions in the current MCAGCC range complex area and converge on a single objective in the western part of what is called ''Johnson Valley,'' conducting live-fire from ground- and air-based combat elements throughout the training exercise. During non-MEB training periods, any newly acquired installation lands would be used for live-fire, combined arms training and other military training of smaller units. With regard to any Special Use Airspace, this alternative would establish Restricted Airspace over the Western Area to accommodate live-fire from aviation and surface units. Special Use Airspace over the proposed Southern expansion area would need to be converted from Military Operational Airspace to Restricted Airspace.

Alternative 2 would add approximately 112,000 acres to the West of the base, the same 22,000 acres to the South as in Alternative 1, and accompanying Special Use Airspace. During a MEB training exercise, three battalions would begin movement in a westerly direction from different starting positions in the current MCAGCC range complex area and converge on a single objective in the center of what is called ''Johnson Valley,'' conducting live-fire from ground- and air-based combat elements throughout the training exercise. During non-MEB training periods, any newly acquired installation lands would be used for live-fire, combined arms training and other military training of smaller units. With regard to Special Use Airspace, this alternative would establish Restricted Airspace over the Western Area to accommodate combined arms live-fire from aircraft in support of the Ground Combat Element and would determine whether the current Special Use Airspace over the proposed Southern expansion area would need to be converted from Military Operational Airspace to Restricted Airspace.

Alternative 3 would add the same 22,000 acres of land in the South as would be added in Alternatives 1 and 2 and would add approximately 228,000 acres to the East of the base. During a MEB training exercise, two battalions would begin movement from starting positions to the east of the MCAGCC current range complex and travel together in a westerly direction before separating for individual movement once aboard the current MCAGCC. The third battalion would begin movement in a westerly direction from a starting position in the southern portion of the current range complex. All three battalions would maneuver toward a single objective in the northwest portion of the current range complex. The two battalions that would start in the proposed new areas to the east would conduct live-fire from ground- and air-based combat elements once aboard the current MCAGCC range complex, and the third battalion would be able to conduct live fire from ground- and air-based combat elements throughout the training exercise. During non-MEB training periods, any newly acquired installation lands to the east would be used for live small arms fire and other military training of smaller units, and any newly acquired installation lands in the south would be used for live-fire, combined arms training and other military training of smaller units. In this alternative, it is possible that no additional Special Use Airspace would need to be established, or that any current Special Use Airspace would need to be modified.

Alternative 4 would add the same 188,000 acres to the west of the current installation and approximately 22,000 acres to the south of the installation as are contained in Alternative 1. During a MEB training exercise, three battalions would begin movement in an easterly direction from different starting positions in what is called ''Johnson Valley'' and assault different objectives in the eastern portion of the current range complex and in the proposed southern expansion area. Live-fire training in the western expansion area would be limited to non-dud producing ordnance, with dud-producing ordnance only targeted within the current range boundary. Non-MEB training events would be subject to the same restrictions. With respect to Special Use Airspace, this alternative would establish Restricted Airspace over the Western and Southern Areas to accommodate combined arms live-fire from aviation and surface units.

Alternative 5 would add the same 188,000 acres of land to the west of the base as in Alternatives 1 and 4. During a MEB training exercise, three battalions would begin movement in an easterly direction from separate starting positions in ''Johnson Valley.'' Two battalions would attack separate objectives in the current range complex, and the third battalion would attack the Combined Arms Military Operations in Urban Terrain (CA MOUT) facility in the current range complex. Live-fire training in the western expansion area would be limited to non-dud producing ordnance, with dud-producing ordnance only targeted within the current range boundary. Non-MEB training events would be subject to the same restrictions. With respect to Special Use Airspace, this alternative would establish Restricted Airspace over the Western Area to accommodate combined arms live-fire from aviation and surface units.

The No Action Alternative would seek no additional lands and no additional or changes to Special Use Airspace associated with MCAGCC's current range complex. During a MEB exercise, the three battalions of the ground combat element would commence their operations aboard the current MCAGCC range complex in the eastern and central areas of the base, moving towards a single objective in the northwest corner of the current MCAGCC, undertaking live-fire and combined arms actions throughout, except as restrained by on-base administrative controls.

The Department of the Navy is initiating the scoping process to identify community interests and local issues to be addressed in the EIS. Federal, state and local agencies, Native American Indian Tribes and interested individuals are encouraged to provide oral and/or written comments regarding the scope of the EIS to develop reasonable alternatives and/or to identify specific issues or topics of environmental

concern that the commenter believes should be considered.

The EIS will evaluate potential environmental effects associated with action alternatives and the No Action Alternative. Potential issues include, but are not limited to: Land use, recreation, energy development, air quality, airspace/air traffic, biological resources, cultural resources, mining/minerals, socioeconomics and noise.

A mailing list has been assembled to facilitate preparation of the EIS. Those on this list will receive notices and documents related to EIS preparation. This list includes local, state, and federal agencies with jurisdiction or other interests in the alternatives. In addition, the mailing list includes adjacent property owners, affected municipalities, and other interested parties such as conservation and off-highway vehicle organizations. Anyone wishing to be added to the mailing list may request to be added by contacting the EIS project manager at the address provided above.

Dated: October 24, 2008.

T.M. Cruz,

Lieutenant Commander, Judge Advocate Generals Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–25845 Filed 10–29–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, 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 December 29, 2008.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: October 24, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Reading First Expenditure Study.

Frequency: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 4,420.

Burden Hours: 13,260.

Abstract: The U.S. Department of Education Reading First program has no formal mechanism for grantees to report on specific uses of grant funds. The proposed surveys will collect data on the use and allocation of Reading First grants from current State educational agencies (SEA) grantees and their local educational agencies (LEA) subgrantees. Collecting such information will help satisfy the informational needs of key stakeholders, and inform future grant-making efforts.

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 3844. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–25894 Filed 10–29–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: Department of Education, National Assessment Governing Board.

ACTION: Notice of open meeting and partially closed meetings.

SUMMARY: The notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify members of the general public of their opportunity to attend. Individuals who will need special accommodations in order to attend the meeting (i.e., interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than November 10, 2008. 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.

DATES: November 20–22, 2008.

Times

November 20

Committee Meetings:

Ad Hoc Committee on NAEP Testing and Reporting on Students with Disabilities and English Language Learners: Open Session—2 p.m. to 4 p.m.

Executive Committee: Open Session—4:30 p.m. to 5 p.m.; Closed

Session—5 p.m. to 6 p.m.

November 21

Full Board: Open Session—8:30 a.m. to 9:45 a.m.; Closed Session—12:30 p.m. to 1:30 p.m.; Open Session—1:30 p.m. to 4:30 p.m.

Committee Meetings:

Assessment Development Committee: Open Session—9:45 a.m. to 11:45 a.m.; Closed Session—11:45 a.m. to 12:15 p.m.

Committee on Standards, Design and Methodology: Open Session—9:45 a.m. to 11:30 a.m.; Closed Session 11:30 a.m.—12:15 p.m.

Reporting and Dissemination Committee: Open Session—9:45 a.m. to 12:15 p.m.

November 22

Nominations Committee: Closed Session—7:45 a.m. to 8:45 a.m.

Full Board: Open Session—9 a.m. to 12 p.m.

Location: The Westin Arlington Gateway, 801 North Glebe Road, Arlington, VA 20024.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, *Telephone:* (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include selecting subject areas to be assessed, developing assessment specifications and frameworks, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

On November 20, the Ad Hoc Committee on NAEP Testing and Reporting on Students with Disabilities and English Language Learners will meet in open session from 2 p.m. to 4 p.m. Thereafter, the Executive Committee will meet in open session from 4:30 p.m. to 5 p.m. and in closed session from 5 p.m. to 6 p.m.

During the closed session the Executive Committee will receive a briefing from the National Center for Education Statistics (NCES) on options for NAEP contracts covering the 2008–2012 assessment years, based on funding for Fiscal Year 2009–2010. The discussion of contract options and costs will address the implications for congressionally mandated goals and adherence to Board policies on NAEP assessments. This part of the meeting must be conducted in closed session because public discussion of this information would disclose independent government cost estimates and contracting options, adversely impacting the confidentiality of the contracting process. Public disclosure of information discussed would significantly impede implementation of the NAEP contracts, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

The second portion of the closed session of the Executive Committee is for discussion of personnel matters. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

On November 21, the full Board will meet in open session from 8:30 a.m. to 9 a.m. The Board will approve the agenda and the August 2008 Board minutes. The Secretary of Education Margaret Spellings will address the Governing Board and administer the oath of office to new and reappointed members. Thereafter, the Governing Board will receive a report from the Interim Executive Director of the Governing Board, and hear an update on the work of the National Center for Education Statistics (NCES).

On November 21, the Board's standing committees—the Assessment Development Committee, the Committee on Standards, Design and Methodology, and the Reporting and Dissemination Committee will meet from 9:45 a.m. to 12:15 p.m.

The Assessment Development Committee will meet in open session on November 21, 2008 from 9:45 a.m. to 11:45 a.m. From 11:45 a.m. to 12:15 p.m. the Assessment Development Committee will meet in closed session to review secure accessible booklet items at grades 4 and 8 for the NAEP 2009 reading and mathematics assessments. The meeting must be conducted in closed session as disclosure of test items would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On Friday, November 22, the Committee on Standards, Design and Methodology will meet in open session from 9:45 a.m. to 11:30 a.m. and in closed session from 11:30 a.m. to 12:15 p.m. During the closed session, the Committee will review results from the final trend analysis for the 2008 NAEP reading field trial data at grades 4 and 8. The results are sensitive and confidential and will be utilized to make a decision on development of work statements for the 2009 achievement level setting contracts in reading and mathematics. The meeting must therefore be conducted in closed session in order to allow the Committee to receive and discuss confidential acquisition planning and not provide an undue advantage to potential bidders which would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

The Reporting and Dissemination Committee will meet in open session on November 21 from 9:45 a.m.—12:15 p.m.

On November 21 from 12:30 p.m. to 1:30 p.m. the full Board will meet in closed session to receive a briefing on the NAEP Achievement Gaps Report from the Associate Commissioner of NCES. The Governing Board will be provided with embargoed data on the report that cannot be discussed in an open meeting prior to their official release. The meeting must therefore be conducted in closed session as premature disclosure of data would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

From 1:30 p.m. to 2:30 p.m., the Board will receive the final report from the Chair of the Board's 12th Grade Technical Panel on Preparedness Research. From 2:45 p.m. to 4 p.m., the Board will hear a presentation on Common Core Standards and International Benchmarking. This session will be followed by an ethics briefing for members of the Governing Board. The November 21 session of the Board meeting is scheduled to adjourn at 4:30 p.m.

On November 22, the Nominations Committee will meet in closed session from 7:45 a.m. to 8:45 a.m. to review candidate applications for vacant Board positions for terms beginning in October 2009. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are

protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

The full Board will meet in open session on November 22 from 9 a.m. to 10 a.m. to hear a presentation on ''Inside NAEP: Plausible Values Methodology.'' From 10:15 a.m. to 12 p.m., the Board will receive and take action on Committee reports. The November 22, 2008 session of the Board meeting is scheduled to adjourn at 12 p.m.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW., Washington, DC, from 9 a.m. to 5 p.m. Eastern Standard Time, Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: October 27, 2008.

Mary Crovo,

Interim Executive Director, National Assessment Governing Board, U.S. Department of Education.

[FR Doc. E8–25912 Filed 10–29–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–13–000]

Natural Gas Pipeline Company of America LLC; Notice of Application

October 24, 2008.

Take notice that on October 21, 2008, Natural Gas Pipeline Company of America LLC (Natural), 3250 Lacey Road, 7th Floor, Downers Grove, Illinois 60515–7918, filed an application in Docket No. CP09–13–000, pursuant to section 7(b) of the Natural Gas Act, requesting permission and approval to abandon, by sale to CPI Pipe and Steel, Inc. (CPI), the following facilities: (1) The majority of Natural's Hooker Lateral located in Texas and Beaver Counties, Oklahoma; (2) Booster Station No. 63 located in Texas County, Oklahoma; (3) the Baker Lateral located in Texas County, Oklahoma; (4) the Beaver Lateral located in Texas County, Oklahoma; (5) the ANR tap located in Beaver County, Oklahoma; and (6) the Regier Lateral located in Beaver County, Oklahoma.

Natural states that there has been no flow of gas on the Hooker Lateral for the last four years and thus the Hooker Lateral and the other appurtenant facilities to be sold no longer serve any purpose. Natural further states that the sale of the subject facilities will save Natural operation and maintenance expenses. Moreover, Natural states that the abandonment and transfer of the facilities as proposed will allow Natural to serve the needs of its transportation shippers more effectively by eliminating inefficiencies associated with the operation and maintenance of facilities which are no longer required, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Bruce H. Newsome, Vice President, Natural Gas Pipeline Company of America LLC, 3250 Lacey Road, 7th Floor, Downers Grove, Illinois 60515–7918, *telephone:* (630) 725–3070, *e-mail: bruce_newsome@kindermorgan.com*.

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be

required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 14, 2008.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25919 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–104–000]

Wheelabrator Bridgeport, L.P.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 24, 2008.

This is a supplemental notice in the above-referenced proceeding of Dynegy Marketing and Trade's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is November 24, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list.

They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25916 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 27, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–200–175.

Applicants: CenterPoint Energy Gas Transmission Co.

Description: CenterPoint Energy Gas Transmission Company submits a notice of the termination of negotiated rate agreement with Anadarko Energy Services Company, effective 10/31/08.

Filed Date: 10/21/2008.

Accession Number: 20081022–0323.

Comment Date: 5 p.m. Eastern Time on Monday, November 03, 2008.

Docket Numbers: RP99–176–169.

Applicants: Natural Gas Pipeline Co of America LLC.

Description: Natural Gas Pipeline Company of America LLC submits First Revised Sheet 34C to FERC Gas Tariff, Seventh Revised Volume 1, effective 11/1/08.

Filed Date: 10/21/2008.

Accession Number: 20081022–0324.

Comment Date: 5 p.m. Eastern Time on Monday, November 03, 2008.

Docket Numbers: RP09–29–000.

Applicants: Questar Overthrust Pipeline Company.

Description: Questar Overthrust Pipeline Company submits First Revised Sheet 3 to its FERC Gas Tariff, Second Revised Volume 1-A, effective 11/24/08.

Filed Date: 10/22/2008.

Accession Number: 20081023–0111.

Comment Date: 5 p.m. Eastern Time on Monday, November 03, 2008.

Docket Numbers: RP09–30–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Florida Gas Transmission Co, LLC submits Thirteenth Revised Sheet 7 *et al.* to FERC Gas Tariff, Fourth Revised Volume 1, effective 11/1/08.

Filed Date: 10/24/2008.

Accession Number: 20081024–0129.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 05, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://*

www.ferc.gov. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25911 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

September 25, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC08–126–000.

Applicants: LS Power Development, LLC, Luminus Management, LLC.

Description: Joint Application of LS Power Development, LLC and Luminus Management, LLC for Approval Under Section 203 of the Federal Power Act.

Filed Date: 09/25/2008.

Accession Number: 20080925–5004.

Comment Date: 5 p.m. Eastern Time on Thursday, October 16, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–1517–002; ER06–1518–001; EL07–14–001.

Applicants: Wisconsin Power and Light Company.

Description: Amended Settlement Agreement.

Filed Date: 09/23/2008.

Accession Number: 20080923–5065.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER07–1194–001.

Applicants: Castlebridge Energy Group LLC.

Description: Castlebridge Energy Group LLC submits an amendment to its 8/13/08 Motion for Determination of Category 1 Seller Status, to be effective 8/13/08.

Filed Date: 09/18/2008.

Accession Number: 20080924–0083.

Comment Date: 5 p.m. Eastern Time on Thursday, October 02, 2008.

Docket Numbers: ER08–1042–002; ER08–1055–001.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits supplemental data in response to Data Request 5 pursuant to FERC's 7/30/08 Order.

Filed Date: 09/09/2008.

Accession Number: 20080925–0145.

Comment Date: 5 p.m. Eastern Time on Thursday, October 02, 2008.

Docket Numbers: ER08–1278–001.

Applicants: PacifiCorp.

Description: PacifiCorp informs that on 7/17/08 they submitted revisions to First Revised FERC Rate Schedule 297 between PacifiCorp and Utah Associated Municipal Power Systems.

Filed Date: 09/23/2008.

Accession Number: 20080924–0041.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1560–000.

Applicants: San Diego Gas & Electric Company.

Description: San Diego Gas & Electric Company submits proposed modification to the following two tariff sheets in Appendices IX and VII of its Transmission Owner Tariff, FERC Electric Tariff, Original Volume 1 effective 1/1/09.

Filed Date: 09/22/2008.

Accession Number: 20080924–0135.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1561–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits a Large Generator Interconnection Agreement among Wisconsin Power and Light Company, the Midwest ISO, and American Transmission Company LLC.

Filed Date: 09/22/2008.

Accession Number: 20080924–0052.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1563–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits proposes to revise a portion of its Open Access Transmission Tariff.

Filed Date: 09/23/2008.

Accession Number: 20080924–0037.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1564–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits a Services Agreement for Substation Operator Services and Substation Facility Maintenance Service between MidAmerican and Cordova Energy Company, LLC.

Filed Date: 09/23/2008.

Accession Number: 20080924–0038.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1565–000.

Applicants: California Independent System Operator Corporation.

Description: Petition of the California Independent System Operator Corporation for approval of disposition of proceeds of penalty assessments.

Filed Date: 09/22/2008.

Accession Number: 20080924–0039.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: ER08–1566–000.

Applicants: Central Illinois Light Company.

Description: Central Illinois Light Company submits the Connection Construction Agreement with the City of Springfield, IL Office of Public Utilities.

Filed Date: 09/23/2008.

Accession Number: 20080925–0051.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–157–000.

Applicants: Southern Company Services, Inc.

Description: Southern Company Services, Inc.'s Order No. 890 and Order No. 890–B OATT Rollover Reform Compliance.

Filed Date: 09/23/2008.

Accession Number: 20080923–5042.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a

compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25928 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 24, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–11–000.

Applicants: Power Holdings, LLC, Tieton Hydropower, LLC.

Description: Power Holdings, LLC & Tieton Hydropower, LLC's application for order authorizing disposition of jurisdictional facilities under Section 203 of the Federal Power Act etc.

Filed Date: 10/24/2008.

Accession Number: 20081024–0127.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER97–3359–012.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Co.'s Notification of Non-Material Changes in Status.

Filed Date: 10/22/2008.

Accession Number: 20081022–5081.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER05–737–002.

Applicants: Commerce Energy Inc.

Description: Commerce Energy submits supplemental filing to earlier filed Market Power Analysis, request for treatment as Category 1 and Tariff Revision Filing, as required by order 697 and 697–A.

Filed Date: 10/22/2008.

Accession Number: 20081023–0308.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–89–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits a clean copy of the relevant tariff sheets as Exhibit I with redlined copies showing the adjustments as Exhibit II to their original 10/17/08 filing of revised pages to the OATT.

Filed Date: 10/22/2008.

Accession Number: 20081024–0008.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER08–980–001.

Applicants: Alliant Energy Corporate Services, Inc.

Description: Interstate Power and Light Company submits a further amended Agreement that includes a complete copy of IPL's current RES–5 rate schedule as changes to the Agreement have been made.

Filed Date: 10/22/2008.

Accession Number: 20081023–0309.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER08–1257–001.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits an amendment to its 7/11/08 filing that proposed various revisions to its Open Access Transmission Energy and Operating Reserve Markets Tariff.

Filed Date: 10/21/2008.

Accession Number: 20081023–0110.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–107–000.

Applicants: Koda Energy LLC.

Description: Petition of KODA Energy, LLC for Order Accepting Market-Based Rate Tariff for Filing and Granting Waivers and Blanket Approvals and Request for Expedited Action.

Filed Date: 10/21/2008.

Accession Number: 20081023–0108.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–108–000.

Applicants: Midwest Independent Transmission System, Great River Energy.

Description: Midwest Independent Transmission System Operator Corporation *et al.* submit revised tariff sheets with proposed revisions to Attachment O re Open Access Transmission and Energy Market Tariff *et al.*

Filed Date: 10/21/2008.

Accession Number: 20081023–0107.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–112–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc submits an Amended and Restated Interconnection and Operating Agreement among Wisconsin Electric Power Company, etc.

Filed Date: 10/22/2008.

Accession Number: 20081023–0101.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–116–000.

Applicants: Idaho Power Company.

Description: Idaho Power Co submits revised depreciation accrual rates, Second Revised Sheet 129–A and 129–B to their OATT etc and Letter clarifying service of October 22, 2008 filing.

Filed Date: 10/22/2008; 10/23/2008.

Accession Number: 20081024–0042; 20081023–5089.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–117–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits Large Generator Interconnection Agreement re Original Service Agreement 1983.

Filed Date: 10/23/2008.

Accession Number: 20081024–0006.

Comment Date: 5 p.m. Eastern Time on Thursday, November 13, 2008.

Docket Numbers: ER09–118–000.
Applicants: Midwest Independent Transmission System.
Description: Midwest Independent Transmission System Operator, Inc submits an Amended and Restated Large Generator Interconnection Agreement with American Transmission Company, LLC *et al.*
Filed Date: 10/23/2008.
Accession Number: 20081024–0005.
Comment Date: 5 p.m. Eastern Time on Thursday, November 13, 2008.

Docket Numbers: ER09–120–000.
Applicants: DUKE ENERGY CAROLINAS, LLC.
Description: Duke Energy Carolinas, LLC's CD containing report as part of its power purchase agreements with City of Concord, NC.
Filed Date: 10/23/2008.
Accession Number: 20081023–4004.
Comment Date: 5 p.m. Eastern Time on Thursday, November 13, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E8–25935 Filed 10–29–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF09–37–001]

Ausra CA I, LLC; Notice of Filing

October 24, 2008.

Take notice that on October 21, 2008, Ausra CA I, LLC, filed an Application for Certification as a Qualifying Small Power Production Facility pursuant to 18 CFR 292.207(b) of the Commission's regulations.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll-free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 12, 2008.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E8–25917 Filed 10–29–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the Record Communications; Public Notice

October 24, 2008.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable

proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e) (1) (v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Exempt:

Docket No.	File date	Presenter or requester
1. CP06–365–000, CP06–366–000, CP06–376–000, CP06–377–000	10–2–08	Margaret Collins.[1]
2. CP06–365–000, CP06–366–000, CP06–376–000, CP06–377–000	10–2–08	Lori Durheim.
3. CP06–365–000, CP06–366–000, CP06–376–000, CP06–377–000	10–2–08	Sandi Fitts-Freeman.
4. CP06–365–000, CP06–366–000, CP06–376–000, CP06–377–000	10–2–08	Ron Sadler.
5. CP06–365–000, CP06–366–000, CP06–376–000, CP06–377–000	10–2–08	Paul Sansone.
6. CP08–31–000	10–16–08	Hon. Arlen Specter.
7. CP08–475–000	10–7–08	Hon. John Hoeven.
8. P–2438–000	9–30–08	Hon. John R. Kuhl, Jr.
9. P–10822–000, *et al.*	10–8–08	Hon. Christopher J. Dodd. Hon. Joseph Lieberman. Hon. Christopher S. Murphy.

[1] One of five emails (nos. 1–5 of this notice) commenting on Commission decision in the Bradwood Landing proceeding.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25915 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM01–5–000]

Electronic Tariff Filings; Notice of Technical Conference Regarding Electronic Tariff Filing

October 24, 2008.

Take notice that on Wednesday, December 3, 2008, a technical conference will be held to discuss the implementation of electronic tariff filing. In Order No. 714,[1] the Commission adopted regulations requiring that, as of April 10, 2010, tariff and tariff related filings must be made electronically. The Commission adopted a set of protocols and standards developed through a consensus process under the auspices of the North American Energy Standards Board (NAESB) to govern the manner and format in which such filings must be made. NAESB developed these standards and protocols to provide each filing company with the ''flexibility to develop software to better integrate tariff filings with their individual tariff maintenance and business needs.'' [2] As part of the compliance process, the Commission authorized Commission staff to continue their dialog with ''the industries involved to help the industries better understand the use of the code values as well as to discuss issues that may arise regarding methods of implementing the standards.'' [3]

This first technical conference is designed to provide tariff filers and third-party software developers with an opportunity to obtain technical information about the requirements of the standards to assist companies in developing software and in determining whether developing or purchasing software would best fit their tariff maintenance needs. The conference also will consider the schedule for future conferences and the subjects to be discussed at those conferences.

The format of the conference will be interactive, and companies are encouraged to ask questions about the technical aspects of the standards. To help Commission staff in planning the conference so that it will provide as much assistance to the industries as possible, participants are encouraged to submit by e-mail in advance of the meeting the topics or questions they would like discussed. Emails should be directed to *eTariff@ferc.gov* and should include ''Discussion Topic'' in the subject line.

Background material on the standards and requirements can be found on the Commission's Web site (*www.ferc.gov;* click on eTariff under the Documents and Filings Heading).

The technical conference is open to the public. The conference will be held from 10 a.m. until 4 p.m. (EDT) at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. In addition, the conference will be accessible via WebEx and telephone.

Those wishing to participate via a WebEx (*http://www.webex.com*) computer connection and telephone must submit by no later than November 24, 2008, a request to *eTariff@ferc.gov.* The e-mail must include Registration in the subject line and the requester's name, e-mail address, and telephone number in the body of the e-mail. Only the first 50 requests to use the WebEx computer connection to view documents can be honored. All telephonic connection requests can be honored. We will notify WebEx requesters if their request to use WebEx computer connections can be granted and will provide the appropriate Logon information by e-mail prior to the conference. We anticipate that most of the material to be referenced on WebEx during the conference is posted on the Commission's Web site, so even those without the WebEx computer connection should be able to follow most of the discussion.

For more information, contact Keith Pierce, Office of Energy Markets and

[1] *Electronic Tariff Filings,* Order No. 714, 73 FR 57,515 (Oct. 3, 2008), 124 FERC ¶ 61,270 (Sept. 19, 2008).

[2] Order No. 714, at P 9. The Commission also recognized that ''these standards and protocols also will provide an open platform permitting third-party software developers to create more efficient tariff filing and maintenance applications, which will spread the development costs over larger numbers of companies.'' *Id.*

[3] Order No. 714, at P 88.

Reliability at (202) 502–8525 or *Keith.Pierce@ferc.gov.*

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25918 Filed 10–29–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8736–6]

Approval of a Petition for Exemption From Hazardous Waste Disposal Injection Restrictions to AK Steel Corporation, Middletown, OH

AGENCY: Environmental Protection Agency.

ACTION: Notice of final decision on petition.

SUMMARY: Notice is hereby given by the United States Environmental Protection Agency (EPA) that an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) has been granted to AK Steel Corporation (AK Steel) of Middletown, Ohio, for two Class I injection wells located in Middletown, Ohio. As required by 40 CFR part 148, AK Steel has demonstrated, to a reasonable degree of certainty, that there will be no migration of hazardous constituents out of the injection zone or into an underground source of drinking water (USDW) for at least 10,000 years. This final decision allows the continued underground injection by AK Steel of a specific restricted waste, Waste Pickle Liquor, (code K062 under 40 CFR part 261), into two Class I hazardous waste injection wells specifically identified as Waste Disposal Wells No. 1 and No. 2, at the Middletown facility. This decision constitutes a final EPA action for which, except for the two parties who commented on the draft decision, there is no Administrative Appeal.

DATES: This action is effective as of October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Leslie Patterson, Lead Petition Reviewer, EPA, Region V, telephone (312) 886–4904. Copies of the petition and all pertinent information relating thereto are on file and are part of the Administrative Record. It is recommended that you contact the lead reviewer prior to reviewing the Administrative Record.

SUPPLEMENTARY INFORMATION:

Background

AK Steel submitted a petition for renewal of an existing exemption from the land disposal restrictions of hazardous waste on March 6, 2006. EPA personnel reviewed all data pertaining to the petition, including, but not limited to, well construction, well operations, regional and local geology, seismic activity, penetrations of the confining zone, and computational models of the injection zone. EPA has determined that the geologic setting at the site as well as the construction and operation of the wells are adequate to prevent fluid migration out of the injection zone within 10,000 years, as required under 40 CFR part 148. The injection zone at this site is the upper Middle Run Formation, the Mt. Simon Sandstone, and the Eau Claire Formation, at depths between 2,423 feet to 3,296 feet below ground level. The confining zone is the Knox Dolomite at depths between 1,172 feet to 2,423 feet below ground level. The confining zone is separated from the lowermost underground source of drinking water (at a depth of 522 feet below ground level) by a sequence of permeable and less permeable sedimentary rocks, which provide additional protection from fluid migration into drinking water sources.

EPA issued a draft decision, which described the reasons for granting this exemption in more detail, a fact sheet, which summarized these reasons, and a public notice on June 21, 2008, pursuant to 40 CFR 124.10. A public meeting was subsequently held in Middletown on July 21, 2008. The public comment period expired on August 5, 2008. EPA received two comments on the proposed exemption granted to AK Steel, neither of which bear on the validity of the no-migration demonstration. Although the draft decision incorrectly referred to an injection rate of 90 gallons per minute, this final decision is based on the more conservative injection rate that was used to demonstrate no-migration. This value is 60 gallons per minute, combined for both wells. EPA has determined that its reasons for granting the exemption as set forth in the original draft decision remain valid. A final exemption is therefore granted as proposed.

Conditions

This exemption is subject to the following conditions. Non-compliance with any of these conditions is grounds for termination of the exemption:

(1) All regulatory requirements in 40 CFR 148.24 are incorporated by reference;

(2) The exemption applies to the two existing injection wells, UIC Well No. 1 and

UIC Well No. 2, located at the AK Steel facility at 1801 Crawford Street, Middletown, Ohio;

(3) Injection is limited to that part of the lower Eau Claire Formation, Mt. Simon Sandstone, and upper Middle Run Sandstone at depths between 2,900 and 3,296 feet below the surface (referenced from an eight-foot Kelly bushing);

(4) Only wastes denoted by the RCRA waste code K062 may be injected;

(5) Maximum concentrations of chemical contaminants that are hazardous at less than one part per million are limited according to the table below:

Chemical constituent	Maximum concentration at the well head (mg/L)
Chromium	1,200
Hexavalent Chromium	1,200
Lead	1,000
Nickel	542

(6) The specific gravity of the injected waste stream must at all times range from 1.00 to 1.30;

(7) The volume of wastes injected in any month through both wells at the site must not exceed 2,629,800 gallons;

(8) This exemption is approved for the 12-year modeled injection period, which ends on October 1, 2017. AK Steel may petition EPA for a reissuance of the exemption beyond that date, provided that EPA Region 5 receives a new and complete petition and no-migration demonstration by April 1, 2017.

(9) AK Steel must quarterly submit to EPA a report containing the fluid analyses of the injected waste which must indicate the chemical and physical properties upon which the no-migration petition was based, including the levels of those constituents listed in Condition 5 of this exemption approval;

(10) AK Steel must annually submit to EPA a report containing the results of a bottom hole pressure survey (fall-off test) performed on either UIC Well No. 1 or UIC Well No. 2. The survey must be performed after shutting in the well for a period of time sufficient to allow the pressure in the injection interval to reach equilibrium, in accordance with 40 CFR 146.68(e)(1). The annual report must include a comparison of reservoir parameters determined from the fall-off test with parameters used in the approved no-migration petition; and

(11) The petitioner must fully comply with all requirements set forth in

Underground Injection Control Permits UIC 05–09–001–PTO–I and UIC 05–09–002–PTO–I issued by the Ohio Environmental Protection Agency. Upon the expiration, cancellation, reissuance, or modification of these permits by the Ohio Environmental Protection Agency, this exemption is subject to review. A new demonstration may be required if information shows that the basis for granting the exemption is no longer valid under 40 CFR 148.23 and 148.24.

Dated: October 7, 2008.

Timothy C. Henry,

Acting Director, Water Division, EPA Region 5.

[FR Doc. E8–25909 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8736–4]

Child-Specific Exposure Factors Handbook

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA is announcing the availability of a final report titled, ''Child-Specific Exposure Factors Handbook'' (EPA/600/R–06/096F), which was prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development (ORD). This report updates a 2002 interim final version of the handbook. It provides updated information on various physiological and behavioral factors used in assessing children's exposure to environmental contaminants. These factors include: Water ingestion; soil ingestion and non-dietary factors; inhalation rates; dermal factors including skin surface area and soil adherence factors; consumption of retail and home-grown foods; breast milk intake; body weight; activity pattern data; and consumer product use. This updated version also provides analysis of exposure factors data using the age groups for children as recommended in the 2005 EPA Risk Assessment Forum report document titled, ''Guidance on Selecting Age Groups for Monitoring and Assessing Childhood Exposures to Environmental Contaminants'' (71 FR 6775, February 9, 2006).

ADDRESSES: The document is available electronically through the NCEA Web site at *http://www.epa.gov/ncea* or you may access the document directly at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=199243*. In the near future, a limited number of CD–ROMs and hard copies of the executive summary will be available from EPA's National Service Center for Environmental Publications (NSCEP), P.O. Box 42419, Cincinnati, OH 45242; *telephone:* 1–800–490–9198; *facsimile:* 301–604–3408; *e-mail: nscep@bps-lmit.com*. Please provide your name, your mailing address, the title and the EPA number of the requested publication.

FOR FURTHER INFORMATION CONTACT: The Information Management Team, National Center for Environmental Assessment (8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. *Telephone:* 703–347–8561; *fax:* 703–347–8691; *e-mail: nceadc.comment@epa.gov*.

Dated: October 22, 2008.

Rebecca Clark,

Director, National Center for Environmental Assessment.

[FR Doc. E8–25908 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8736–7]

Clean Air Act Operating Permit Program; Decision on Reconsideration of Petition to Object to Title V Permit for Reliant Portland Generating Station, Upper Mount Bethel Township, Northampton County, PA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of action denying reconsideration of final order on petition to object to state operating permit.

SUMMARY: Pursuant to the Clean Air Act (CAA), the EPA Administrator signed an order, dated June 20, 2007, denying a petition to object to a state operating permit proposed to be issued by the Pennsylvania Department of Environmental Protection (PADEP) to Reliant Energy Mid-Atlantic Power Holdings, LLC, for its Portland Generating Station in Northampton County, Pennsylvania. On September 24, 2008, the Administrator signed a letter denying the request of the petitioner, the New Jersey Department of Environmental Protection (NJDEP), that EPA reconsider the June 20, 2007 Order.

FOR FURTHER INFORMATION CONTACT: Kathleen Anderson, Chief, Permits and Technical Assessment Branch, Air Protection Division, EPA Region III (3AP11), telephone (215) 814–2173; e-mail *anderson.kathleen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. How Can I Get Copies of This Document and Other Related Information?

Copies of the final order, the petition, the NJDEP letter seeking reconsideration, the Administrator's letter denying the reconsideration, and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region III, Air Protection Division (APD), 1650 Arch St., Philadelphia, Pennsylvania 19103. The Administrator's letter is also available electronically at the following Web site: *http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb.htm*.

II. Background

The Clean Air Act affords EPA a 45-day period to review and object to, as appropriate, operating permits proposed by state permitting authorities. Section 505(b)(2) of the CAA authorizes any person to petition the EPA Administrator within 60 days after the expiration of this review period to object to a state operating permit if EPA has not done so. EPA received a petition from the NJDEP, dated July 21, 2006, requesting that EPA object to the issuance of the proposed title V permit for the Reliant Portland Generating Station. By Order dated June 20, 2007, the Administrator responded by denying NJDEP's petition. On September 14, 2007, the Attorney General of New Jersey, on behalf of NJDEP, simultaneously filed an appeal of the Administrator's Order in the United States Court of Appeals for the Third Circuit and sent a letter to EPA seeking reconsideration of the Administrator's Order. The Court of Appeals stayed the appeal until September 26, 2008, to allow EPA an opportunity to respond to the motion for reconsideration of the Order. By letter dated September 24, 2008, the Administrator responded by denying reconsideration. The letter explains the reasons for denying NJDEP's request for reconsideration.

III. Judicial Review

Section 307(b)(1) of the Clean Air Act indicates which Federal Courts of Appeals have venue for petitions for review of final actions by EPA. For final actions which are not nationally applicable, Section 307(b)(1) provides that appeals shall be filed in the United States Court of Appeals for the appropriate circuit. The denial of New

Jersey's motion for reconsideration of the Administrator's Order denying New Jersey's request that EPA object to the issuance of a state operating permit to the Reliant Portland Generating Station is a final action which is not nationally applicable. The Third Circuit Court of Appeals is the appropriate court of appeals. As noted above, New Jersey has already filed an appeal of the Administrator's June 20, 2007 Order in the U.S. Court of Appeals for the Third Circuit. Section 307(b)(1) also requires that any petition for review must be filed within sixty (60) days from the date that this Notice is published in the **Federal Register**.

Dated: October 17, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–25910 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8736–5]

Electronic Report on the Environment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA is announcing the availability of the electronic *Report on the Environment* (eROE or ROE), an online site that provides access to the environmental and human health information contained in the *EPA's 2008 Report on the Environment* (EPA/600/R–07/045F), released May 20, 2008, and in the *EPA's 2008 Report on the Environment: Highlights of National Trends*, released September 24, 2008, in one location and in a searchable format. The ROE asks important questions about the condition of our nation's environment and human health over time and provides answers to those questions in the form of indicators. The site also includes the methodology, references, and sources of additional information behind the indicators that form the foundation of the reports. Indicators will be updated periodically on the ROE Web site so the most up-to-date information on environmental and human health condition is available to the public in a searchable format. The Web site was developed by EPA's National Center for Environmental Assessment, within the Office of Research and Development, and the Office of Environmental Information.

ADDRESSES: The Web site URL is *http://www.epa.gov/roe*.

FOR FURTHER INFORMATION CONTACT: The Information Management Team, National Center for Environmental Assessment (8601P), U.S. Environmental Protection Agency,1200 Pennsylvania Avenue, NW., Washington, DC 20460. *Telephone:* 703–347–8561; *fax:* 703–347–8691; *e-mail: nceadc.comment@epa.gov*.

SUPPLEMENTARY INFORMATION: To accomplish its mission to protect human health and the environment, EPA must pay close attention to status and trends in the nation's air, water, and land, as well as related trends in human health and ecological systems. To help meet this need, EPA embarked on an initiative in 2001 to assemble the most reliable indicators of national environmental and health conditions that are important to EPA's mission. EPA initially presented these indicators in its *Draft Report on the Environment Technical Document* and its publicly oriented companion document, the *Draft Report on the Environment*, both released in 2003. Since then, EPA has revised, updated, and refined the ROE in response to scientific developments and feedback from EPA's Science Advisory Board and other stakeholders. As a result, the *EPA's 2008 Report on the Environment* (EPA/600/R–07/045F), released May 20, 2008 (73 FR 29134), provides both an update and an improvement over the 2003 draft edition. In addition, EPA's Office of Environmental Information produced the companion document, *EPA's 2008 Report on the Environment: Highlights of National Trends* (ROE Highlights), released September 24, 2008, which presents the key findings of the ROE in a format intended for the general public and without the technical detail.

In an effort to make the content of both ROE documents widely available, EPA has created a dynamic Web site—the electronic Report on the Environment (eROE)—which has all the ROE information in a searchable format. In addition to the indicator findings and charts, it includes the methodology, references and sources of additional information behind the indicators in the report. The ROE Highlights document has an accompanying Web site with links to the ROE-wide site. Both reports are available for download from the ROE front page and the online topics are linked together to make navigation seamless. Furthermore, EPA plans to update indicator information online as new data become available so the public has access to the most current information.

Dated: October 22, 2008.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E8–25907 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX]

Information Collection; Management Services Center (MSC) Customer Satisfaction E-Survey

AGENCY: Management Services Center (MSC), Federal Acquisition Service (FAS), General Services Administration (GSA).

ACTION: Notice of request for comments regarding a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement regarding to a Management Services Center (MSC) Customer Satisfaction E-Survey.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: December 29, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Geri Haworth, Director, Business Management Division, Management Services Center, Federal Acquisition Service, at telephone (253) 931–7064 or via e-mail to *geri.haworth@gsa.gov*.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4041, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–XXXX, Management Services Center (MAS) Customer Satisfaction E-Survey, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

The data collected from the Management Services Center (MSC)

Customer Satisfaction E-Survey will be used to measure customer satisfaction and to identify areas where service to Federal agencies and industry requires improvement.

B. Annual Reporting Burden

Respondents: 400.
Responses Per Respondent: 1.
Hours Per Response: .05.
Total Burden Hours: 20.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–XXXX, Management Services Center (MSC) Customer Satisfaction E-Survey, in all correspondence.

Dated: October 20, 2008.

Casey Coleman,

Chief Information Officer, General Services Administration.

[FR Doc. E8–25931 Filed 10–29–08; 8:45 am]

BILLING CODE 6820–DH–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (DHHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Full Committee Meeting.

Time and Date: November 18, 2008 9 a.m.–3 p.m. November 19, 2008 10 a.m.–12 p.m.

Place: Radisson Hotel Reagan National Airport, 2020 Jefferson Davis Hwy., Arlington, VA 22202.

Status: Open.

Purpose: At this meeting the Committee will hear presentations and hold discussions on several health data policy topics. On the morning of the first day the Committee will hear updates from the Department from the HHS Data Council, the Centers for Medicare and Medicaid Services, and the NCVHS Executive Subcommittee. In the afternoon there will be a speaker on Clinical and Translational Science Awards (CTSA) from the National Institutes of Health and an update from the Office of the National Coordinator regarding the American Health Information Community (AHIC) advisory body.

On the morning of the second day the Committee will discuss subcommittee work. There will also be an update from NCHS Board of Scientific Counselors. In addition, there will be a discussion of the NCVHS 60th Anniversary celebration and 21st Century Health Statistics update.

The times shown above are for the full Committee meeting. Subcommittee breakout sessions can be scheduled for late in the afternoon of the first day and second day and in the morning prior to the full Committee meeting on the second day. Agendas for these breakout sessions will be posted on the NCVHS Web site (URL below) when available.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: October 20, 2008.

James Scanlon,

Deputy Assistant Secretary for Science and Data Policy,Office of the Assistant Secretary, for Planning and Evaluation.

[FR Doc. E8–25884 Filed 10–29–08; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (DHHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Subcommittee on Populations Meeting.

Time and Date: November 19, 2008 1 p.m.–5:30 p.m.

Place: Hubert H. Humphrey Building, 200 Independence Avenue, SW., Room 305A, Washington, DC 20201.

Status: Open.

Purpose: The Populations Subcommittee will hear testimony from invited experts on Federal data capacity to support health policy in areas relating to health insurance; including coverage, under-insurance, access to insurance coverage, and costs. The Subcommittee will also hear about the capability of federal data systems to monitor the effects of economic downturns on health insurance coverage and on health care expenditures. The hearing will conclude with a roundtable discussion between the Subcommittee and speakers.

Contact Person for More Information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Dale Hitchcock, lead staff for Populations Subcommittee, NCVHS, Office of the Assistant Secretary for Planning and Evaluation, Office of Science and Data Policy, 200 Independence Avenue, SW., Hubert Humphrey Building Room 440D, Washington, DC 20201, telephone (202) 690–6796 or Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: October 23, 2008.

James Scanlon,

Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. E8–25885 Filed 10–29–08; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–08–08BB]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Health Hazard Evaluation Program Customer Survey—New—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Health Hazard Evaluation Program (HHE) was mandated by specific provision of the Occupational Safety and Health Act of 1970 and the Federal Mine Safety Act of 1977.

Through the HHE Program, NIOSH responds to requests to identify chemical, biological or physical hazards in workplaces throughout the United States. An HHE Program evaluation can be requested by employers, employees, employee representatives, other federal agencies, and state and local agencies. NIOSH proposes conducting a program of quantitative and qualitative research to help ensure that the HHE Program is responsive to the needs of its customers and enhances the diversity of workplaces and hazards assessed. The information from this research will be used to develop a targeted marketing campaign to increase awareness of and access to HHE Program services. To begin, NIOSH will conduct a Web based survey of potential customers in the Food and Beverage Manufacturing or Services to Buildings and Dwellings industry who are responsible for workplace health and safety. The goals of the survey are to determine: (1) What percentage of customers are familiar with the HHE Program; (2) how customers surveyed prefer to receive occupational safety and health-related information, (3) what occupational safety and health communication products are most useful to customers surveyed; (4) what barriers prevent customers surveyed from using HHE Program resources; (5) what would motivate customers surveyed to use HHE Program resources; and (6) what are the top occupational safety and health concerns of those surveyed. This will be followed by qualitative research (focus groups) to determine (1) what concepts are most effective at raising awareness of the HHE Program with consumers, and (2) what messages should be used to inform customers about the HHE Program. The results from both phases of this research will be used to design and refine a targeted marketing campaign before materials are promoted and distributed nationally. Each phase will be conducted over a two to three month period.

There will be no cost to the respondents other than their time. The total estimated annualized burden hours are 1,880.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Customer Survey Pretest Respondent	32	1	15/60
Customer Survey Respondent	5,760	1	15/60
Customer Focus Group Screener Respondent	216	1	15/60
Customer Focus Group Concept Testing Respondent	108	1	2
Customer Focus Group Material Testing Respondent	108	1	1.5

Dated: October 24, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–25897 Filed 10–29–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1422–N]

Medicare Program; Listening Session on Hospital-Acquired Conditions in Inpatient Settings and Hospital Outpatient Healthcare-Associated Conditions in Outpatient Settings, December 18, 2008

AGENCY: Centers for Medicare & Medicaid Services (CMS) and Centers for Disease Control and Prevention (CDC), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces a listening session being conducted by the Centers for Medicare & Medicaid Services and Centers for Disease Control and Prevention to solicit informal comments on hospital-acquired conditions (HACs) and hospital outpatient healthcare-associated conditions (HOP–HACs) in preparation for the fiscal year (FY) 2010 inpatient prospective payment systems (IPPS) and calendar year (CY) 2010 outpatient prospective payment system (OPPS) rulemaking processes. Hospitals, hospital associations, representatives of consumer purchasers, payors of health care services, and other interested parties are invited to attend and make comments in person or in writing. It will also be possible to listen to the session by teleconference. Verbal comments will be taken from telephone participants as time permits. This meeting is open to the public, but registration is required. Further information regarding this listening session will be posted on the HAC section of the CMS Web site at *http://www.cms.hhs.gov/HospitalAcqCond/01_Overview.asp* and the OPPS section of the CMS Web site at *http://www.cms.hhs.gov/hospitaloutpatientpps/.*

DATES: *Meeting Date:* The listening session will be held on Thursday, December 18, 2008 from 10 a.m. e.s.t. until 5 p.m. e.s.t.

Deadline for Meeting Registration and Submitting Requests for Special Accommodations Registration must be completed no later than 5 p.m. e.s.t. Thursday, December 11, 2008. Requests for special accommodations must be received no later than 5 p.m. e.s.t. Thursday, December 11, 2008.

Deadline for Submission of Written Comments or Statements: Written comments may be sent electronically to the address specified in the **ADDRESSES** section of this notice and must be received by 5 p.m. e.s.t. on Wednesday, December 31, 2008.

ADDRESSES: *Meeting Location:* The meeting will be held in the main auditorium of the Central Building of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Registration and Special Accommodations: Persons interested in attending the meeting or listening by teleconference must register by completing the on-line registration at *http://registration.intercall.com/go/cms2.* Individuals who need special accommodations should contact Karen Jackson via phone on (410) 786–0079 or via e-mail at *hacpoa@cms.hhs.gov.*

Written Comments or Statements: Written comments may be sent by e-mail to *hacpoa@cms.hhs.gov* or via mail to Karen Jackson, Centers for Medicare & Medicaid Services, Mailstop C5–15–02, 7500 Security Boulevard, Baltimore, MD 21244–1850.

FOR FURTHER INFORMATION CONTACT: Karen Jackson, (410) 786–0079 or via e-mail at *hacpoa@cms.hhs.gov.* Press inquiries are handled through the CMS Press Office at 202–690–6145.

I. Background

Section 1886(d)(4)(D) of the Social Security Act (the Act) requires the Secretary to select, by October 1, 2007, at least two conditions that: (1) Are high cost or high volume or both; (2) result in the assignment of a case to a Medicare Severity Diagnosis-Related Group (MS–DRG) that has a higher payment when present as a secondary diagnosis; and (3) could reasonably have been prevented through the application of evidence-based guidelines.

For discharges occurring on or after October 1, 2008, hospitals will not receive additional payment for cases in which one of the selected conditions occurring during hospitalization was not present on admission. That is, the case would be paid as though the secondary diagnosis was not present. Section 1886(d)(4)(D) of the Act provides that we can revise the list of conditions from time to time, as long as it contains at least two conditions.

We have discussed the selection of hospital-acquired conditions (HAC) in the inpatient prospective payment systems (IPPS) fiscal year (FY) 2007 (71 FR 23996 and 71 FR 47870), FY 2008 (72 FR 24680 and 72 FR 47130), and FY 2009 (73 FR 23528 and 73 FR 48434) proposed and final rules, respectively. For discharges occurring on or after October 1, 2008, hospitals will not receive additional payment for cases in which one of the selected conditions occurring during hospitalization was not present on admission. That is, the case would be paid as though the secondary diagnosis was not present. Section 1886(d)(4)(D) of the Act provides that we can revise the list of conditions from time to time, as long as it contains at least two conditions. In addition, we discussed the expansion of the principles behind the hospital outpatient healthcare-associated conditions (HOP–HACs) payment provision in the outpatient prospective payment systems (OPPS) calendar year (CY) 2009 proposed rule (73 FR 41416).

II. Listening Session Format

This listening session is being held as a joint partnership between the Centers for Medicare and Medicaid Services (CMS) and the Centers for Disease Control and Prevention (CDC). The listening session will begin at 10 a.m. e.s.t. with an overview of the objectives for the session. A brief overview regarding the implementation strategy for selecting the IPPS HAC's will then be presented. Next, we will present a review of the regulatory language included in the FY 2009 IPPS final rule followed by a public comment session. There will be a lunch break from approximately 12:30 p.m. e.s.t. to 1:30 p.m. e.s.t. Following lunch, we will review the CY 2009 OPPS final rule that discussed the expansion of the principles behind the HOP–HACs payment provision to the outpatient setting. An additional public comment period will follow the afternoon presentations. The meeting will conclude by 5 p.m. e.s.t.

We note that, due to time constraints, telephone participants will be allowed to make verbal comments during the meeting as time permits. We also note that any interested party, irrespective of participation at the listening session, may submit written comments to the address listed in the **ADDRESSES** section by the date specified in the **DATES** section of this notice.

III. Registration Instructions

For security reasons, space limitations, and limited availability of teleconference lines, any persons wishing to attend this meeting or listen via teleconference must register by the date listed in the **DATES** section of this notice. Persons interested in attending the meeting or listening by teleconference must register by completing the on-line registration located at *http://registration.intercall.com/go/cms2.* The on-line registration system will generate a confirmation page to indicate the completion of your registration. Please print this page as your registration receipt.

The number of call-in lines will be limited for individuals participating in the listening session by teleconference. The call-in number will be provided upon confirmation of registration.

An audio download of the listening session will be available through the CMS Hospital-Acquired Conditions Web site at *http://www.cms.hhs.gov/HospitalAcqCond/01_Overview.asp* after the listening session.

IV. Security, Building, and Parking Guidelines

This meeting will be held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. The on-site check-in for visitors will begin at 9:15 a.m. e.s.t. Please allow sufficient time to complete security checkpoints.

Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel.
- Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection.

We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

Note: Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. The public may not enter the building earlier than 45 minutes prior to the convening of the meeting.

All visitors must be escorted in areas other than the lower and first floor levels in the Central Building. Seating capacity is limited to the first 550 registrants.

Authority: Section 1886(d)(4)(D) of the Act.

Dated: October 23, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. E8–25833 Filed 10–29–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Allotment Percentages to States for Child Welfare Services State Grants

AGENCY: Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services.

ACTION: Biennial publication of allotment percentages for States under the Title IV–B subpart 1, Child Welfare Services State Grants Program (CFDA No. 93.645).

SUMMARY: As required by section 423(c) of the Social Security Act (42 U.S.C. 623(c)), the Department is publishing the allotment percentage for each State under the Title IV–B Subpart 1, Child Welfare Services State Grants Program. Under section 423(a), the allotment percentages are one of the factors used

in the computation of the Federal grants awarded under the Program.

DATES: *Effective Date:* The allotment percentages shall be effective for Fiscal Years 2010 and 2011.

FOR FURTHER INFORMATION CONTACT: Deborah Bell, Grants Fiscal Management Specialist, Office of Grants Management, Office of Administration, Administration for Children and Families, telephone (202) 401–4611.

SUPPLEMENTARY INFORMATION: The allotment percentage for each State is determined on the basis of paragraphs (b) and (c) of section 423 of the Act. These figures are available on the ACF homepage on the Internet: *http://www.acf.dhhs.gov/programs/cb/*. The allotment percentage for each State is as follows:

State	Allotment percentage
Alabama	57.84
Alaska	48.05
Arizona	56.38
Arkansas	61.11
California	46.00
Colorado	45.84
Connecticut	29.80
Delaware	47.41
District of Columbia	30.00
Florida	49.99
Georgia	55.97
Hawaii	49.58
Idaho	58.77
Illinois	47.38
Indiana	56.49
Iowa	54.98
Kansas	53.08
Kentucky	59.84
Louisiana	57.58
Maine	55.90
Maryland	39.77
Massachusetts	36.86
Michigan	54.78
Minnesota	46.78
Mississippi	63.23
Missouri	55.60
Montana	57.46
Nebraska	53.19
Nevada	47.38
New Hampshire	46.11
New Jersey	36.67
New Mexico	60.11
New York	40.20
North Carolina	55.99
North Dakota	54.67
Ohio	54.92
Oklahoma	55.55
Oregon	54.50
Pennsylvania	49.89
Rhode Island	48.70
South Carolina	59.40
South Dakota	54.49
Tennessee	56.26
Texas	52.11
Utah	60.33
Vermont	52.12
Virginia	45.62
Washington	47.36
West Virginia	62.02
Wisconsin	52.98
Wyoming	41.29
American Samoa	70.00
Guam	70.00
N. Mariana Islands	70.00
Puerto Rico	70.00
Virgin Islands	70.00

Dated: October 21, 2008.

Joan E. Ohl,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. E8–25843 Filed 10–29–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; 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.

Proposed Project: SAMHSA Fetal Alcohol Spectrum Disorders Center for Excellence Screening and Brief Intervention Evaluation—New

Since 2001, SAMHSA's Center for Substance Abuse Prevention has been operating the SAMHSA Fetal Alcohol Spectrum Disorders (FASD) Center for Excellence. The purpose of the FASD Center is to prevent FASD and improve the treatment of FASD. The FASD Center's activities include providing training, technical assistance, and subcontracts to increase the use of effective evidence-based interventions.

The FASD Center will be integrating Screening and Brief Intervention (SBI) for pregnant women through service delivery organizations and will be evaluating the results. Seven sites will implement the SBI program operated through WIC or Healthy/Health Start. Using the protocol developed by O'Connor and Whaley, each of the participating WIC and Healthy Start programs will be screening pregnant women to identify those who are currently drinking. The SBI focuses on 10- to 15-minute sessions of counseling by a counselor who will use a scripted manual to guide the intervention. Participants in the SBI will be assessed at each visit (to monitor alcohol use), referred for additional services to support their efforts to stop drinking, and will be provided with the 10–15 minute intervention. Clients will be followed up until their 36th week of pregnancy.

At baseline, a screening tool will be administered by the WIC or Healthy/Health Start counselor to assess pregnant women at the participating sites or health care delivery programs. Women will be assessed for risk using the T–ACE or TWEAK screening instruments which have been used successfully with pregnant women. Both quantity and frequency of drinking will be assessed. In addition, basic demographic data will be collected (age, race/ethnicity, education, and marital status) at baseline by participating sites but no personal identification information will be transmitted to SAMHSA.

On a monthly basis, as clients return for their WIC or Healthy/Health Start program counseling session, follow-up data will be collected by the WIC or Healthy Start counselor. At each monthly follow-up visit, the quantity and frequency of drinking will be assessed and the client's goals for drinking will be recorded. In addition, process level variables will be assessed to understand how the program is being implemented (e.g., whether SBI was delivered; what referrals were made; which referral services were received). At the 36th week of pregnancy, the client will be asked for permission to place her record from this program into her infant's medical record (upon delivery) and quantity and frequency of drinking will be assessed.

The data collection is designed to evaluate the implementation of the proposed Screening and Brief

Intervention by measuring whether abstinence from alcohol is achieved. Furthermore, the project will include process measures to assess whether and how the intervention was provided.

ESTIMATED ANNUALIZED BURDEN HOURS

Screening tool/activity	Number of respondents (7 Sites)	Number of responses per respondent	Average burden per response	Total burden hours per collection
Assessment/Baseline Data Collection	3,428	1	.25	857
Monthly Follow-up (75% of baseline × 4 months maximum)	2,571	4	.33	3,393
Assessment Data Collection at 36th week (75% of baseline)	2,571	1	.25	642
Total	8,570	6		4,892

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 7–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: October 23, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–25898 Filed 10–29–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; 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.

Proposed Project: Training and Technical Assistance in the Fetal Alcohol Spectrum Disorders (FASD) Center for Excellence—New

Since 2001, the Fetal Alcohol Spectrum Disorders (FASD) Center for Excellence has been operating under contract to SAMHSA's Center for Substance Abuse Prevention. The purpose of the FASD Center for Excellence is to prevent FASD and improve the treatment of FASD. As a cornerstone of the services delivered by the FASD Center for Excellence, targeted training, technical assistance, and consultation is provided in order to significantly improve immediate, intermediate, and long-term outcomes in the prevention and treatment of FASD.

The purpose of this submission is to obtain approval for the use of customer satisfaction feedback forms to be used by FASD Center for Excellence to monitor the delivery and quality of technical assistance, training, and consultation services. Based on estimates derived from a review of the services provided in the first 5 years of operation, the FASD Center for Excellence expects to conduct approximately 240 trainings, 5 informational meetings, and 150 technical assistance events over the course of their contract with SAMHSA. Presentations are available nationwide and can vary in topic and length depending on audience characteristics and presentation setting. Data collection protocols will vary slightly for different types of services and are presented separately for trainings, meetings, and technical assistance services.

Trainings

In keeping with theories of behavior change, changes in knowledge about FASD (for general trainings) and about topic-specific FASD issues (for advanced trainings) will be measured using a pre- and post-test methodology. The pre-test form will also include questions about participants' demographic background and professional affiliation. Participant evaluation forms will be administered immediately following a training event in order to assess customer satisfaction. The post-event evaluation form consists of a brief 2 page questionnaire that asks participants to rate the speaker, identify the most and least helpful features of the presentation, and assess their satisfaction with the services provided. A paper-and-pencil format will be utilized to collect participant responses, although a link to an online survey may be provided at the conclusion of a Webinar or other online presentation. Follow-up will occur both 3 and 6 months after the training either through a brief online survey or a telephone interview. Non-respondents will receive one follow up reminder e-mail.

Informational Meetings

Informational meetings that involve field trainers, who deliver the majority of the Center's FASD trainings, will utilize a pre- and post-test methodology to assess changes in knowledge. In addition, pre-test forms will also gather information about field trainers' cultural background, professional setting, and number of years of experience in the field. Post-test questionnaires will evaluate both knowledge and customer satisfaction immediately following informational meetings. Follow up occurs both at 6 and 12 months after the meeting through either a brief online survey or a telephone interview. Non-respondents will receive one follow up reminder e-mail.

No pre-test forms will be used for informational meetings that do not involve field trainers. Meeting feedback surveys will be administered immediately following informational meetings, and will both assess customer satisfaction and gather background information about participant demographics and professional affiliation. No long-term follow up activity is anticipated for informational

meetings that do not involve field trainers.

Technical Assistance

Feedback forms will be used to evaluate customer satisfaction immediately following technical assistance services. Follow-up will occur both at 6 and 12 months after the TA.

All Events

Feedback will also be solicited from the event requestor (the administrative contact in the requesting organization) to assess the administration of all events: trainings, TA, and informational meetings. Rigorous efforts will be made to maintain participant confidentiality across all presentation settings. Participation in data collection is voluntary and no identifying information (name, social security number, etc.) will be collected from any participant. Unique identification codes will be used to match pre-assessment, post-assessment, and follow up evaluation forms in order to track client data over time.

The primary use for information gathered is to identify strengths and weaknesses in current service provisions and to make improvements that are practical and feasible. Several of the customer satisfaction surveys expected to be implemented under this approval will provide data for measurement of program effectiveness under the Government Performance and Results Act (GPRA). Information from these customer surveys will be used to plan and redirect resources and efforts to improve or maintain a high quality of service to service providers, individuals with an FASD and their families, and members of the public.

ESTIMATED ANNUALIZED BURDEN HOURS

Instrument/activity	Number of respondents	Number of responses per respondent	Average hours of burden per response	Total burden hours per collection
Trainings:				
FASD Event Pre-Test Form	1,200	1	.083	100
FASD Event Post-Test Form	1,200	1	.067	80
FASD Event Feedback Form	1,200	1	.17	204
FASD Training Feedback Survey (3- and 6-month follow-up)	600	2	.067	80
Meetings (Field Trainers):				
Pre-Meeting Form (Field Trainers)	25	1	.12	3
Post-Meeting Form (Field Trainers)	25	1	.17	4
FASD Meeting Follow-Up Feedback Survey (6- and 12-month follow-up)	12	2	.067	2
Meetings (Other meetings):				
Meeting Feedback Form	75	1	.083	6
Technical Assistance:				
Technical Assistance Feedback Form	375	1	.083	31
Technical Assistance Follow-Up Feedback Survey (6- and 12-month follow-up)	188	2	.067	25
All Events (Trainings, Meetings, TA):				
Event Requestor Form	100	1	.067	7
Total	5,000			542

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 71–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: October 23, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–25899 Filed 10–29–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Cross-Site Evaluation of the Minority Substance Abuse/HIV/Hepatitis Prevention Program—NEW

The cross-site evaluation builds on five previous grant programs funded by SAMHSA's Center for Substance Abuse Prevention (CSAP) to provide HIV prevention services for minority populations The first two were planning grant programs and the last three were service grant programs. HIV Cohort 1 and HIV Cohort 2 funded 2-year planning grants in FY 2000 and FY 2001 respectively. HIV Cohort 3 funded 48 3-year grants in FY 2002, HIV Cohort 4 funded 22 5-year grants in FY 2003, and HIV Cohort 5 funded 46 4-year grants in FY 2004. The goals for the Cohort 3–5 grants were to add, increase, or enhance integrated substance abuse (SA) and HIV prevention services by providing supportive services and strengthening linkages between service providers for at-risk minority populations. The HIV Cohort 1–3 grants previously received OMB clearance No. 0930–0208.

The current HIV Cohort 6 Minority SA/HIV/Hepatitis Prevention Program funded 81 5-year grants in FY 2005 to community based organizations that are required to address the SAMHSA Strategic Prevention Framework (SPF) and participate in this cross-site evaluation. The grantees are expected to provide leadership and coordination on the planning and implementation of the SPF that targets minority populations and the minority reentry population in communities of color with high prevalence of SA, HIV/AIDS, and hepatitis. The primary objectives of the cross-site evaluation are to: (1) Assess the process of adopting and implementing the SPF with the target populations; (2) measure the

effectiveness of specified intervention strategies such as cultural enrichment activities, educational and vocational services, and/or computer-based curricula; and (3) determine the success of the program in delaying, preventing, and/or reducing the use of alcohol, tobacco, and other drugs (ATOD) among the target populations. The grantees are expected to provide an effective prevention process, direction, and a common set of goals, expectations, and accountabilities to be adapted and integrated at the community level. While the grantees have substantial flexibility in choosing their individual evidence-based programs, they are all required to base them on the five steps of the SPF to build service capacity specific to SA, HIV, and hepatitis prevention services. In FY 2006, all the grantees initiated Steps 1–3 of the SPF, namely conducting a needs assessment, building capacity, and planning how to implement their projects. Once their plans have been approved by their Government Project Officers they can precede onto Step 4 (implementation) and Step 5 (evaluation). Conducting this cross-site evaluation will assist SAMHSA/CSAP in promoting and disseminating optimally effective prevention programs.

Grantees must also conduct ongoing monitoring and evaluation of their projects to assess program effectiveness including Federal reporting of the Government Performance and Results Act (GPRA) of 1993, the Performance Assessment Rating Tool (PART), SAMHSA/CSAP National Outcome Measures (NOMs), and HIV counseling and testing. All of this information will be collected through self-report questionnaires administered to program participants. All grantees will use two instruments, one for youth between the ages of 12 and 17, and one for adults 18 and older. These instruments include baseline, exit and 3–6 month follow-up (post-exit) questionnaires related to GPRA and NOMs augmented by questions pertaining to HIV and hepatitis. While the GPRA and NOMs measures have already been approved by OMB (OMB No. 0930–0230), the remaining HIV and hepatitis-related questions have not, hence this data collection. Each questionnaire contains 135 questions, of which 102 relate to HIV and hepatitis.

Sample size, respondent burden, and intrusiveness have been minimized to be consistent with the cross-site objectives. Procedures are employed to safeguard the privacy and confidentiality of participants. Every effort has been made to coordinate cross-site data collection with local data collection efforts in an attempt to minimize respondent burden.

The cross-site evaluation results will have significant implications for the substance abuse, HIV/AIDS and hepatitis prevention fields, the allocation of grant funds, and other evaluation activities conducted by multiple Federal, State, and local government agencies. They will be used to develop Federal policy in support of SAMHSA/CSAP program initiatives, inform the public of lessons learned and findings, improve existing programs, and promote replication and dissemination of effective prevention strategies.

The following table shows the estimated annualized burden for data collection.

	Number of respondents at baseline	Number of respondents at exit	Number of respondents at follow-up	Average burden/ response (hrs.)	Total burden hours
Total of Adults and Youth	9,000	6,750	4,455	0.83	16,770

Written comments and recommendations concerning the proposed information collection should be sent by December 1, 2008 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503. Due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated; October 23, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–25900 Filed 10–29–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1802–DR]

Kentucky; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Kentucky (FEMA–1802–DR), dated October 9, 2008, and related determinations.

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 9, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the Commonwealth of Kentucky resulting from a severe wind storm associated with Tropical Depression Ike, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act). Therefore, I declare that such a major disaster exists in the Commonwealth of Kentucky.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the Commonwealth, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75

percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Kim R. Kadesch, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the Commonwealth of Kentucky have been designated as adversely affected by this declared major disaster:

Ballard, Boone, Breckenridge, Bullitt, Caldwell, Calloway, Campbell, Carlisle, Carroll, Crittenden, Daviess, Fulton, Gallatin, Graves, Hancock, Henderson, Hickman, Hopkins, Jefferson, Livingston, Lyon, Marshall, McCracken, McLean, Meade, Muhlenberg, Ohio, Oldham, Shelby, Trigg, Trimble, Union, and Webster Counties for Public Assistance.

All counties within the Commonwealth of Kentucky are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25872 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1803–DR]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–1803–DR), dated October 9, 2008, and related determinations.

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 9, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Oklahoma resulting from severe storms, tornadoes, and flooding during the period of September 12–19, 2008, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Oklahoma.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Justin A. Dombrowski, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the State of Oklahoma have been designated as adversely affected by this declared major disaster:

Alfalfa, Cimarron, Dewey, Ellis, Grant, Harper, Kay, Major, Woods, and Woodward Counties for Public Assistance.

All counties within the State of Oklahoma are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25871 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1785–DR]

Florida; Amendment No. 12 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–1785–DR), dated August 24, 2008, and related determinations.

DATES: Effective Date: October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency

Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Florida is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 24, 2008.

Madison County for Individual Assistance.

Bradford, Clay, and Taylor Counties for Individual Assistance (already designated for Public Assistance).

Charlotte County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25875 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1800–DR]

Illinois; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Illinois (FEMA–1800–DR), dated October 3, 2008, and related determinations.

DATES: *Effective Date:* October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Illinois is hereby amended to include the Public Assistance program for the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of October 3, 2008.

Cook, DuPage, Grundy, and LaSalle Counties for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25870 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1795–DR]

Indiana; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1795–DR), dated September 23, 2008, and related determinations.

DATES: *Effective Date:* October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the Public Assistance program for the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 23, 2008.

Clark, Crawford, Dearborn, Harrison, Jefferson, Jennings, Lake, Porter, and Switzerland Counties for Public Assistance (already designated for Individual Assistance).

Fayette, Ripley, and Wayne Counties for Public Assistance.

Scott and Washington Counties for Individual Assistance and Public Assistance.

Floyd and Perry Counties for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25876 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1802–DR]

Kentucky; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–1802–DR), dated October 9, 2008, and related determinations.

DATES: *Effective Date:* October 21, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of October 9, 2008.

Kenton County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters);97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25877 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1786–DR]

Louisiana; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1786–DR), dated September 2, 2008, and related determinations.

DATES: *Effective Date:* October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 2, 2008.

Concordia, East Carroll, Madison, Morehouse, Ouachita, Richland, Tensas, Union, West Carroll, and Winn Parishes for Individual Assistance (already designated for Public Assistance, including direct Federal Assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25869 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1794–DR]

Mississippi; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–1794–DR), dated September 22, 2008, and related determinations.

DATES: *Effective Date:* October 20, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 22, 2008.

Issaquena County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; for public inspection in their entirety.97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25868 Filed 10–29–08; 8:45 am]

BILLING CODE 9110–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1798–DR]

Puerto Rico; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Puerto Rico (FEMA–1798–DR), dated October 1, 2008, and related determinations.

DATES: *Effective Date:* October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Puerto Rico is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of October 1, 2008.

Ponce Municipality for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25873 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1791–DR]

Texas; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–1791–DR), dated September 13, 2008, and related determinations.

DATES: *Effective Date:* October 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 13, 2008.

Aransas, Burleson, Nueces, and San Patricio Counties for Public Assistance.

Rusk County for Public Assistance (already designated for Individual Assistance).

Cherokee, Harris, Houston, Liberty, Matagorda, Montgomery, Orange, San Augustine, and Trinity Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–25874 Filed 10–29–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2008–N0291; 40120–1112–0000–F5]

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with threatened and endangered species.

DATES: We must receive written data or comments on the applications at the address given below, by *December 1, 2008.*

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: David Dell, HCP Coordinator).

FOR FURTHER INFORMATION CONTACT: David Dell, telephone 404/679–7313; facsimile 404/679–7081.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). This notice is provided under section 10(c) of the Act. If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (e-mail) to *david_dell@fws.gov*. Please include your name and return address in your e-mail message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your e-mail message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver comments to the Fish and Wildlife Service office listed above (see **ADDRESSES** section).

Before including your address, telephone number, e-mail address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Applicant: Paul Yokley, Florence, Alabama, TE027307

The applicant requests renewal of existing authorization to capture, identify, and release 67 species of mussel, fish, snail, and turtle for presence/absence surveys throughout the species ranges in Alabama, Tennessee, Mississippi, and Georgia.

Applicant: CCR Environmental, Atlanta, Georgia, TE059008

The applicant requests renewal of existing authorization to capture, identify, and release 110 species of mussel, fish, snail, crayfish, reptile and amphibian; and to harass five bird species for presence/absence surveys throughout the species ranges in Alabama, Tennessee, Mississippi, Georgia, Arkansas, Louisiana, Kentucky, North Carolina, South Carolina, and Florida.

Applicant: East Kentucky Power Cooperative, Winchester, Kentucky, TE816862

The applicant requests renewal of existing authorization to capture, identify, and release Virginia big-eared bats (*Plecotus townsendii virginianus*), Indiana bats (*Myotis sodalis*), and gray bats (*Myotis grisescen*), as well as nineteen species of mussels, for presence/absence surveys throughout

Kentucky. Indiana bat surveys are also conducted throughout the species range in the southeast and midwestern United States.

Applicant: Geosyntac Consultants, Inc., Kennesaw, Georgia, TE095972

The applicant requests renewal of existing authorization to capture, identify, and release Conasauga logperch (*Percina jenkinsi*), blue shiner (*Cyprinella caerulea*), amber darter (*Percina antesella*), goldline darter (*Percina aurolineata*), Etowah darter (*Etheostoma etowahae*), snail darter (*Percina tanasi*), and Cherokee darter (*Etheostoma scotti*) for presence/absence surveys throughout the species ranges in Georgia. The applicant requests amendment of this authorization to add eleven species of mussels and to add flatwoods salamander (*Ambystoma cingulatum*) and eastern indigo snake (*Drymarchon corais couperi*) for presence/absence surveys throughout the species ranges in Georgia.

Applicant: The University of Florida, Fort Lauderdale Research and Education Center, Davie, Florida, TE077258

The applicant requests renewal of existing authorization to capture, tag, salvage, collect blood and tissue, and release American crocodiles (*Crocodylus acutus*) for research and monitoring populations throughout the species range in Florida.

Applicant: Mark Merchant, McNeese State University, Lake Charles, Louisiana, TE196632

The applicant requests authorization to capture, collect blood and tissue, and release American crocodiles for research purposes throughout the species range in Florida.

Applicant: Register-Nelson, Inc., McDonaugh, Georgia, TE114088

The applicant requests renewal of existing authorization to capture, identify, and release blue shiner (*Cyprinella caerulea*), Etowah darter (*Etheostoma etowahae*), Cherokee darter (*Etheostoma scotti*), amber darter (*Percina antesella*), goldline darter (*Percina aurolineata*), snail darter (*Percina tanasi*), Conasauga logperch (*Percina jenkinsi*), and the eastern indigo snake (*Drymarchon corais couperi*) for presence/absence surveys throughout the species ranges in Georgia.

Applicant: Hopi Hoekstra, Harvard University, Cambridge, Massachussetts, TE095962

The applicant requests renewal of existing authorization to capture, tag, collect tissue samples, and release, Perdido Key (*Peromyscus polionotus trissyllepsis*), Choctawhatchee (*P.p. polionotus*), and St. Andrews (*P.p. peninsularis*) beach mice while conducting research activities throughout Florida.

Applicant: Christopher Skelton, Athens, Georgia, TE121073

The applicant requests renewal of existing authorization to capture, identify, and release seven species of fish and seventeen species of mussel for presence/absence surveys throughout the species ranges in Georgia.

Applicant: Tampa's Lowry Park Zoo, Tampa, Florida, TE763742

The applicant requests renewal of existing authorization to receive and maintain in captivity Florida panthers (*Felis concolor coryi*) in cooperation with the State of Florida and the Service for species recovery activities.

Applicant: Ronald Rohrbaugh, Cornell Lab of Ornithology, Ithaca, New York, TE108852

The applicant requests renewal of existing authorization to harass ivory-billed woodpeckers (*Campephilus principalis*) for survey and research purposes throughout the species potential range in the southeastern and Midwestern United States.

Applicant: James B. Layzer, Tennessee Cooperative Fishery Research Unit, Cookeville, Tennessee, TE078207

The applicant requests renewal of existing authorization to capture, retain for captive propagation, and release seventeen species of mussels while conducting research and recovery-related activities throughout the species ranges in Tennessee, Alabama, North Carolina, and Kentucky.

Applicant: Sunlight Gardens, Anderson, Tennessee, TE125626

The applicant requests renewal of existing authorization to sell in interstate commerce artificially propagated specimens of Tennessee purple coneflower (*Echinaceae tennesseensis*) and Cumberland rosemary (*Conradina verticillata*).

Dated: October 16, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–25901 Filed 10–29–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2008–N0290; 96300–1671–0000–P5]

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species.

DATES: Written data, comments or requests must be received by December 1, 2008.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: Michael A. Jarvis, Oregon Health and Science University, Portland, OR,PRT–190313

The applicant requests a permit to acquire fibroblast cell cultures from one female captive born gorilla (*Gorilla gorilla*) in interstate commerce from Coriell Cell Repository, Camden, NJ, for the purpose of scientific research. This notification covers the one-time acquisition only.

Applicant: Fred H. Gage, Salk Institute for Biological Studies, San Diego, CA, PRT–191132

The applicant requests a permit to acquire fibroblast cell cultures from one male captive born chimpanzee (*Pan troglodytes*) and one male and one

female bonobo (*Pan paniscus*) in interstate commerce from Coriell Cell Repository, Camden, NJ, for the purpose of scientific research. This notification covers the one-time acquisition only.

Applicant: Sherry V. Nelson, Department of Anthropology, University of New Mexico, Albuquerque, NM, PRT–194491

The applicant requests a permit to import powdered tooth enamel from chimpanzees (*Pan troglodytes*) found dead in the wild in Uganda, for the purpose of scientific research. This notification covers the one-time importation only.

Applicant: Wildlife Conservation Society, Bronx, NY, PRT–195916

The applicant requests a permit to export two male and two female captive born Western gorillas (*Gorilla gorilla*) to the Calgary Zoo, Canada for the purpose of enhancement of the species through captive breeding and conservation education.

Applicant: University of Florida, Florida Museum of Natural History, Gainesville, FL, PRT–193170

The applicant requests a permit to import specimens from endangered Crocodilian species from various museums and scientific institutions around the world for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: Kenneth E. Buch, Silver Spring, MD, PRT–193458

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: David Clemente, Laredo, TX, PRT–195244

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Wesley E. Hixon, Wildwood, GA, PRT–195911

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Trent B. Latshaw, Tulsa, OK, PRT–196067

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Roger D. Barker, Birmingham, AL, PRT–196611

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Russell C. Murphy, Little Rock, AR, PRT–196610

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Gary L. Joeris, San Antonio, TX, PRT–196633

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Robert W. Barnes, San Antonio, TX, PRT–195287

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Raymond M. Waters, III, Columbus, MS, PRT–196478

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: October 17, 2008.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E8–25921 Filed 10–29–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Rate Adjustments for Indian Irrigation Projects

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of proposed rate adjustments.

SUMMARY: The Bureau of Indian Affairs (BIA) owns, or has an interest in, irrigation projects located on or associated with various Indian reservations throughout the United States. We are required to establish irrigation assessment rates to recover the costs to administer, operate, maintain, and rehabilitate these projects. We request your comments on the proposed rate adjustments.

DATES: Interested parties may submit comments on the proposed rate adjustments on or before *December 29, 2008*.

ADDRESSES: All comments on the proposed rate adjustments must be in writing and addressed to: John Anevski, Chief, Division of Irrigation, Power and Safety of Dams, Office of Trust Services, Mail Stop 4655–MIB, 1849 C Street, NW., Washington, DC 20240, Telephone (202) 208–5480.

FOR FURTHER INFORMATION CONTACT: For details about a particular irrigation project, please use the tables in the **SUPPLEMENTARY INFORMATION** section to contact the regional or local office where the project is located.

SUPPLEMENTARY INFORMATION: The first table in this notice provides contact information for individuals who can give further information about the irrigation projects covered by this notice. The second table provides the current 2008 irrigation assessment rates, the proposed rates for the 2009 irrigation season, and proposed rates for subsequent years where these are available.

What is the meaning of the key terms used in this notice?

In this notice:

Administrative costs means all costs we incur to administer our irrigation projects at the local project level and is a cost factor included in calculating your O&M assessment. Costs incurred at the local project level do not normally include Agency, Region, or Central Office costs unless we state otherwise in writing.

Assessable acre means lands designated by us to be served by one of our irrigation projects, for which we collect assessments in order to recover

costs for the provision of irrigation service. (See total assessable acres.)

BIA means the Bureau of Indian Affairs.

Bill means our statement to you of the assessment charges and/or fees you owe the United States for administration, operation, maintenance, and/or rehabilitation. The date we mail or hand-deliver your bill will be stated on it.

Costs means the costs we incur for administration, operation, maintenance, and rehabilitation to provide direct support or benefit to an irrigation facility. (See administrative costs, operation costs, maintenance costs, and rehabilitation costs).

Customer means any person or entity to which we provide irrigation service.

Due date is the date on which your bill is due and payable. This date will be stated on your bill.

I, me, my, you, and *your* means all persons or entities that are affected by this notice.

Irrigation project means a facility or portion thereof for the delivery, diversion, and storage of irrigation water that we own or have an interest in, including all appurtenant works. The term ''irrigation project'' is used interchangeably with irrigation facility, irrigation system, and irrigation area.

Irrigation service means the full range of services we provide customers of our irrigation projects. This includes our activities to administer, operate, maintain, and rehabilitate our projects in order to deliver water.

Maintenance costs means costs we incur to maintain and repair our irrigation projects and associated equipment and is a cost factor included in calculating your operation and maintenance (O&M) assessment.

Operation and maintenance (O&M) assessment means the periodic charge you must pay us to reimburse costs of administering, operating, maintaining, and rehabilitating irrigation projects consistent with this notice and our supporting policies, manuals, and handbooks.

Operation or operating costs means costs we incur to operate our irrigation projects and equipment and is a cost factor included in calculating your O&M assessment.

Past due bill means a bill that has not been paid by the close of business on the 30th day after the due date as stated on the bill. Beginning on the 31st day after the due date, we begin assessing additional charges accruing from the due date.

Rehabilitation costs means costs we incur to restore our irrigation projects or features to original operating condition or to the nearest state which can be achieved using current technology and is a cost factor included in calculating your O&M assessment.

Responsible party means an individual or entity that owns or leases land within the assessable acreage of one of our irrigation projects and is responsible for providing accurate information to our billing office and paying a bill for an annual irrigation rate assessment.

Total assessable acres means the total acres served by one of our irrigation projects.

Water delivery is an activity that is part of the irrigation service we provide our customers when water is available.

We, us, and *our* means the United States Government, the Secretary of the Interior, the BIA, and all who are authorized to represent us in matters covered under this notice.

Does this notice affect me?

This notice affects you if you own or lease land within the assessable acreage of one of our irrigation projects or if you have a carriage agreement with one of our irrigation projects.

Where can I get information on the regulatory and legal citations in this notice?

You can contact the appropriate office(s) stated in the tables for the irrigation project that serves you, or you can use the Internet site for the Government Printing Office at *http://www.gpo.gov*.

Why are you publishing this notice?

We are publishing this notice to notify you that we propose to adjust our irrigation assessment rates. This notice is published in accordance with the BIA's regulations governing its operation and maintenance of irrigation projects, found at 25 CFR part 171. This regulation provides for the establishment and publication of the rates for annual irrigation assessments as well as related information about our irrigation projects.

What authorizes you to issue this notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has in turn delegated this authority to the Assistant Secretary—Indian Affairs under Part 209, Chapter 8.1A, of the Department of the Interior's Departmental Manual.

When will you put the rate adjustments into effect?

We will put the rate adjustments into effect for the 2009 irrigation season and subsequent years where applicable.

How do you calculate irrigation rates?

We calculate annual irrigation assessment rates in accordance with 25 CFR part 171.500 by estimating the annual costs of operation and maintenance at each of our irrigation projects and then dividing by the total assessable acres for that particular irrigation project. The result of this calculation for each project is stated in the rate table in this notice.

What kinds of expenses do you consider in determining the estimated annual costs of operation and maintenance?

Consistent with 25 CFR part 171.500, these expenses include the following:

(a) Salary and benefits for the project engineer/manager and project employees under the project engineer/manager's management or control;

(b) Materials and supplies;

(c) Vehicle and equipment repairs;

(d) Equipment costs, including lease fees;

(e) Depreciation;

(f) Acquisition costs;

(g) Maintenance of a reserve fund available for contingencies or emergency costs needed for the reliable operation of the irrigation facility infrastructure;

(h) Maintenance of a vehicle and heavy equipment replacement fund;

(i) Systematic rehabilitation and replacement of project facilities;

(j) Contingencies for unknown costs and omitted budget items; and

(k) Other expenses we determine necessary to properly perform the activities and functions characteristic of an irrigation project.

When should I pay my irrigation assessment?

We will mail or hand-deliver your bill notifying you of: (a) The amount you owe to the United States, and (b) when such amount is due. If we mail your bill, we will consider it as being delivered no later than 5 business days after the day we mail it. You should pay your bill by the due date stated on the bill.

What information must I provide for billing purposes?

All responsible parties are required to provide the following information to the billing office associated with the irrigation project where you own or lease land within the project's assessable acreage or to the billing office

associated with the irrigation project with which you have a carriage agreement:

(1) The full legal name of person or entity responsible for paying the bill;

(2) An adequate and correct address for mailing or hand delivering our bill; and

(3) The taxpayer identification number or social security number of the person or entity responsible for paying the bill.

Why are you collecting my taxpayer identification number or social security number?

Public Law 104–134, the Debt Collection Improvement Act of 1996, requires that we collect the taxpayer identification number or social security number before billing a responsible party and as a condition to servicing the account.

What happens if I am a responsible party but I fail to furnish the information required to the billing office responsible for the irrigation project within which I own or lease assessable land or for which I have a carriage agreement?

If you are late paying your bill because of your failure to furnish the required information listed above, you will be assessed interest and penalties as provided below, and your failure to provide the required information will not provide grounds for you to appeal your bill or any penalties assessed.

What can happen if I do not provide the information required for billing purposes?

We can refuse to provide you irrigation service.

If I allow my bill to become past due, could this affect my water delivery?

If we do not receive your payment before the close of business on the 30th day after the due date stated on your bill, we will send you a past due notice. This past due notice will have additional information concerning your rights. We will consider your past due notice as delivered no later than 5 business days after the day we mail it. We have the right to refuse water delivery to any irrigated land for which the bill is past due. We can continue to refuse water delivery until you pay your bill or make payment arrangements to which we agree. We follow the procedures provided in 31 CFR 901.2, ''Demand for Payment,'' when demanding payment of your past due bill.

Are there any additional charges if I am late paying my bill?

Yes. We will assess you interest on the amount owed, using the rate of interest established annually by the Secretary of the United States Treasury (Treasury) to calculate what you will be assessed (31 CFR 901.9(b)). You will not be assessed this charge until your bill is past due. However, if you allow your bill to become past due, interest will accrue from the original due date, not the past due date. Also, you will be charged an administrative fee of $12.50 for each time we try to collect your past due bill. If your bill becomes more than 90 days past due, you will be assessed a penalty charge of six percent (6%) per year, which will accrue from the date your bill initially became past due. As a Federal agency, we are required to charge interest, penalties, and administrative costs on debts owed to us pursuant to 31 U.S.C. 3717 and 31 CFR 901.9, ''Interest, penalties, and administrative costs.''

What else will happen to my past due bill?

If you do not pay your bill or make payment arrangements to which we agree, we are required to send your past due bill to the Treasury for further action. Under the provisions of 31 CFR 901.1, ''Aggressive agency collection activity,'' we must send any unpaid annual irrigation assessment bill to Treasury no later than 180 days after the original due date of the bill.

Who can I contact for further information?

The following tables are the regional and project/agency contacts for our irrigation facilities.

Northwest Region Contacts

Stanley Speaks, Regional Director
Bureau of Indian Affairs, Northwest Regional Office
911 N.E. 11th Avenue
Portland, Oregon 97232–4169
Telephone: (503) 231–6702

Project Name	Project/Agency Contacts
Flathead Irrigation Project	Chuck Courville, Superintendent Ed McKay, Acting Irrigation Manager Flathead Agency Irrigation Division P.O. Box 40 Pablo, MT 59855–0040 *Telephone:* (406) 675–2700
Fort Hall Irrigation Project	Eric J. LaPointe, Superintendent Alan Oliver, Supervisory General Engineer Fort Hall Agency P.O. Box 220 Fort Hall, ID 83203–0220 *Telephone:* (208) 238–2301
Wapato Irrigation Project	Pierce Harrison, Project Administrator Wapato Irrigation Project P.O. Box 220 Wapato, WA 98951–0220 *Telephone:* (509) 877–3155

Rocky Mountain Region Contacts

Ed Parisian, Regional Director

Bureau of Indian Affairs, Rocky Mountain Regional Office
316 North 26th Street
Billings, Montana 59101
Telephone: (406) 247–7943

Project Name	Agency/Project Contacts
Blackfeet Irrigation Project	Stephen Pollock, Superintendent Ted Hall, Irrigation Project Manager Box 880 Browning, MT 59417 *Telephones:* (406) 338–7544, Superintendent (406) 338–7519, Irrigation Project Manager
Crow Irrigation Project	George Grover, Superintendent Karl Helvik, Irrigation Project Manager P.O. Box 69 Crow Agency, MT 59022 *Telephones:* (406) 638–2672, Superintendent (406) 638–2863, Irrigation Project Manager
Fort Belknap Irrigation Project	Judy Gray, Superintendent Ralph Leo, Irrigation Project Manager R.R.1, Box 980 Harlem, MT 59526 *Telephones:* (406) 353–2901, Superintendent (406) 353–2905, Irrigation Project Manager
Fort Peck Irrigation Project	Florence White Eagle, Superintendent P.O. Box 637 Poplar, MT 59255 Richard Kurtz, Irrigation Manager 602 6th Avenue North Wolf Point, MT 59201 *Telephones:* (406) 768–5312, Superintendent (406) 653–1752, Irrigation Manager
Wind River Irrigation Project	Ed Lone Flight, Superintendent Ray Nation, Acting Irrigation Project Manager P.O. Box 158 Fort Washakie, WY 82514 *Telephones:* (307) 332–7810, Superintendent (307) 332–2596, Irrigation Project Manager

Southwest Region Contacts

William T. Walker, acting Regional Director
Bureau of Indian Affairs, Southwest Regional Office
1001 Indian School Road
Albuquerque, New Mexico 87104
Telephone: (505) 563–3100

Project Name	Project/Agency Contacts
Pine River Irrigation Project	Vacant, Superintendent John Formea, Irrigation Engineer P.O. Box 315 Ignacio, CO 81137–0315 *Telephones:* (970) 563–4511, Superintendent (970) 563–9484, Irrigation Engineer

Western Region Contacts

Allen Anspach, Regional Director
Bureau of Indian Affairs, Western Regional Office
Two Arizona Center
400 N. 5th Street, 12th floor
Phoenix, Arizona 85004
Telephone: (602) 379–6600

Project Name	Project/Agency Contacts
Colorado River Irrigation Project	Janice Staudte, Superintendent Ted Henry, Irrigation Project Manager 12124 1st Avenue Parker, AZ 85344 *Telephone:* (928) 669–7111

Duck Valley Irrigation Project	Joseph McDade, Superintendent 1555 Shoshone Circle Elko, NV 89801 *Telephone:* (775) 738–0569
Fort Yuma Irrigation Project	Raymond Fry, Superintendent P.O. Box 11000 Yuma, AZ 85366 *Telephone:* (520) 782–1202
San Carlos Irrigation Project Joint Works	Bryan Bowker, Project Manager Carl Christensen, Supervisory General Engineer P.O. Box 250 Coolidge, AZ 85228 *Telephone:* (520) 723–6216
San Carlos Irrigation Project Indian Works	Cecilia Martinez, Superintendent Joe Revak, Supervisory General Engineer Pima Agency, Land Operations P.O. Box 8 Sacaton, AZ 85247 *Telephone:* (520) 562–3326 *Telephone:* (520) 562–3372
Uintah Irrigation Project	Daniel Picard, Superintendent Lynn Hansen, Irrigation Manager P.O. Box 130 Fort Duchesne, UT 84026 *Telephone:* (435) 722–4300 *Telephone:* (435) 722–4341
Walker River Irrigation Project	Athena Brown, Superintendent 311 E. Washington Street Carson City, NV 89701 *Telephone:* (775) 887–3500

What irrigation assessments or charges are proposed for adjustment by this notice?

The rate table below contains the current rates for all irrigation projects where we recover costs of administering, operating, maintaining, and rehabilitating them. The table also contains the proposed rates for the 2009 season and subsequent years where applicable. An asterisk immediately following the name of the project notes the irrigation projects where rates are proposed for adjustment.

Project name	Rate category	Final 2008 rate	Final 2009 rate	Proposed 2010 rate
Northwest Region Rate Table				
Flathead Irrigation Project * (See Note #1)	Basic per acre—A	$23.45	$23.45	$23.45
	Basic per acre—B	10.75	10.75	11.75
	Minimum Charge per tract	65.00	65.00	65.00
Fort Hall Irrigation Project *	Basic per acre	31.00	40.50	To be determined.
	Minimum Charge per tract	27.00	30.00	
Fort Hall Irrigation Project—Minor Units *	Basic per acre	21.00	21.00	
	Minimum Charge per tract	27.00	30.00	
Fort Hall Irrigation Project—Michaud *	Basic per acre	39.75	41.50	
	Pressure per acre	55.50	58.00	
	Minimum Charge per tract	27.00	30.00	
	Minimum Charge for farm unit/land tracts up to one acre.	14.00	15.00	
	Farm unit/land tracts over one acre—per acre.	14.00	15.00	
Wapato Irrigation Project—Toppenish/Simcoe Units *.	Minimum Charge for per tract	14.00	15.00	
	Basic per acre	14.00	15.00	
Wapato Irrigation Project—Ahtanum Units *.	Minimum Charge per tract	14.00	15.00	
	Basic per acre	14.00	15.00	
Wapato Irrigation Project—Satus Unit *	Minimum Charge for per tract	55.00	58.00	
	"A" Basic per acre	55.00	58.00	
	"B" Basic per acre	65.00	68.00	
Wapato Irrigation Project—Additional Works *.	Minimum Charge per tract	60.00	63.00	
	Basic per acre	60.00	63.00	
Wapato Irrigation Project—Water Rental *	Minimum Charge	67.00	70.00	

Project name	Rate category	Final 2008 rate	Final 2009 rate	Proposed 2010 rate
	Basic per acre	67.00	70.00	

Project name	Rate category	Final 2008 rate	Proposed 2009 rate
Rocky Mountain Region Rate Table			
Blackfeet Irrigation Project *	Basic-per acre	$17.00	$18.00
Crow Irrigation Project—Willow Creek O&M (includes Agency, Lodge Grass #1, Lodge Grass #2, Reno, Upper Little Horn, and Forty Mile Units).	Basic-per acre	20.80	20.80
Crow Irrigation Project—All Others (includes Bighorn, Soap Creek, and Pryor Units).	Basic-per acre	20.50	20.50
Crow Irrigation Two Leggins Drainage District	Basic-per acre	2.00	2.00
Fort Belknap Irrigation Project *	Basic-per acre	13.88	20.00
Fort Peck Irrigation Project *	Basic-per acre	22.00	25.75
Wind River Irrigation Project *	Basic-per acre	16.00	18.00
Wind River Irrigation Project—LeClair District *	Basic-per acre	17.00	19.00

Project name	Rate category	Final 2008 rate	Proposed 2009 rate
Southwest Region Rate Table			
Pine River Irrigation Project	Minimum Charge per tract	$50.00	$50.00
	Basic-per acre	15.00	15.00

Project name	Rate category	Final 2008 rate	Proposed 2009 rate	Proposed 2010 rate	Proposed 2011 rate
Western Region Rate Table					
Colorado River Irrigation Project *	Basic per acre up to 5.75 acre-feet	$47.00	$51.00	$52.50	$54.00
	Excess Water per acre-foot over 5.75 acre-feet.	17.00	17.00		
Duck Valley Irrigation Project	Basic per acre	5.30	5.30	To be determined	To be determined.
Fort Yuma Irrigation Project * (See Note #2).	Basic per acre up to 5.0 acre-feet	77.00	77.00	To be determined	To be determined.
	Excess Water per acre-foot over 5.0 acre-feet.	14.00	14.00		
	Basic per acre up to 5.0 acre-feet (Ranch 5).	28.00	77.00		
San Carlos Irrigation Project (Joint Works) (See Note #3).	Basic per acre	21.00	21.00	21.00	To be determined.
San Carlos Irrigation Project (Indian Works).	Basic per acre	57.00	57.00	To be determined	To be determined.
Uintah Irrigation Project *	Basic per acre	12.50	13.70		
	Minimum Bill	25.00	25.00		
Walker River Irrigation Project *	Indian per acre	13.00	16.00	19.00	21.00
(See Note #4)	non-Indian per acre	16.00	16.00	19.00	21.00

* Notes irrigation projects where rates are proposed for adjustment.

Note #1—The 2009 rate was established by final notice published in the FEDERAL REGISTER on June 5, 2008 (Vol. 73, No. 109, page 32046). The 2010 rate is to be determined.

Note #2—The O&M rate for the Fort Yuma Irrigation Project has two components. The first component is the O&M rate established by the Bureau of Reclamation (BOR), the owner and operator of the Project. The BOR rate for 2009 remains unchanged at 70.00/acre. The second component is for the O&M rate established by BIA to cover administrative costs including billing and collections for the Project. The 2009 BIA rate remains unchanged at 7.00/acre. In 2009, the BOR rate for ''Ranch 5'' will be increased from 28.00/acre to 70.00/acre, and BIA will begin charging the 7.00/acre administrative fee on ''Ranch 5'' acreage.

Note #3—The 2009 rate was established by final notice published in the FEDERAL REGISTER on April 20, 2007 (Vol. 72, No. 76, page 19954).

Note #4—The 2009 rate was established by final notice published in the FEDERAL REGISTER on June 5, 2008 (Vol. 73, No. 109, page 32047). The 2010 and 2011 rates are proposed through this notice.

Consultation and Coordination With Tribal Governments (Executive Order 13175)

To fulfill its consultation responsibility to tribes and tribal organizations, BIA communicates, coordinates, and consults on a continuing basis with these entities on issues of water delivery, water availability, and costs of administration, operation, maintenance, and rehabilitation of projects that concern them. This is accomplished at the individual irrigation project by Project, Agency, and Regional representatives,

as appropriate, in accordance with local protocol and procedures. This notice is one component of our overall coordination and consultation process to provide notice to, and request comments from, these entities when we adjust irrigation assessment rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

The rate adjustments will have no adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies) should the proposed rate adjustments be implemented. This is a notice for rate adjustments at BIA-owned and operated irrigation projects, except for the Fort Yuma Irrigation Project. The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation with a portion serving the Fort Yuma Reservation.

Regulatory Planning and Review (Executive Order 12866)

These rate adjustments are not a significant regulatory action and do not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

These rate adjustments are not a rule for the purposes of the Regulatory Flexibility Act because they establish ''a rule of particular applicability relating to rates.'' 5 U.S.C. 601(2).

Unfunded Mandates Reform Act of 1995

These rate adjustments do not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than $130 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Therefore, the Department is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Takings (Executive Order 12630)

The Department has determined that these rate adjustments do not have significant ''takings'' implications. The rate adjustments do not deprive the public, State, or local governments of rights or property.

Federalism (Executive Order 13132)

The Department has determined that these rate adjustments do not have significant Federalism effects because they will not affect the States, the relationship between the national government and the States, or the distribution of power and responsibilities among various levels of government.

Civil Justice Reform (Executive Order 12988)

In issuing this rule, the Department 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.

Paperwork Reduction Act of 1995

These rate adjustments do not affect the collections of information which have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires August 31, 2009.

National Environmental Policy Act

The Department has determined that these rate adjustments do not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

Information Quality Act

In developing this notice, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. No. 106–554).

Dated: October 22, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs.

[FR Doc. E8–25920 Filed 10–29–08; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14875–A, F–14875–A2; AK–965–1410–KC–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface estate in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Kugkaktlik Limited. The lands are in the vicinity of Kipnuk, Alaska, and are located in:

Lots 6, 8, and 10, U.S. Survey No. 11316, Alaska.

Containing 73.63 acres.

Lot 8, U.S. Survey No. 11340, Alaska.

Containing 7.90 acres.

Lots 5 and 6, U.S. Survey No. 11368, Alaska.

Containing 3.30 acres.

Lots 12, 13, and 14, U.S. Survey No. 11387, Alaska.

Containing 67.79 acres.

Seward Meridian, Alaska

T. 1 S., R. 84 W.,
Secs. 23 to 27, inclusive;
Secs. 33 and 34.

Containing approximately 3,913 acres.

T. 2 S., R. 84 W.,
Secs. 3 to 10, inclusive;
Secs. 16, 17, and 18.

Containing approximately 5,789 acres.

T. 3 S., R. 84 W.,
Secs. 1 to 36, inclusive.

Containing approximately 16,275 acres.

T. 4 S., R. 84 W.,
Secs. 1 to 4, inclusive;
Secs. 9 to 16, inclusive;
Secs. 21 to 28, inclusive.

Containing approximately 8,107 acres.

T. 2 S., R. 85 W.,
Secs. 7 and 8;
Secs. 11 to 15, inclusive;
Secs. 16, 17, and 18;
Sec. 28, those lands formerly within Native allotment application F–18086, Parcel A;
Sec. 33, those lands formerly within Native allotment application F–18081, Parcel B.

Containing approximately 5,409 acres.

T. 3 S., R. 85 W.,
Sec. 6, those lands formerly within Native allotment application F–18080, Parcel B;
Sec. 7, those lands formerly within Native allotment application F–16585, Parcel B.

Containing approximately 160 acres.

T. 4 S., R. 85 W.,
Sec. 1, those lands formerly within Native allotment application F–18159, Parcel B.

Containing approximately 40 acres.

T. 2 S., R. 86 W.,
Sec. 25;
Sec. 28, those lands formerly within Native allotment application F–18110, Parcel A;
Secs. 34, 35, and 36.

Containing approximately 1,927 acres.

T. 3 S., R. 86 W.,
Sec. 32, those lands formerly within Native allotment application F–18089, Parcel C;
Sec. 33, those lands formerly within Native allotment application F–18089, Parcel C.

Containing approximately 78 acres.

T. 4 S., R. 86 W.,
Secs. 14, 15, and 16;
Secs. 21 to 24, inclusive.

Containing approximately 2,121 acres.
Aggregating approximately 43,972 acres.

A portion of the subsurface estate in these lands will be conveyed to Calista

Corporation when the surface estate is conveyed to Kugkaktlik Limited. The remaining lands lie within the Kuskokwim National Wildlife Range, renamed the Clarence Rhode National Wildlife Range, January 16, 1961. The subsurface estate in the refuge lands will be reserved to the United States at the time of conveyance. Notice of the decision will also be published four times in the Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until December 1, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Robin Middleton,

Land Law Examiner, Land Transfer Adjudication II.

[FR Doc. E8–26027 Filed 10–29–08; 8:45 am]

BILLING CODE 4310–JA–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–608; Investigation No. 337–TA–612]

Notice of Commission Determination to Review-in-Part a Final Determination on Violation of Section 337; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding; In the Matter of Certain Nitrile Gloves; and In the Matter of Certain Nitrile Rubber Gloves

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review a portion of the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on August 25, 2008, regarding whether there is a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. * 1337, in the above-captioned consolidated investigation.

FOR FURTHER INFORMATION CONTACT: Michelle Walters, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337-TA–608 on July 6, 2007, based on a complaint filed by Tillotson Corporation d.b.a. Best Manufacturing Company (''Tillotson''). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. **1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain nitrile gloves by reason of infringement of various claims of United States Patent No. Re. 35,616 (''the '616 patent''). The complaint named over thirty respondents. The Commission instituted a second investigation, Inv. No. 337–TA–612, on August 22, 2007, based on a complaint filed by Tillotson. That complaint also alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain nitrile gloves by reason of infringement of various claims of the '616 patent and named seven respondents. On September 19, 2007, the ALJ consolidated Inv. No. 337–TA–608 with Inv. No. 337–TA–612.

On August 25, 2008, the ALJ issued a final ID and recommended determination on remedy and bonding in the above-referenced consolidated investigation, finding that the active respondents did not violate section 337. Specifically, he found that the vast majority of accused gloves infringe claims 17, 18, and 19 of the '616 patent, but that nine accused gloves do not infringe the asserted claims. He also concluded that when the patentees amended the claims through a reissue application filed more than two years after the grant of the original patent, they improperly enlarged the scope of the claims, rendering them invalid. The ALJ further concluded that the claims are invalid because the patentees filed a defective reissue declaration when applying for the reissue patent. He rejected other arguments of invalidity and unenforceability. Accordingly, the ALJ concluded that respondents had not violated section 337.

On September 8, 2008, complainant Tillotson filed a petition for review, as did several respondents. On September 16, 2008, respondents filed a response to complainant's petition and complainant filed a response to respondents' petition.

Having examined the record of this investigation, including the ALJ's ID and the submissions of the parties, the Commission has determined (1) to review the ALJ's claim construction of the term ''predetermined pressure,'' (2) to review the ALJ's determination of invalidity for a broadening reissue, (3) to review the ALJ's determination of invalidity for a deficient reissue declaration, (4) to review the ALJ's determination that the claims are not invalid for failure to disclose a best mode, (5) to review the ALJ's determination that the claims are not invalid for lack of enablement, and (6) not to review the ALJ's determinations relating to any of the remaining issues on violation. Finally, the Commission has determined to deny complainant's request for oral argument.

The parties should brief their positions on the issues on review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Before the ALJ and in its petition for review, complainant asserted that the term ''predetermined pressure'' means ''the amount of pressure first exerted on the hand by the glove after the glove is donned.'' Nevertheless, complainant also states in its petition that the ''predetermined pressure'' must be determined in advance—a limitation that is omitted from its proposed claim construction. Assuming that the ''predetermined pressure'' must be determined in advance, what does it

mean to determine the pressure in advance?

a. Please explain the meaning of the word ''determine.'' Please submit copies of any dictionary entries that you rely upon for the term ''determine'' and any dictionary entries that you relied upon before the ALJ for the term ''predetermine.''

b. Must a person select a particular pressure to be exerted on the hand, for example, 100 psi, and then make the glove and test it to ensure that it meets the 100 psi requirement? If so, is a mental step, such as this, appropriate in a product claim?

c. Or is it enough to actually measure the pressure in psi, for example, before putting the glove on the hand? For purposes of this question, assume that the claims require that the predetermined pressure be determined in advance of initially exerting the pressure on the hand.

d. Or is it enough that the pressure is fixed by ''basic physics'' when the glove is made? Can the pressure in fact be calculated from the physical characteristics of the glove and the hand?

e. How do the intrinsic and extrinsic evidence support your responses?

2. State precisely how your claim construction of the term ''predetermined pressure'' differs from the ALJ's claim construction.

3. Regarding the issue of broadening reissue, if the ''predetermined pressure'' is determined in advance by selecting a specific pressure and then making the glove, were the claims broadened when the claims were amended during reissue?

4. If the ''predetermined pressure'' is determined in advance by measuring the pressure in advance, were the claims broadened when the claims were amended during reissue?

5. If the ''predetermined pressure'' is determined in advance by means of the properties of the glove, *i.e.*, basic physics, were the claims broadened when the claims were amended during reissue?

6. Please analyze these three scenarios (3, 4, and 5) under the hypothetical glove test.

7. Has the United States Court of Appeals for the Federal Circuit ever applied the omitted limitation test in the broadening reissue context?

8. Regarding the issue of the reissue declaration, assuming that *Dethmers Manufacturing Co., Inc.* v. *Automatic Equipment Manufacturing Co.,* 272 F.3d 1365 (Fed. Cir. 2001), and 37 CFR 1.175(a) (1996) control and further assuming that the change from ''predetermined pressure'' to ''initial pressure'' (regardless of their meanings) was a broadening amendment, were the declarations deficient?

9. Was the amendment a small change in language that did not affect the scope of claim 1? If so, did the change need to be explained in the reissue declaration?

10. Regarding the issue of enablement, what must respondents establish in order to prove that the claims are not enabled?

11. Were any articles or references submitted into evidence that discuss the use of non-carboxylated nitrile butadiene rubber in thin films?

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in a respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers.

The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the United States Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patent expires and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on November 10, 2008. Reply submissions must be filed no later than the close of business on November 17, 2008. The written submissions must be no longer than 60 pages and the reply submissions must be no longer than 30 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42–46 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46 and 210.50).

Issued: October 24, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–25859 Filed 10–29–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Settlement Agreement Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Notice is hereby given that on October 24, 2008, a proposed Settlement Agreement regarding the Precision National Plating Services Superfund Site (the Site), was filed with the United States District Court for the Middle District of Pennsylvania in *United States* v. *Precision National Plating Services, Inc.*, Civil No. 3:08–CV–1946 (M.D. Penn.). Under the terms of the proposed Consent Decree, Precision will pay EPA $987,809.25 for unreimbursed response costs incurred at the Site from April 29, 2004 through August 18, 2007. In addition, Precision has agreed to reimburse EPA for future response costs associated with the Site, and Precision will continue work to clean up the Site pursuant to a Unilateral Administrative Order issued by EPA in April 1998.

The Department of Justice will receive comments relating to the proposed Agreement for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Precision National Plating Services, Inc.*, DJ Ref. No. 90–11–3–07298/1.

The proposed Agreement may be examined at the Office of the United States Attorney for the Middle District of Pennsylvania, William J. Nealon Federal Building and Courthouse, 235 N. Washington Ave., Suite 311, Scranton, PA 18503; at the office of the Environmental Protection Agency Region 3, 1650 Arch Street, Philadelphia, PA 19103. During the public comment period, the proposed Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the proposed Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $6.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–25860 Filed 10–29–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Public Meeting by Teleconference Concerning Heavy Duty Diesel Engine Consent Decrees

The Department of Justice and the Environmental Protection Agency will hold a public meeting on November 19, 2008 at 10 a.m. eastern time by teleconference. The subject of the meeting will be implementation of the provisions of the seven consent decrees signed by the United States and diesel engine manufacturers and entered by the United States District Court for the District of Columbia on July 1, 1999 (*United States* v. *Caterpillar*, Case No. 1:98CV02544; *United States* v. *Navistar International Transportation Corporation*, Case No. 1:98CV02545; *United States* v. *Cummins Engine Company*, Case No. 1:98CV02546; *United States* v. *Detroit Diesel Corporation*, Case No. 1:98CV02548; *United States* v. *Volvo Truck Corporation*, Case No. 1:98CV02547; *United States* v. *Mack Trucks, Inc.*, Case No. 1:98CV01495; and *United States* v. *Renault Vehicles Industries, S.A.*, Case No. 1:98CV02543). In supporting entry by the court of the decrees, the United States committed to meet periodically with states, industry groups, environmental groups, and concerned citizens to discuss consent decree implementation issues. Future meetings will be announced here and on EPA's Diesel Engine Settlement Web site at: *http://www.epa.gov/compliance/resources/cases/civil/caa/diesel/index.html*.

Interested parties should contact the Environmental Protection Agency at the address listed below prior to the meeting to reserve a telephone line and receive instructions for the call.

Agenda

1. Panel Remarks—10 a.m.

Remarks by DOJ and EPA regarding implementation of the provisions of the diesel engine consent decrees.

2. Public comments and questions.

FOR FURTHER INFORMATION CONTACT: Anne Wick, EPA Diesel Engine Consent Decree Coordinator, U.S. Environmental Protection Agency (Mail Code 2242A), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, *e-mail: wick.anne@epa.gov*.

Karen S. Dworkin,

Assistant Chief, Environment & Natural Resources Division, Environmental Enforcement Section.

[FR Doc. E8–25888 Filed 10–29–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0023]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review, Import/Export Declaration for List I and List II Chemicals; DEA Form 486.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** at 73 FR 50055 on August 25, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 1, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of

information are encouraged. Your comments should address one or more of the following four points:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0023

(1) *Type of Information Collection:* Extension of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Import/Export Declaration for List I and List II Chemicals.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Form 486.

Component: Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: Persons importing, exporting, and conducting international transactions with List I and List II chemicals must notify DEA of those transactions in advance of their occurrence, including information regarding the person(s) to whom the chemical will be transferred and the quantity to be transferred. For importations, persons must also provide return declarations, confirming the date of the importation and transfer, and the amounts of the chemical transferred. This information is used to prevent shipments not intended for legitimate purposes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* A respondent may submit multiple responses. The below table presents information regarding the number of respondents, responses, and associated burden hours:

	Number of respondents	Number of responses	Average time per response	Total (hours)
Form 486 (export)	193	10,327	0.2 hour (12 minutes)	2,065.4
Form 486 (Export Return Declaration)	193	10,327	0.08 hour (5 minutes)	860.6
Form 486 (import)	120	1,618	0.25 hour (15 minutes)	404.5
Form 486 (import return declaration).*	120	1,780	0.08 hour (5 minutes)	148.3
Form 486 (international transaction)	14	14	0.2 hour (12 minutes)	2.8
Form 486 (international transaction return declaration).	14	14	0.08 hour (5 minutes)	1.2
Quarterly reports for imports of acetone, 2-butanone, and toluene.	110	440	0.5 hour (30 minutes)	220
Total	193			3,702.8

*DEA assumes 10% of all imports will not be transferred in the first thirty days and will necessitate submission of a subsequent return declaration.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,703 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: October 24, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–25927 Filed 10–29–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

October 24, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Mary Beth Smith-Toomey on 202–693–4223 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Department of Labor—ETA, Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–7316/*Fax:* 202–395–6974 (these are not toll-free numbers), *E-mail: OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB 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 estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment Training Administration.

Type of Review: Revision of an existing OMB Control Number.

Title of Collection: Title 29 CFR Part 29—Labor Standards for the Registration of Apprenticeship Programs.

OMB Control Number: 1205–0223.

Agency Form Number: ETA–671.

Affected Public: Private Sector—Business or other for-profits.

Total Estimated Number of Respondents: 248,728.

Total Estimated Annual Burden Hours: 26,757.

Total Estimated Annual Costs Burden: $0.

Description: Title 29 CFR part 29 sets forth labor standards to safeguard the welfare of apprentices and to extend the application of such standards by prescribing policies and procedures concerning the registration of an apprenticeship. The Form ETA 671 collects the information necessary for the Department to enforce the safeguards set forth in the aforementioned Standard. The Form consists of two sections: Section I records the sponsor's information and Section II is for the apprentice's information. For additional information, see related notice published at Volume 73 FR 36903 on June 30, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–25902 Filed 10–29–08; 8:45 am]

BILLING CODE 4510–FR–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Revised Fiscal Year 2008 Tariff-Rate Quota Allocations for Refined Sugar—Re-allocation of Refined Sugar Previously Assigned to Mexico

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The Office of the United States Trade Representative (USTR) is providing notice of a revision in the Fiscal Year (FY) 2008 Tariff-Rate Quota (TRQ) allocation for imported refined sugar for the period August 13 through December 31, 2008. The USTR is re-allocating the portion of the increase in the refined sugar TRQ initially allocated to Mexico on August 13, 2008 to the global portion of the refined sugar TRQ, subject to certain conditions.

DATES: *Effective Date:* October 30, 2008.

ADDRESSES: Inquiries may be mailed or delivered to Leslie O'Connor, Director of Agricultural Affairs, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Leslie O'Connor, Office of Agricultural Affairs, *telephone:* 202–395–6127 or *facsimile:* 202–395–4579.

SUPPLEMENTARY INFORMATION: Pursuant to Additional U.S. Note 5 to Chapter 17 of the Harmonized Tariff Schedule of the United States (HTS), the United States maintains a tariff-rate quota for imports of refined sugar.

Section 404(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a tariff-rate quota for any agricultural product among supplying countries or customs areas. The President delegated this authority to the USTR under Presidential Proclamation 6763 (60 FR 1007). Pursuant to this Proclamation, the USTR may modify previously established allocations as he or she finds appropriate in carrying out the international rights and obligations of the United States and promoting the economic interests of the United States.

In response to tight market conditions, on August 6, 2008, the Secretary of Agriculture increased the in-quota quantity of the tariff-rate quota for refined sugar for FY 2008 by 272,155 metric tons raw value (MTRV) (equivalent of 300,000 short tons raw value) and extended the period in which the sugar could be entered until December 31, 2008.

On August 13, 2008, the USTR allocated this TRQ volume, with a total of 40,000 MTRV allocated to Canada, 68,278 MTRV allocated to Mexico, and the remaining 163,877 MTRV allocated to a global tariff-rate quota, which may be supplied by any country on a first-come, first-served basis, subject to any other provision of law.

The U.S. market for sugar, particularly for refined sugar, remains tight as shown by the historically low 6.0 percent ending stocks-to-use ratio for FY 2009 projected in USDA's October World Agricultural Supply and Demand Estimates report. As a result, the U.S. Government consulted with the Government of Mexico as to whether it intends to fill its allocated portion of the August 2008 increase. The Government of Mexico has informed the Government of the United States that Mexico will continue to export sugar under the duty-free access provided by the North American Free Trade Agreement and thus will not use the portion of the WTO refined sugar TRQ allocated to Mexico and it is available for re-allocation by the United States.

The USTR hereby re-allocates that portion, 68,278 MTRV, to the global refined sugar TRQ, which may be supplied by any country on a first-come, first-served basis, subject to any other provision of law. With this reallocation, the global portion of the FY 2009 refined sugar tariff-rate quota now amounts to 239,245 MTRV. No certificate of quota eligibility is required for sugar entering under this global tariff-rate quota.

On October 27, 2008, the Secretary of Agriculture, pursuant to his authority under 15 CFR pt. 2011.110 to the set terms, limitations, and conditions for entry of refined sugar such as this, determined that 28,278 MTRV of the re-allocated portion of the refined sugar TRQ shall be eligible to enter upon publication of a **Federal Register** notice by the USTR. Of the remainder, 10,000 MTRV may enter 14 days after publication; 10,000 MTRV 28 days after publication; 10,000 MTRV 42 days after publication; and 10,000 MTRV 56 days after publication. If any of these dates fall on a weekend or Federal holiday, the TRQ will open on the next business day.

Susan C. Schwab,

United States Trade Representative.

[FR Doc. E8–25937 Filed 10–29–08; 8:45 am]

BILLING CODE 3190–W9–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 6e–2 and Form N–6EI–1; SEC File No. 270–177; OMB Control No. 3235–0177.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the

''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 6e–2 (17 CFR 270.6e–2) under the Investment Company Act of 1940 (''Act'') (15 U.S.C. 80a) is an exemptive rule that permits separate accounts, formed by life insurance companies, to fund certain variable life insurance products. The rule exempts such separate accounts from the registration requirements under the Act, among others, on condition that they comply with all but certain designated provisions of the Act and meet the other requirements of the rule. The rule sets forth several information collection requirements.

Rule 6e–2 provides a separate account with an exemption from the registration provisions of section 8(a) of the Act if the account files with the Commission Form N–6EI–1, a notification of claim of exemption.

The rule also exempts a separate account from a number of other sections of the Act, provided that the separate account makes certain disclosure in its registration statements, reports to contractholders, proxy solicitations, and submissions to state regulatory authorities, as prescribed by the rule.

Paragraph (b)(9) of rule 6e–2 provides an exemption from the requirements of section 17(f) of the Act and imposes a reporting burden and certain other conditions. Section 17(f) requires that every registered management company meet various custody requirements for its securities and similar investments. Paragraph (b)(9) applies only to management accounts that offer life insurance contracts subject to rule 6e–2.

Since 2005, there have been no filings under paragraph (b)(9) of rule 6e–2 by management accounts. Therefore, since 2005, there has been no cost or burden to the industry regarding the information collection requirements of paragraph (b)(9) of rule 6e–2. In addition, there have been no filings of Form N–6EI–1 by separate accounts since 2005. Therefore, there has been no cost or burden to the industry since that time. The Commission requests authorization to maintain an inventory of one burden hour for administrative purposes.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 22, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25863 Filed 10–29–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation BTR; OMB Control No. 3235–0579; SEC File No. 270–521.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''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.

Regulation Blackout Trade Restriction (''Regulation BTR'') (17 CFR 245.100–245.104) clarifies the scope and application of Section 306(a) of the Sarbanes-Oxley Act of 2002 (''Act'') (15 U.S.C. 7244(a)). Section 306(a)(6) (15 U.S.C. 7244(a)(6)) of the Act requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that would trigger the statutory trading prohibition of Section 306(a)(1)(15 U.S.C. 7244(a)(1)). Approximately 1,230 issuers file Regulation BTR notices annually. We estimate that it takes 2 hours per response for an issuer to draft a notice to directors and executive officers for a total annual burden of 2,460 hours. The issuer prepares 75% of the 2,460 annual burden hours for a total reporting burden of (1,230 × 2 × .75) 1,845 hours. In addition, we estimate that an issuer distributes a notice to five directors and executive officers at an estimated 5 minutes per notice (1,230 blackout period × 5 notices × 5 minutes) for a total reporting burden of 512 hours. The combined annual reporting burden is (1,845 hours + 512 hours) 2,357 hours.

Written comments are invited on: (a) 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; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 22, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25866 Filed 10–29–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation G; OMB Control No. 3235–0576; SEC File No. 270–518.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''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.

Regulation G (17 CFR 244.100–244.102) under the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78a *et seq.*) requires registrants that publicly disclose material information that includes a non-GAAP financial measure to provide a reconciliation to the most directly comparable GAAP financial measure. Regulation G implemented the requirements of Section 401 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7261; 78m). We estimate that approximately 14,000 public companies must comply with Regulation G approximately six times a year for a total of 84,000 responses annually. We estimated that it takes approximately .5 hours per response (84,000 x .5 hours) for a total reporting burden of 42,000 hours annually.

Written comments are invited on: (a) 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; (b) the accuracy of the agency's estimate of the burden imposed by the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 22, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25867 Filed 10–29–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58833; File No. SR–NYSE–2008–106]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Eliminate Subscribership to NYSE Bonds and Provide That All NYSE Members and Member Organizations Are Eligible To Access NYSE Bonds

October 22, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 17, 2008, NYSE Alternext U.S. LLC (''NYSE Alternext'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 86 as part of the relocation of the trading of certain debt securities (''Bonds Relocation'') conducted on NYSE Alternext U.S. LLC's (''NYSE Alternext'') legacy trading systems to an automated trading platform based on NYSE Bonds℠ that will be operated by the Exchange on behalf of NYSE Alternext (''NYSE Alternext Bonds''). The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE Alternext has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposal is to amend NYSE Rule 86 as part of the Bonds Relocation.

Background

As described more fully in a related rule filing, the Exchange's parent company, NYSE Euronext, acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext U.S. LLC,[3] and will continue to operate as a national securities exchange registered under Section 6 of the Act.[4] The effective date of the Merger was October 1, 2008.

In connection with the Merger, NYSE Alternext will relocate all equities trading conducted on the NYSE Alternext legacy trading systems and facilities located at 86 Trinity Place, New York, New York (the ''86 Trinity Trading Systems''), to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation''). The NYSE Alternext equity trading systems and facilities at 11 Wall Street (the ''NYSE Alternext Trading Systems'') will be operated by the Exchange on behalf of NYSE Alternext. Similarly, NYSE Alternext will relocate all options trading currently conducted on the 86 Trinity Trading Systems to new facilities to be located at 11 Wall Street, which will use a trading system based on the options trading system used by NYSE Arca, Inc. (''NYSE Arca'') (the ''Options Relocation'').[5]

Post-Merger, all NYSE Alternext members and member organizations that were authorized to trade on NYSE Alternext before the Merger will receive trading permits (referred to as ''86 Trinity Permits'') that authorize continued trading on the 86 Trinity Trading Systems. Holders of the 86

[3] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger). As noted, Amex was renamed NYSE Alternext U.S. LLC and will be referred to as NYSE Alternext for all purposes throughout this filing. For the avoidance of doubt, NYSE Alternext U.S. LLC is a self regulatory organization distinct from NYSE Euronext's European-market subsidiary, NYSE Alternext.

[4] 15 U.S.C. 78f.

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

Trinity Permits are eligible to apply for an NYSE Alternext equities trading license or options trading permit upon the Equities or Options Relocation, as applicable.[6] In addition, pursuant to the Merger, all NYSE Alternext members and member organizations that apply for an NYSE Alternext equities trading license are automatically waived in as NYSE members and member organizations.[7] Similarly, all NYSE members and member organizations are automatically waived in as NYSE Alternext members and member organizations.[8]

Current NYSE Rule 86 and NYSE Bonds Trading Platform

The NYSE Bonds trading platform processes all bonds trading (including convertible bonds and certain structured products) at the Exchange, including receipt, execution and reporting of transactions.[9]

NYSE Rule 86 prescribes how NYSE Bonds operates, who may use the platform, and how it is regulated.[10] In relevant part, NYSE Rule 86(b)(2)(I) provides that all NYSE member organizations are eligible to subscribe to trade on NYSE Bonds. A member organization becomes a ''Subscriber'' to NYSE Bonds upon entering into a subscription and service and access agreement with the Exchange. A Subscriber to NYSE Bonds may enter orders for themselves or their customer.

In addition, NYSE Rule 86 provides a mechanism for handling clearly erroneous executions and for when trading may be halted or suspended, and has provisions governing sponsored access.[11] In particular, NYSE Rule 86(o) provides, subject to certain requirements and restrictions, that non-members may be granted sponsored access to NYSE Bonds as ''Sponsored Participants.'' A non-member may become a Sponsored Participant so long as the non-member is authorized to do so by the Exchange and enters into a written agreement with both the Exchange and its Sponsoring Member Organization.

All securities traded on NYSE Bonds are designated upon execution with an ''N'' indicator for ''listed'' debt securities or a ''U'' indicator for ''traded'' debt securities. In addition, all bond directory pages on the NYSE Bonds Web site identify securities as either ''listed'' or ''traded.''[12]

The Bonds Relocation

Similar to the Equities and Options Relocations, NYSE Alternext is now proposing the Bonds Relocation.[13]

The debt securities involved in the Bonds Relocation will be traded on NYSE Alternext Bonds and NYSE Alternext will maintain the listings of these securities in accordance with its listing standards. The Exchange will not cross-list any NYSE Alternext-listed securities on the Exchange and will not cross-list any Exchange-listed securities on NYSE Alternext. The Exchange does not currently trade any debt securities listed on other exchanges on a UTP basis, and neither the Exchange nor NYSE Alternext will trade debt securities listed on their respective exchanges on a UTP basis.

The Exchange understands that the Bonds Relocation will occur as soon as reasonably practicable following the date of the Merger, concurrent with the Equities Relocation.[14]

Proposed Amendments to NYSE Rule 86

The Exchange proposes the following amendments to NYSE Rule 86 in order to facilitate the Bonds Relocation and to permit both NYSE and NYSE Alternext members and member organizations to access NYSE Bonds.[15]

The Exchange proposes to modify subparagraph (b)(2)(I) to remove the subscription requirement from Rule 86. At the time the Exchange first adopted Rule 86 and implemented the NYSE Bonds platform, it required NYSE members and member organizations to complete a subscription and service and access agreement. The Exchange now believes that continuing to require members and member organizations to separately ''subscribe'' to NYSE Bonds and complete the related documentation is inefficient, impractical, and does not provide any additional benefit to the Exchange or to investors. All of the requirements contained in the subscription and service and access agreement relating to compliance with legal and regulatory obligations are governed by the rules of the Exchange. By eliminating the subscription requirement, the Exchange believes it will help to streamline the process for members and member organizations to access NYSE Bonds without compromising the integrity of the regulatory process.

Correspondingly, the Exchange also proposes to substitute the references to ''Subscribers'' in subparagraphs (b)(2)(J), (b)(2)(M), (m)(4) and (o) of NYSE Rule 86 with ''Members and Member Organizations'', which would permit all NYSE members and member organizations to be automatically eligible to access NYSE Bonds without any additional requirements.[16] Also, as described above, post-Merger all NYSE Alternext members and member organizations that apply for an NYSE Alternext equities trading permit will be automatically waived in as members and member organizations of the Exchange. Thus, by providing in subparagraph (o) that all Exchange members and member organizations will be eligible to access NYSE Bonds, both NYSE and NYSE Alternext

[6] *See* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70) (describing and approving membership rule changes related to the Merger); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[7] *See* NYSE Rules 2.10 and 2.20. NYSE Alternext members and member organizations will have a six-month grace period within which to meet NYSE and NYSE Alternext Equities membership requirements. If a member or member organization fails to meet those requirements by the close of the grace period, both NYSE and NYSE Alternext will revoke trading approvals on their respective exchanges. *See* NYSE Rule 300.10T and NYSE Alternext Equities Rule 300.10T. *See also* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63).

[8] *See* NYSE Alternext Equities Rules 2.10 and .20. *See also* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63).

[9] *See* NYSE Rules 86(a) and (g).

[10] *See* NYSE Rules 86(b)—(l), (p).

[11] *See* NYSE Rules 86(m)—(o).

[12] On NYSE Bonds, ''listed'' refers to registered (or exempt) debt securities that have been listed with the Exchange by the issuer, subject to the applicable initial and continued listing approvals and criteria. ''Traded'' refers to unregistered debt securities that are admitted to trading on NYSE Bonds without requiring the issuer to have listed those securities on the Exchange. *See* Securities Exchange Act Release No. 54766 (November 16, 2006), 71 FR 67657 (November 22, 2006) (S7–06–05) (SEC exemption for the trading of certain unregistered and unlisted securities). *See also* NYSE Rules 1400–1401.

[13] In the filing governing the Equities Relocation, NYSE Alternext noted that it expected to delist certain debt securities and that those securities would subsequently be listed and traded on NYSE Bonds. *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63). In the interim period since that filing was submitted to the Commission, NYSE Alternext determined that it will retain the listing of these debt securities while adopting and using the advanced technology of NYSE Alternext Bonds to trade them. *See* SR–NYSEALTR–2008–03.

[14] In order to implement the Bonds Relocation, NYSE Alternext is proposing to adopt NYSE Rule 86 as NYSE Alternext Equities Rule 86, and to adopt or make conforming amendments to other NYSE Alternext Equities Rules. *See* SR–NYSEALTR–2008–03.

[15] The Commission approved NYSE Rule 86 in March 2007 after full notice and comment. *See* Securities Exchange Act Release No. 55496 (March 20, 2007), 72 FR 14631 (March 28, 2007) (SR-NYSE–2006–37) (approving NYSE Bonds).

[16] *See* proposed NYSE Rule 86(o) in Exhibit 5. The Exchange also proposes to substitute the reference to ''Subscriber'' in subparagraph (b)(2)(L) with ''Sponsoring Member Organization''.

members and member organizations will be able to trade on NYSE Bonds.

By removing the subscription requirement and providing that all NYSE members and member organizations are eligible to access NYSE Bonds without any additional requirements, the Exchange hopes to maximize participation, increase liquidity and improve pricing, which benefits all market participants.

In addition, the Exchange will modify the NYSE Bonds website to reflect which securities are listed with NYSE and which securities are listed with NYSE Alternext. Executions of NYSE Alternext-listed securities will be designated with an ''A'' indicator.

Operative Date

The Exchange proposes that the operative date of the proposed rule changes be the date of the Equities and Bonds Relocations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change also supports the principles of Section 11A(a)(1)[19] of the Act in that it seeks to ensure economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

The Exchange believes that the proposed amendments to NYSE Rule 86 will enhance the efficient execution of transactions and fair competition among broker-dealers and markets and provide increased bond market activity for the benefit of all market participants.

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.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78k–1(a)(1).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that this proposal qualifies for immediate effectiveness upon filing as a non-controversial rule change pursuant to Section 19(b)(3)(A) of the Act[20] and Rule 19b–4(f)(6)[21] thereunder. The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.[22] This filing is non-controversial because it raises no novel issues and is simply streamlining members' and member organizations' access to NYSE Bonds, as all of the requirements contained in the subscription and service and access agreement relating to compliance with legal and regulatory obligations are already and will continue to be governed by the rules of the Exchange. The proposed rule change will not become operative until the date of the Equities and Bonds Relocations.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2008–106 on the subject line.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(6).

[22] 7 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE complied with this requirement.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-NYSE–2008–106. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–106 and should be submitted on or before November 20, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25913 Filed 10–29–08; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58839; File No. SR–NYSEALTR–2008–03]

Self-Regulatory Organizations; NYSE Alternext US LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Relocation of the Trading of Certain Debt Securities Conducted on or Through the Exchange's Legacy Trading Systems and Facilities to an Automated Bond Trading Platform Based on NYSE Bonds℠

October 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 22, 2008, NYSE Alternext US LLC (''NYSE Alternext'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt NYSE Alternext Equities Rule 86 in order to implement the relocation (''Bonds Relocation'') of the trading of certain debt securities conducted on or through the Exchange's legacy trading systems and facilities to an automated bond trading platform based on NYSE Bonds℠ that will be operated by the New York Stock Exchange LLC (''NYSE'') on behalf of NYSE Alternext (''NYSE Alternext Bonds''). The Bonds Relocation is being implemented in connection with the recent acquisition of The Amex Membership Corporation (''AMC'') by NYSE Euronext. This proposal also includes non-substantive and technical changes to other NYSE Alternext Equities Rules that relate to bond trading at the Exchange. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com/equities/nysealternextequities,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE Alternext has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the NYSE Alternext Equities Rules as needed and to adopt, subject to such changes as are necessary to apply the rule to the Exchange, NYSE Rule 86, which governs trading on the NYSE Bonds platform that NYSE Alternext Bonds is based on.

Background

As described more fully in a related rule filing, NYSE Euronext acquired AMC pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC[3], and will continue to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ''Act'').[4] The effective date of the Merger was October 1, 2008.

In connection with the Merger, the Exchange will relocate all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York (the ''86 Trinity Trading Systems''), to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation''). The Exchange's equity trading systems and facilities at 11 Wall Street (the ''NYSE Alternext Trading Systems'') will be operated by the NYSE on behalf of the Exchange. Similarly, the Exchange will relocate all options trading currently conducted on the 86 Trinity Trading Systems to new facilities of the Exchange to be located at 11 Wall Street, which will use a trading system based on the options trading system used by NYSE Arca, Inc. (''NYSE Arca'') (the ''Options Relocation'').[5] After the Equities Relocation, the Exchange will trade all equities securities currently listed on the Exchange on the NYSE Alternext Trading Systems.

Post-Merger, all Exchange members and member organizations that were authorized to trade on the Exchange before the Merger will receive trading permits (referred to as ''86 Trinity Permits'') that authorize continued trading on the 86 Trinity Trading Systems. Holders of the 86 Trinity Permits are eligible to apply for an NYSE Alternext equities trading license or options trading permit upon the Equities or Options Relocation, as applicable.[6] In addition, pursuant to the Merger, all NYSE Alternext members and member organizations that apply for an NYSE Alternext equities trading license are automatically waived in as NYSE members and member organizations.[7] Similarly, all NYSE members and member organizations are automatically waived in as NYSE

[1] 15 USC. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger). As noted, Amex was renamed NYSE Alternext US LLC and will be referred to as NYSE Alternext or the Exchange for all purposes throughout this rule filing. For the avoidance of doubt, NYSE Alternext US LLC will be a self regulatory organization distinct from NYSE Euronext's European-market subsidiary, NYSE Alternext.

[4] 15 USC. 78f.

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation). The Exchange will submit a separate rule filing to adopt a new rule set to govern NYSE Alternext options trading following the Options Relocation.

[6] *See* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70) (describing and approving membership rule changes related to the Merger); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[7] *See* NYSE Rules 2.10 and 2.20. NYSE Alternext members and member organizations will have a six-month grace period within which to meet NYSE and NYSE Alternext Equities membership requirements. If a member organization fails to meet those requirements by the close of the grace period, both the NYSE and NYSE Alternext will revoke trading approvals on their respective exchanges. *See* NYSE Rule 300.10T and NYSE Alternext Equities Rule 300.10T. *See also* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70) (describing and approving membership issues related to the Merger); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (including discussion of membership issues).

Alternext members and member organizations.[8]

The Bonds Relocation

As with the Equities and Options Relocations, the Exchange now proposes to relocate the trading of certain debt securities currently conducted on the 86 Trinity Trading Systems[9] to NYSE Alternext Bonds.[10] The Exchange believes that the NYSE Alternext Bonds platform is technologically superior to the 86 Trinity Trading Systems and the Exchange believes that the use and implementation of NYSE Alternext Bonds will promote increased market activity in debt securities trading at the Exchange.

Although they will be traded on a new technological platform, the Exchange will maintain the listings of the securities involved in the Bond Relocation in accordance with its listing standards. The Exchange will not cross-list any NYSE-listed securities on the Exchange and will not cross-list any Exchange-listed securities on the NYSE. The Exchange understands that NYSE does not currently trade any debt securities on a UTP basis, and the Exchange does not intend to trade any securities on NYSE Alternext Bonds on a UTP basis. Moreover, neither the Exchange nor NYSE will trade debt securities listed on their respective exchanges on a UTP basis.

The Exchange anticipates that the Bonds Relocation will occur as soon as reasonably practicable following the date of the Merger, concurrent with the Equities Relocation.

Proposed NYSE Alternext Bond Trading Rules

The Exchange proposes to adopt NYSE Rule 86 as NYSE Alternext Equities Rule 86, and to make conforming amendments to other NYSE Alternext Equities Rules.[11] The adoption of these rules is necessary in order to trade debt securities on NYSE Alternext Bonds. Following the Bonds Relocation, NYSE Alternext Equities Rule 86 and the related rules will govern all debt securities transactions conducted on NYSE Alternext Bonds.[12]

Because NYSE Alternext Bonds will be operated by the NYSE on behalf of the Exchange, NYSE Alternext Equities Rule 86 and the related rules will be substantially identical to the existing NYSE Rules, subject to certain minor changes necessary to apply these rules to the Exchange. The Exchange's bond market structure will be identical to the NYSE's and they will have the same rules governing, among other things, (i) the processing and trading of debt securities, including receipt, execution and reporting of transactions, (ii) the types of market participants, (iii) clearly erroneous executions, and (iv) trading halts.

Rule Modifications Relating to NYSE Alternext

As noted above, the Exchange proposes to adopt NYSE Rule 86 as NYSE Alternext Equities Rule 86, subject to a few minor modifications. This filing conforms with amendments to NYSE Rule 86 that were recently filed by the NYSE.[13]

In order to facilitate trading on NYSE Alternext Bonds, the Exchange proposes that NYSE Alternext Equities Rule 86 provide that all NYSE Alternext members and member organizations will be automatically eligible to access NYSE Alternext Bonds.[14] By providing that all NYSE Alternext members and member organizations, which, as described above, includes by cross-designation all NYSE members and member organizations, are automatically eligible to access NYSE Alternext Bonds without any further requirements, both NYSE and NYSE Alternext members and member organizations will be able to trade on NYSE Alternext Bonds. The Exchange believes that these modifications will maximize participation, increase liquidity and improve pricing, which benefits all market participants.

Similar to the manner in which NYSE designates the securities it trades on NYSE Bonds, the Exchange will indicate on the NYSE Alternext Bonds website which securities are listed with the NYSE and which are listed with NYSE Alternext. Executions of NYSE Alternext-listed securities will be designated with an ''A'' indicator and executions of NYSE-listed securities will be designated with an ''N'' indicator.[15]

Regulation of Trading on NYSE Alternext Bonds

Trading on NYSE Alternext Bonds and maintenance of the applicable listing standards will be regulated by NYSE Regulation Inc. (''NYSER'') in accordance with the terms and conditions of the Regulatory Services Agreement the Exchange entered into with NYSER pursuant to the Merger, effective October 1, 2008.

Proposed Amendments to Related NYSE Alternext Equities Rules

The Exchange proposes conforming amendments to NYSE Alternext Equities Rules 13, 51, 55, 61, 72, 76, 79A, 123D and 342 to accommodate the trading of debt securities on NYSE Alternext Bonds. The Exchange also proposes to adopt NYSE Rule 119 as NYSE Alternext Equities Rule 119, which prescribes the procedures for canceling an order in NYSE Alternext Bonds when there is a change in the basis of bonds trading from ''and interest'' to ''flat'' as determined by the Exchange.

Operative Date

The Exchange proposes that the operative date of the proposed rule changes be the date of the Equities and Bonds Relocations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(b)(5) of the Act,[17] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

[8] *See* NYSE Alternext Equities Rules 2.10 and .20. *See also* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63).

[9] *See* Exhibit 3A for a list of the securities involved in the Bonds Relocation.

[10] In the filing governing the Equities Relocation, the Exchange noted that it expected to delist certain debt securities and that those securities would subsequently be listed and traded on NYSE Bonds. *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63). In the interim period since that filing was submitted to the Commission, the Exchange has determined that it will retain the listing of these debt securities while adopting and using the advanced technology of NYSE Alternext Bonds to trade them.

[11] The Commission approved NYSE Rule 86 in March 2007 after full notice and comment. *See* Securities Exchange Act Release No. 55496 (March 20, 2007), 72 FR 14631 (March 28, 2007) (SR–NYSE–2006–37) (approving NYSE Bonds).

[12] *See* Amex Rule 0 and NYSE Alternext Equities Rule 0. Together these rules prescribe that all trading conducted on the systems and facilities operated by NYSE on behalf of the Exchange, including the NYSE Alternext Bonds trading platform, shall be governed solely by the NYSE Alternext Equities Rules unless otherwise specifically designated.

[13] *See* SR–NYSE–2008–106.

[14] *See* proposed NYSE Alternext Equities Rule 86(o).

[15] Pursuant to an SEC Exemptive Order for NYSE Bonds, NYSE is permitted to trade certain unregistered and unlisted securities on NYSE Bonds. *See* Securities Exchange Act Release No. 54766 (November 16, 2006), 71 FR 67657 (November 22, 2006) (S7–06–05). *See also* NYSE Rules 1400–1401. Executions of these securities on NYSE Bonds are designated with a ''U'' indicator. The securities included in the Bonds Relocation (listed in Exhibit 3A) are not subject to the SEC's Exemptive Order and thus the Exchange will not need the ''U'' indicator for any securities traded on NYSE Alternext Bonds.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change also supports the principles of Section 11A(a)(1)[18] of the Act in that it seeks to ensure economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

The Exchange believes that the proposed adoption of NYSE Alternext Rule 86 and other rule amendments will enhance the efficient execution of transactions and fair competition among broker-dealers and markets and provide increased bond market activity for the benefit of all market participants

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that this proposal qualifies for immediate effectiveness upon filing as a non-controversial rule change pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6)[20] thereunder. The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing.[21]

The Exchange believes that this filing is non-controversial because it raises no novel issues and is consistent with the Commission's prior approvals of the NYSE Bonds platform, the relocation of equities trading on NYSE Alternext, and recent amendments to NYSE Rule 86, upon which this filing is modeled.[22] As described above, this proposal seeks only to implement NYSE Alternext Bonds, which is based on the existing NYSE Bonds platform, and to adopt the related rules (subject to minor modifications to apply them to the Exchange), to govern the trading of debt securities on NYSE Alternext.

The operative date of the proposed rule changes is the date of the Equities and Bonds Relocations.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEALTR–2008–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEALTR–2008–03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2008–03 and should be submitted on or before November 20, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25914 Filed 10–29–08; 8:45 am]

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[18] 15 U.S.C. 78k–1(a)(1).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE Alternext complied with this requirement.

[22] *See* Securities Exchange Act Release No. 55496 (March 20, 2007), 72 FR 14631 (March 28, 2007) (SR–NYSE–2006–37); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63); SR–NYSE–2008–106.

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58855; File No. SR–NYSEArca–2008–111]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Proposing To Amend NYSE Arca Equities Rule 5.2(j)(6)(v) in Order To Add the CBOE Volatility Index® (VIX®) Futures (''VIX Futures'') to the Definition of Futures Reference Asset

October 24, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 17, 2008, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange''), through its wholly-owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities'' or the ''Corporation''), is proposing to amend NYSE Arca Equities Rule 5.2(j)(6)(v) in order to add the CBOE Volatility Index® (VIX®) Futures (''VIX Futures'') to the definition of Futures Reference Asset.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78A.

[3] 17 CFR 240.19b–4.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 19b–4(e)[4] under the Securities Exchange Act of 1934 (''Act'')[5] provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') shall not be deemed a proposed rule change, pursuant to section (c)(1) of Rule 19b–4,[6] if the Commission has approved, pursuant to Section 19(b) of the Act,[7] the SRO's trading rules, procedures, and listing standards for the product class including products linked to VIX Futures, and the SRO has a surveillance program for the product class.[8]

The Commission has approved the listing pursuant to NYSE Arca Equities Rule 5.2(j)(6), including listing pursuant to Rule 19b–4(e), of Index-Linked Securities, which term currently is defined in NYSE Arca Equities Rule 5.2(j)(6) to encompass Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities.[9]

The Exchange is proposing to amend its generic listing standards under amended NYSE Arca Equities Rule 5.2(j)(6) for Index-Linked Securities pursuant to which it will be able to trade securities linked to VIX Futures without Commission approval of each individual product pursuant to Section 19(b)(2) of the Act.[10] Specifically, the Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(v) to add the VIX Futures as an underlying financial instrument of a Futures-Linked Securities and included VIX Futures within the definition of a futures reference asset. The Exchange represents that any securities it lists and/or trades pursuant to NYSE Arca Equities Rule 5.2(j)(6) will satisfy the standards set forth therein, and all applicable Exchange and Federal Securities rules. The Exchange states that within five business days after commencement of trading of an Index-Linked Security in reliance on NYSE Arca Equities Rule 5.2(j)(6), the Exchange will file a Form 19b–4(e).[11]

The Commission has previously approved the listing and trading of options on the VIX.[12]

The VIX

The information in this filing relating to the VIX was taken from the Web site of the Chicago Board Options Exchange (the ''CBOE'').

The VIX was originally developed by the CBOE in 1993 and was calculated using S&P 100® Index options. The current methodology for the VIX was introduced by the CBOE in September 2003 and it is now an index that uses the quotes of certain S&P® 500 Index (''SPX'') option series to derive a measure of the volatility of the U.S. equity market. The VIX measures market expectations of near term volatility conveyed by the prices of options on the SPX. It provides investors with up-to-the-minute market estimates of expected stock market volatility over the next 30 calendar days by extracting implied volatilities from real-time index option bid/ask quotes.

The VIX is calculated using put and call options on the SPX in the two nearest-term expiration months in order to bracket a 30-day calendar period. However, when there is 8 days left to expiration, the VIX ''rolls'' to the second and third contract months in order to minimize the pricing anomalies that might occur close to expiration.

For each contract month, CBOE will determine the at-the-money strike price. It will then select the at-the-money and out-of-the money series with non-zero bid prices and determine the midpoint of the bid-ask quote for each of these series. The midpoint quote of each series is then weighted so that the further away that series is from the at the-money strike, the less weight that is accorded to the quote. Then, to compute the index level, CBOE will calculate a volatility measure for the nearest term options and then for the next term options. This is done using the weighted mid-point of the prevailing bid-ask quotes for all included option series with the same expiration date. These volatility measures are then interpolated to arrive at a single, constant 30-day measure of volatility.

The CBOE will compute the index on a real-time basis throughout each trading day, from 8:30 AM until 3:15 PM (Chicago Time) CST. The CBOE has calculated historical index values for the new VIX back to 1986. VIX levels will be calculated by CBOE and disseminated at 15-second intervals to market information vendors via the Options Price Reporting Authority (''OPRA'').

VIX Futures

Information regarding VIX Futures can be found on the Web site of the CBOE Futures Exchange (the ''CFE'').

The CFE began listing and trading VIX Futures since March 26, 2004, under the ticker symbol VX. VIX Futures trade between the hours of 8:30 a.m.–3:15 p.m. Central Time (Chicago Time). The CFE is a member of the Intermarket Surveillance Group (''ISG'').[13]

The monthly volume and open interest, in USD, as of the last day of each of the last six months for the VIX Futures was as follows:

	Monthly volume	Open interest
Mar—08	$266,990,096	$2,621,925,695
Apr—08	220,242,675	2,539,855,183
May—08	214,255,026	2,574,362,763

[4] 17 CFR 240.19b–4(e).

[5] 17 U.S.C. 78a.

[6] 17 CFR 240.19b–4(c)(1).

[7] 15 U.S.C. 78s(b).

[8] *See* Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998).

[9] *See* Securities Exchange Act Release Nos. 56637 (October 10, 2007), 72 FR 58704 (October 16, 2007) (SR–NYSEArca–2007–92) and 57701 [sic] (March 14, 2008), 73 FR 15550 (March 24, 2008) (SR–NYSRArca–2008–20).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 240.19b–4(e)(2)(ii); 17 CFR 249.820.

[12] *See* Securities Exchange Release No. 48807 (November 19, 2003), 68 FR 66516 (November 26, 2003) (SR–CBOE–2003–40).

[13] For a list of the current members and affiliate members of ISG, see *www.isgportal.org.*

	Monthly volume	Open interest
Jun—08	210,130,373	2,506,392,108
Jul—08	216,902,870	2,476,056,292
Aug—08	254,239,715	2,113,750,676

The Exchange believes that the proposed criteria to add VIX Futures as an underlying Futures Reference asset will facilitate the listing and trading of additional Futures-Linked Security that will enhance competition among market participants, to the benefit of investors and the marketplace.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [14] of the Act, in general, and furthers the objectives of Section 6(b)(5) [15] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of additional Futures-Linked Security that will enhance competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange 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.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice of the filing thereof. The Commission has determined that a 15-day comment period is appropriate in this case.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–111 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–111. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–111 and should be submitted on or before November 14, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25923 Filed 10–29–08; 8:45 am]

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[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58856; File No. SR–NYSEArca–2008–112]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Listing of the NETS S&P/MIB Index Fund (Italy)

October 24, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 21, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares (''Shares'') of the following fund of the NETS Trust (''Trust''): NETS S&P/MIB Index Fund (Italy). The text of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 C.F.R. 240.19b–4.

the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the following fund under NYSE Arca Equities Rule 5.2(j)(3), the Exchange's listing standards for Investment Company Units (''ICUs''): [3] NETS S&P/MIB Index Fund (Italy) (the ''Fund'').

The Fund is currently listed on NYSE Alternext US LLC (''NYSE Alternext US'') (formerly, American Stock Exchange LLC) and is traded on the Exchange pursuant to unlisted trading privileges (''UTP''). Prior to listing on the Exchange, the Fund would be required to satisfy the applicable delisting procedures of NYSE Alternext US and applicable statutory and regulatory requirements, including, without limitation, Section 12 of the Act,[4] relating to listing the Fund on the Exchange.[5]

The Fund is an ''index fund'' that seeks to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of publicly-traded securities in the aggregate in the Italian equity markets, as represented by the S&P/MIB Index (''Index''). The primary market for securities in the Index is principally the Borsa Italiana.

The Exchange is submitting this proposed rule change because the Index for the Fund does not meet all of the ''generic'' listing requirements of Commentary .01(a)(B) to NYSE Arca Equities Rule 5.2(j)(3) applicable to listing of ICUs based on international or global indexes. The Index meets all such requirements except for those set forth in Commentary .01(a)(B)(3).[6] The Exchange represents that: (1) Except for the requirement under Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) that the five most heavily weighted component stocks shall not exceed 60% of the weight of the Index, the Shares of the Fund currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(3); (2) the continued listing standards under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2) applicable to ICUs shall apply to the Shares; and (3) the Trust is required to comply with Rule 10A–3 [7] under the Act for the initial and continued listing of the Shares. In addition, the Exchange represents that the Shares will comply with all other requirements applicable to ICUs including, but not limited to, requirements relating to the dissemination of key information such as the Index value and Intraday Indicative Value, rules governing the trading of equity securities, trading hours, trading halts, surveillance,[8] and Information Bulletin to ETP Holders, as set forth in Exchange rules applicable to ICUs and in prior Commission orders approving the generic listing rules applicable to the listing and trading of ICUs.[9]

Detailed descriptions of the Fund, the Index, procedures for creating and redeeming Shares, transaction fees and expenses, dividends, distributions, taxes, and reports to be distributed to beneficial owners of the Shares can be found in the Trust's Registration Statement [10] or on the Web site for the Fund (*http://www.netsetfs.com*), as applicable.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,[11] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will allow the listing and trading of the Fund on the Exchange, which the Exchange believes will be to the benefit of investors and the marketplace.

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 purpose of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on

[3] An Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities). *See* NYSE Arca Equities Rule 5.2(j)(3)(A).

[4] 15 U.S.C. 78(*l*).

[5] The Exchange will seek the voluntary consent of the issuer of the Fund to be delisted from NYSE Alternext US and listed on the Exchange. The Exchange notes that its approval of the Fund's listing application would be required prior to listing.

[6] The Exchange states that the Index satisfies the first requirement under Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) that the most heavily weighted component stock shall not exceed 25% of the weight of the index or portfolio. However, the Index fails to meet the second requirement of Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) that the five most heavily weighted component stocks shall not exceed 60% of the weight of the Index. The Exchange states that, as of September 22, 2008, the five most heavily weighted component stocks represented 60.616% of the Index weight.

[7] 17 CFR 240.10A–3.

[8] The Exchange may obtain information for surveillance purposes via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of ISG. For a list of the current members of ISG, *see http://www.isgportal.org.* The Exchange does not have in place a comprehensive surveillance sharing agreement with the Borsa Italiana and such exchange is not an ISG member.

[9] *See, e.g.*, Securities Exchange Act Release No. 55621 (April 12, 2007), 72 FR 19571 (April 18, 2007) (SR–NYSEArca–2006–86) (order approving generic listing standards for ICUs based on international or global indexes); Securities Exchange Act Release No. 44551 (July 12, 2001), 66 FR 37716 (July 19, 2001) (SR–PCX–2001–14) (order approving generic listing standards for ICUs and Portfolio Depositary Receipts); Securities Exchange Act Release No. 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999) (SR–PCX–98–29) (order approving rules for listing and trading of ICUs).

[10] *See* the Trust's Registration Statement on Form N–1A, dated March 17, 2008, and supplement thereto dated September 3, 2008 (File Nos. 333–147077 and 811–22140).

[11] 15 U.S.C. 78f(b)(5).

which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative until 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)(iii) [15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that it can list and trade the Shares immediately. The Exchange states that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. The Exchange also believes that the proposal is non-controversial because, although the Underlying Index fails to meet the requirement set forth in Commentary .01(a)(B)(3) to NYSE Arca Equities Rule 5.2(j)(3) that the five most heavily weighted component stocks not exceed 60% of the weight of the Index by a small amount (0.616%), the Shares currently satisfy all of the other applicable generic listing standards under NYSE Arca Equities Rule 5.2(j)(3) and all other requirements applicable to ICUs as set forth in Exchange Rules and prior Commission orders approving the generic listing rules applicable to the listing and trading of ICUs.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[16] Given that the Shares comply with all of the NYSE Arca Equities generic listing standards for ICUs (except for narrowly missing the requirement that the five most heavily weighted component stocks not exceed 60% of the weight of the Index), the listing and trading of the Shares by NYSE Arca does not appear to present any novel or significant regulatory issues or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as operative upon filing.

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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2008–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–112. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–112 and should be submitted on or before November 20, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25924 Filed 10–29–08; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] *Id.* In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 15 17 CFR 240.19b–4(f)(6).

[16] 16 For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Office of the Commissioner

[Docket No. SSA–2008–0049]

Cost-of-Living Increase and Other Determinations for 2009

AGENCY: Social Security Administration.

ACTION: Notice.

SUMMARY: We have determined—

(1) A 5.8 percent cost-of-living increase in Social Security benefits under title II of the Social Security Act (the Act), effective for December 2008;

(2) An increase in the Federal Supplemental Security Income (SSI) monthly benefit amounts under title XVI of the Act for 2009 to $674 for an eligible individual, $1,011 for an eligible individual with an eligible spouse, and $338 for an essential person;

(3) The student earned income exclusion to be $1,640 per month in 2009 but not more than $6,600 in all of 2009;

(4) The dollar fee limit for services performed as a representative payee to be $37 per month ($72 per month in the case of a beneficiary who is disabled and has an alcoholism or drug addiction condition that leaves him or her incapable of managing benefits) in 2009;

(5) The dollar limit on the administrative-cost assessment charged to attorneys representing claimants to be $83 in 2009;

(6) The national average wage index for 2007 to be $40,405.48;

(7) The Old-Age, Survivors, and Disability Insurance (OASDI) contribution and benefit base to be $106,800 for remuneration paid in 2009 and self-employment income earned in taxable years beginning in 2009;

(8) The monthly exempt amounts under the Social Security retirement

earnings test for taxable years ending in calendar year 2009 to be $1,180 and $3,140;

(9) The dollar amounts (''bend points'') used in the primary insurance amount benefit formula for workers who become eligible for benefits, or who die before becoming eligible, in 2009 to be $744 and $4,483;

(10) The bend points used in the formula for computing maximum family benefits for workers who become eligible for benefits, or who die before becoming eligible, in 2009 to be $950, $1,372, and $1,789;

(11) The amount of taxable earnings a person must have to be credited with a quarter of coverage in 2009 to be $1,090;

(12) The ''old-law'' contribution and benefit base to be $79,200 for 2009;

(13) The monthly amount deemed to constitute substantial gainful activity for statutorily blind individuals in 2009 to be $1,640, and the corresponding amount for non-blind disabled persons to be $980;

(14) The earnings threshold establishing a month as a part of a trial work period to be $700 for 2009; and

(15) Coverage thresholds for 2009 to be $1,700 for domestic workers and $1,500 for election workers.

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Kunkel, Office of the Chief Actuary, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–3013. Information relating to this announcement is available on our Internet site at *www.socialsecurity.gov/OACT/COLA/index.html*. For information on eligibility or claiming benefits, call 1–800–772–1213, or visit our Internet site, Social Security Online, at *www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Act, we must publish within 45 days after the close of the third calendar quarter of 2008 the benefit increase percentage and the revised table of ''special minimum'' benefits (section 215(i)(2)(D)). Also, we must publish on or before November 1 the national average wage index for 2007 (section 215(a)(1)(D)), the OASDI fund ratio for 2008 (section 215(i)(2)(C)(ii)), the OASDI contribution and benefit base for 2009 (section 230(a)), the amount of earnings required to be credited with a quarter of coverage in 2009 (section 213(d)(2)), the monthly exempt amounts under the Social Security retirement earnings test for 2009 (section 203(f)(8)(A)), the formula for computing a primary insurance amount for workers who first become eligible for benefits or die in 2009 (section 215(a)(1)(D)), and the formula for computing the maximum amount of benefits payable to the family of a worker who first becomes eligible for old-age benefits or dies in 2009 (section 203(a)(2)(C)).

Cost-of-Living Increases

General

The next cost-of-living increase, or automatic benefit increase, is 5.8 percent for benefits under titles II and XVI of the Act. Under title II, OASDI benefits will increase by 5.8 percent for individuals eligible for December 2008 benefits, payable in January 2009. This increase is based on the authority contained in section 215(i) of the Act.

Under title XVI, Federal SSI payment levels will also increase by 5.8 percent effective for payments made for the month of January 2009 but paid on December 31, 2008. This is based on the authority contained in section 1617 of the Act.

Automatic Benefit Increase Computation

Under section 215(i) of the Act, the third calendar quarter of 2008 is a cost-of-living computation quarter for all the purposes of the Act. We are required to increase benefits, effective for December 2008, for individuals entitled under title II of the Act and to increase maximum benefits payable to a family. For December 2008, the benefit increase is the percentage increase in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers from the third quarter of 2007 to the third quarter of 2008.

Section 215(i)(1) of the Act provides that the CPI for a cost-of-living computation quarter shall be the arithmetic mean of this index for the 3 months in that quarter. In accordance with 20 CFR 404.275, we round the arithmetic mean, if necessary, to the nearest 0.001.

The CPI for Urban Wage Earners and Clerical Workers for each month in the quarter ending September 30, 2007, is: For July 2007, 203.700; for August 2007, 203.199; and for September 2007, 203.889. The arithmetic mean for that calendar quarter is 203.596. The corresponding CPI for each month in the quarter ending September 30, 2008, is: For July 2008, 216.304; for August 2008, 215.247; and for September 2008, 214.935. The arithmetic mean for this calendar quarter is 215.495. Thus, because the CPI for the calendar quarter ending September 30, 2008, exceeds that for the calendar quarter ending September 30, 2007 by 5.8 percent (rounded to the nearest 0.1), beginning December 2008, a cost-of-living benefit increase of 5.8 percent is effective for benefits under title II of the Act.

Section 215(i) also specifies that an automatic benefit increase under title II, effective for December of any year, will be limited to the increase in the national average wage index for the prior year if the ''OASDI fund ratio'' for that year is below 20 percent. The OASDI fund ratio for a year is the ratio of the combined assets of the Old-Age and Survivors Insurance and Disability Insurance Trust Funds at the beginning of that year to the combined expenditures of these funds during that year. (The expenditures in the ratio's denominator exclude transfer payments between the two trust funds and reduce any transfers to the Railroad Retirement Account by any transfers from that account into either trust fund.) For 2008, the OASDI fund ratio is assets of $2,238,500 million divided by estimated expenditures of $623,507 million, or 359 percent. Because the 359 percent OASDI fund ratio exceeds 20 percent, the automatic benefit increase for December 2008 is not limited.

Title II Benefit Amounts

In accordance with section 215(i) of the Act, in the case of workers and family members for whom eligibility for benefits (*i.e.*, the worker's attainment of age 62, or disability or death before age 62) occurred before 2009, benefits will increase by 5.8 percent beginning with benefits for December 2008 which are payable in January 2009. In the case of first eligibility after 2008, the 5.8 percent increase will not apply.

For eligibility after 1978, benefits are generally determined using a benefit formula provided by the Social Security Amendments of 1977 (Pub. L. 95–216), as described later in this notice.

For eligibility before 1979, we determine benefits by means of a benefit table. The table is available on the Internet at *www.socialsecurity.gov/OACT/ProgData/tableForm.html*, or by writing to: Social Security Administration, Office of Public Inquiries, Windsor Park Building, 6401 Security Boulevard, Baltimore, MD 21235.

Section 215(i)(2)(D) of the Act requires that, when we determine an automatic increase in Social Security benefits, we will publish in the **Federal Register** a revision of the range of the primary insurance amounts and corresponding maximum family benefits based on the dollar amount and other provisions described in section 215(a)(1)(C)(i). We refer to these benefits as ''special minimum'' benefits. These benefits are payable to certain individuals with long periods of

relatively low earnings. To qualify for such benefits, an individual must have at least 11 ''years of coverage.'' To earn a year of coverage for purposes of the special minimum benefit, a person must earn at least a certain proportion of the ''old-law'' contribution and benefit base (described later in this notice). For years before 1991, the proportion is 25 percent; for years after 1990, it is 15 percent. In accordance with section 215(a)(1)(C)(i), the table below shows the revised range of primary insurance amounts and corresponding maximum family benefit amounts after the 5.8 percent automatic benefit increase.

SPECIAL MINIMUM PRIMARY INSURANCE AMOUNTS AND MAXIMUM FAMILY BENEFITS PAYABLE FOR DECEMBER 2008

Number of years of coverage	Primary insurance amount	Maximum family benefit
11	$36.90	$56.10
12	75.10	113.70
13	113.60	171.00
14	151.60	228.10
15	189.40	285.20
16	227.80	342.80
17	266.10	400.50
18	304.30	457.60
19	342.40	515.00
20	380.70	572.00
21	419.10	629.80
22	457.00	687.00
23	495.80	745.10
24	533.90	802.00
25	572.00	858.70
26	610.80	917.10
27	648.50	974.30
28	686.80	1,031.40
29	725.00	1,089.10
30	763.20	1,145.80

Title XVI Benefit Amounts

In accordance with section 1617 of the Act, maximum Federal SSI benefit amounts for the aged, blind, and disabled will increase by 5.8 percent effective January 2009. For 2008, we derived the monthly benefit amounts for an eligible individual, an eligible individual with an eligible spouse, and for an essential person—$637, $956, and $319, respectively—from corresponding yearly unrounded Federal SSI benefit amounts of $7,651.53, $11,476.00, and $3,834.53. For 2009, these yearly unrounded amounts increase by 5.8 percent to $8,095.32, $12,141.61, and $4,056.93, respectively. Each of these resulting amounts must be rounded, when not a multiple of $12, to the next lower multiple of $12. Accordingly, the corresponding annual amounts, effective for 2009, are $8,088, $12,132, and $4,056. Dividing the yearly amounts by 12 gives the corresponding monthly amounts for 2009—$674, $1,011, and $338, respectively. In the case of an eligible individual with an eligible spouse, we equally divide the amount payable between the two spouses.

Title VIII of the Act provides for special benefits to certain World War II veterans residing outside the United States. Section 805 provides that ''[t]he benefit under this title payable to a qualified individual for any month shall be in an amount equal to 75 percent of the Federal benefit rate [the maximum amount for an eligible individual] under title XVI for the month, reduced by the amount of the qualified individual's benefit income for the month.'' Thus the monthly benefit for 2009 under this provision is 75 percent of $674, or $505.50.

Student Earned Income Exclusion

A blind or disabled child, who is a student regularly attending school, college, university, or a course of vocational or technical training, can have limited earnings that are not counted against his or her SSI benefits. The maximum amount of such income that may be excluded in 2008 is $1,550 per month but not more than $6,240 in all of 2008. These amounts increase based on a formula set forth in regulation 20 CFR 416.1112.

To compute each of the monthly and yearly maximum amounts for 2009, we increase the corresponding unrounded amount for 2008 by the latest cost-of-living increase. If the amount so calculated is not a multiple of $10, we round it to the nearest multiple of $10. The unrounded monthly amount for 2008 is $1,548.10. We increase this amount by 5.8 percent to $1,637.89, which we then round to $1,640. Similarly, we increase the unrounded yearly amount for 2008, $6,240.38, by 5.8 percent to $6,602.32 and round this to $6,600. Thus, the maximum amount of the income exclusion applicable to a student in 2009 is $1,640 per month but not more than $6,600 in all of 2009.

Fee for Services Performed as a Representative Payee

Sections 205(j)(4)(A)(i) and 1631(a)(2)(D)(i) of the Act permit a qualified organization to collect from an individual a monthly fee for expenses incurred in providing services performed as such individual's representative payee. Currently the fee is limited to the lesser of: (1) 10 percent of the monthly benefit involved; or (2) $35 per month ($68 per month in any case in which the individual is entitled to disability benefits and we have determined that payment to the representative payee would serve the interest of the individual because the individual has an alcoholism or drug addiction condition and is incapable of managing such benefits). The dollar fee limits are subject to increase by the automatic cost-of-living increase, with the resulting amounts rounded to the nearest whole dollar amount. Thus, we increase the current amounts by 5.8 percent to $37 and $72 for 2009.

Attorney Assessment Fee

Under sections 206(d) and 1631(d) of the Act, whenever a fee for services is required to be paid to an attorney who has represented a claimant, we must impose on the attorney an assessment to cover administrative costs. Such assessment shall be no more than 6.3 percent of the attorney's fee or, if lower, a dollar amount that is subject to increase by the automatic cost-of-living increase. We derive the dollar limit for December 2008 by increasing the unrounded limit for December 2007, $79.25, by 5.8 percent, which gives $83.85. We then round $83.85 to the next lower multiple of $1. The dollar limit effective for December 2008 is thus $83.

National Average Wage Index for 2007

General

Under various provisions of the Act, several amounts increase automatically with annual increases in the national average wage index. The amounts are: (1) The OASDI contribution and benefit base; (2) the exempt amounts under the retirement earnings test; (3) the dollar amounts, or bend points, in the primary insurance amount and maximum family benefit formulas; (4) the amount of earnings required for a worker to be credited with a quarter of coverage; (5) the ''old-law'' contribution and benefit base (as determined under section 230 of the Act as in effect before the 1977 amendments); (6) the substantial gainful activity amount applicable to statutorily blind individuals; and (7) the coverage threshold for election officials and election workers. Also, section 3121(x) of the Internal Revenue Code requires that the domestic employee coverage threshold be based on changes in the national average wage index.

In addition to the amounts required by statute, two amounts increase automatically under regulatory requirements. The amounts are: (1) The substantial gainful activity amount applicable to non-blind disabled persons; and (2) the monthly earnings threshold that establishes a month as part of a trial work period for disabled beneficiaries.

Computation

We determined the national average wage index for calendar year 2007 based on the 2006 national average wage index of $38,651.41 announced in the **Federal Register** on October 25, 2007 (72 FR 60703), along with the percentage increase in average wages from 2006 to 2007 measured by annual wage data. We tabulate the annual wage data including contributions to deferred compensation plans, as required by section 209(k) of the Act. The average amounts of wages calculated directly from these data were $37,078.27 and $38,760.95 for 2006 and 2007, respectively. To determine the national average wage index for 2007 at a level that is consistent with the national average wage indexing series for 1951 through 1977 (published December 29, 1978, at 43 FR 61016), we multiply the 2006 national average wage index of $38,651.41 by the percentage increase in average wages from 2006 to 2007 (based on SSA-tabulated wage data) as follows, with the result rounded to the nearest cent.

Amount

Multiplying the national average wage index for 2006 ($38,651.41) by the ratio of the average wage for 2007 ($38,760.95) to that for 2006 ($37,078.27) produces the 2007 index, $40,405.48. The national average wage index for calendar year 2007 is about 4.54 percent greater than the 2006 index.

OASDI Contribution and Benefit Base

General

The OASDI contribution and benefit base is $106,800 for remuneration paid in 2009 and self-employment income earned in taxable years beginning in 2009.

The OASDI contribution and benefit base serves two purposes:

(a) It is the maximum annual amount of earnings on which OASDI taxes are paid. The OASDI tax rate for remuneration paid in 2009 is 6.2 percent for employees and employers, each. The OASDI tax rate for self-employment income earned in taxable years beginning in 2009 is 12.4 percent. (The Hospital Insurance tax is due on remuneration, without limitation, paid in 2009, at the rate of 1.45 percent for employees and employers, each, and on self-employment income earned in taxable years beginning in 2009, at the rate of 2.9 percent.)

(b) It is the maximum annual amount of earnings used in determining a person's OASDI benefits.

Computation

Section 230(b) of the Act provides the formula used to determine the OASDI contribution and benefit base. Under the formula, the base for 2009 shall be the larger of: (1) The 1994 base of $60,600 multiplied by the ratio of the national average wage index for 2007 to that for 1992; or (2) the current base ($102,000). If the resulting amount is not a multiple of $300, it shall be rounded to the nearest multiple of $300.

Amount

Multiplying the 1994 OASDI contribution and benefit base amount ($60,600) by the ratio of the national average wage index for 2007 ($40,405.48 as determined above) to that for 1992 ($22,935.42) produces the amount of $106,759.42. We round this amount to $106,800. Because $106,800 exceeds the current base amount of $102,000, the OASDI contribution and benefit base is $106,800 for 2009.

Retirement Earnings Test Exempt Amounts

General

We withhold Social Security benefits when a beneficiary under the normal retirement age (NRA) has earnings in excess of the applicable retirement earnings test exempt amount. (NRA is the age of initial benefit entitlement for which the benefit, before rounding, is equal to the worker's primary insurance amount. The NRA is age 66 for those born in 1943–54, and it gradually increases to age 67.) A higher exempt amount applies in the year in which a person attains his or her NRA, but only with respect to earnings in that year's months prior to such attainment, and a lower exempt amount applies at all other ages below NRA. Section 203(f)(8)(B) of the Act, as amended by section 102 of Pub. L. 104–121, provides formulas for determining the monthly exempt amounts. The corresponding annual exempt amounts are exactly 12 times the monthly amounts.

For beneficiaries attaining NRA in the year, we withhold $1 in benefits for every $3 of earnings in excess of the annual exempt amount for months prior to such attainment. For all other beneficiaries under NRA, we withhold $1 in benefits for every $2 of earnings in excess of the annual exempt amount.

Computation

Under the formula applicable to beneficiaries who are under NRA and who will not attain NRA in 2009, the lower monthly exempt amount for 2009 shall be the larger of: (1) The 1994 monthly exempt amount multiplied by the ratio of the national average wage index for 2007 to that for 1992; or (2) the 2008 monthly exempt amount ($1,130). If the resulting amount is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

Under the formula applicable to beneficiaries attaining NRA in 2009, the higher monthly exempt amount for 2009 shall be the larger of: (1) The 2002 monthly exempt amount multiplied by the ratio of the national average wage index for 2007 to that for 2000; or (2) the 2008 monthly exempt amount ($3,010). If the resulting amount is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

Lower Exempt Amount

Multiplying the 1994 retirement earnings test monthly exempt amount of $670 by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1992 ($22,935.42) produces the amount of $1,180.34. We round this to $1,180. Because $1,180 is larger than the corresponding current exempt amount of $1,130, the lower retirement earnings test monthly exempt amount is $1,180 for 2009. The corresponding lower annual exempt amount is $14,160 under the retirement earnings test.

Higher Exempt Amount

Multiplying the 2002 retirement earnings test monthly exempt amount of $2,500 by the ratio of the national average wage index for 2007 ($40,405.48) to that for 2000 ($32,154.82) produces the amount of $3,141.48. We round this to $3,140. Because $3,140 is larger than the corresponding current exempt amount of $3,010, the higher retirement earnings test monthly exempt amount is $3,140 for 2009. The corresponding higher annual exempt amount is $37,680 under the retirement earnings test.

Computing Benefits After 1978

General

The Social Security Amendments of 1977 provided a method for computing benefits which generally applies when a worker first becomes eligible for benefits after 1978. This method uses the worker's ''average indexed monthly earnings'' to compute the primary insurance amount. We adjust the computation formula each year to reflect changes in general wage levels, as measured by the national average wage index.

We also adjust, or ''index,'' a worker's earnings to reflect the change in general wage levels that occurred during the worker's years of employment. Such indexing ensures that a worker's future

benefit level will reflect the general rise in the standard of living that will occur during his or her working lifetime. To compute the average indexed monthly earnings, we first determine the required number of years of earnings. Then we select that number of years with the highest indexed earnings, add the indexed earnings, and divide the total amount by the total number of months in those years. We then round the resulting average amount down to the next lower dollar amount. The result is the average indexed monthly earnings.

For example, to compute the average indexed monthly earnings for a worker attaining age 62, becoming disabled before age 62, or dying before attaining age 62, in 2009, we divide the national average wage index for 2007, $40,405.48, by the national average wage index for each year prior to 2007 in which the worker had earnings. Then we multiply the actual wages and self-employment income, as defined in section 211(b) of the Act and credited for each year, by the corresponding ratio to obtain the worker's indexed earnings for each year before 2007. We consider any earnings in 2007 or later at face value, without indexing. We then compute the average indexed monthly earnings for determining the worker's primary insurance amount for 2009.

Computing the Primary Insurance Amount

The primary insurance amount is the sum of three separate percentages of portions of the average indexed monthly earnings. In 1979 (the first year the formula was in effect), these portions were the first $180, the amount between $180 and $1,085, and the amount over $1,085. We call the dollar amounts in the formula governing the portions of the average indexed monthly earnings the bend points of the formula. Thus, the bend points for 1979 were $180 and $1,085.

To obtain the bend points for 2009, we multiply each of the 1979 bend-point amounts by the ratio of the national average wage index for 2007 to that average for 1977. We then round these results to the nearest dollar. Multiplying the 1979 amounts of $180 and $1,085 by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1977 ($9,779.44) produces the amounts of $743.70 and $4,482.87. We round these to $744 and $4,483. Accordingly, the portions of the average indexed monthly earnings to be used in 2009 are the first $744, the amount between $744 and $4,483, and the amount over $4,483.

Consequently, for individuals who first become eligible for old-age insurance benefits or disability insurance benefits in 2009, or who die in 2009 before becoming eligible for benefits, their primary insurance amount will be the sum of:

(a) 90 percent of the first $744 of their average indexed monthly earnings, plus

(b) 32 percent of their average indexed monthly earnings over $744 and through $4,483, plus

(c) 15 percent of their average indexed monthly earnings over $4,483.

We round this amount to the next lower multiple of $0.10 if it is not already a multiple of $0.10. This formula and the rounding adjustment described above are contained in section 215(a) of the Act.

Maximum Benefits Payable to a Family

General

The 1977 amendments continued the long established policy of limiting the total monthly benefits that a worker's family may receive based on his or her primary insurance amount. Those amendments also continued the then existing relationship between maximum family benefits and primary insurance amounts but changed the method of computing the maximum amount of benefits that may be paid to a worker's family. The Social Security Disability Amendments of 1980 (Pub. L. 96–265) established a formula for computing the maximum benefits payable to the family of a disabled worker. This formula applies to the family benefits of workers who first become entitled to disability insurance benefits after June 30, 1980, and who first become eligible for these benefits after 1978. For disabled workers initially entitled to disability benefits before July 1980, or whose disability began before 1979, we compute the family maximum payable the same as the old-age and survivor family maximum.

Computing the Old-Age and Survivor Family Maximum

The formula used to compute the family maximum is similar to that used to compute the primary insurance amount. It involves computing the sum of four separate percentages of portions of the worker's primary insurance amount. In 1979, these portions were the first $230, the amount between $230 and $332, the amount between $332 and $433, and the amount over $433. We refer to such dollar amounts in the formula as the bend points of the family-maximum formula.

To obtain the bend points for 2009, we multiply each of the 1979 bend-point amounts by the ratio of the national average wage index for 2007 to that average for 1977. Then we round this amount to the nearest dollar. Multiplying the amounts of $230, $332, and $433 by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1977 ($9,779.44) produces the amounts of $950.29, $1,371.72, and $1,789.02. We round these amounts to $950, $1,372, and $1,789. Accordingly, the portions of the primary insurance amounts to be used in 2009 are the first $950, the amount between $950 and $1,372, the amount between $1,372 and $1,789, and the amount over $1,789.

Consequently, for the family of a worker who becomes age 62 or dies in 2009 before age 62, we will compute the total amount of benefits payable to them so that it does not exceed:

(a) 150 percent of the first $950 of the worker's primary insurance amount, plus

(b) 272 percent of the worker's primary insurance amount over $950 through $1,372, plus

(c) 134 percent of the worker's primary insurance amount over $1,372 through $1,789, plus

(d) 175 percent of the worker's primary insurance amount over $1,789.

We then round this amount to the next lower multiple of $0.10 if it is not already a multiple of $0.10. This formula and the rounding adjustment described above are contained in section 203(a) of the Act.

Quarter of Coverage Amount

General

The amount of earnings required for a quarter of coverage in 2009 is $1,090. A quarter of coverage is the basic unit for determining whether a worker is insured under the Social Security program. For years before 1978, we generally credited an individual with a quarter of coverage for each quarter in which wages of $50 or more were paid, or with 4 quarters of coverage for every taxable year in which $400 or more of self-employment income was earned. Beginning in 1978, employers generally report wages on an annual basis instead of a quarterly basis. With the change to annual reporting, section 352(b) of the Social Security Amendments of 1977 amended section 213(d) of the Act to provide that a quarter of coverage would be credited for each $250 of an individual's total wages and self-employment income for calendar year 1978, up to a maximum of 4 quarters of coverage for the year.

Computation

Under the prescribed formula, the quarter of coverage amount for 2009 shall be the larger of: (1) The 1978 amount of $250 multiplied by the ratio of the national average wage index for 2007 to that for 1976; or (2) the current amount of $1,050. Section 213(d) further provides that if the resulting amount is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

Quarter of Coverage Amount

Multiplying the 1978 quarter of coverage amount ($250) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1976 ($9,226.48) produces the amount of $1,094.82. We then round this amount to $1,090. Because $1,090 exceeds the current amount of $1,050, the quarter of coverage amount is $1,090 for 2009.

''Old-Law'' Contribution and Benefit Base

General

The ''old-law'' contribution and benefit base for 2009 is $79,200. This is the base that would have been effective under the Act without the enactment of the 1977 amendments.

The ''old-law'' contribution and benefit base is used by:

(a) The Railroad Retirement program to determine certain tax liabilities and tier II benefits payable under that program to supplement the tier I payments which correspond to basic Social Security benefits,

(b) the Pension Benefit Guaranty Corporation to determine the maximum amount of pension guaranteed under the Employee Retirement Income Security Act (section 230(d) of the Act),

(c) Social Security to determine a year of coverage in computing the special minimum benefit, as described earlier, and

(d) Social Security to determine a year of coverage (acquired whenever earnings equal or exceed 25 percent of the ''old-law'' base for this purpose only) in computing benefits for persons who are also eligible to receive pensions based on employment not covered under section 210 of the Act.

Computation

The ''old-law'' contribution and benefit base shall be the larger of: (1) The 1994 ''old-law'' base ($45,000) multiplied by the ratio of the national average wage index for 2007 to that for 1992; or (2) the current ''old-law'' base ($75,900). If the resulting amount is not a multiple of $300, it shall be rounded to the nearest multiple of $300.

Amount

Multiplying the 1994 ''old-law'' contribution and benefit base amount ($45,000) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1992 ($22,935.42) produces the amount of $79,276.80. We round this amount to $79,200. Because $79,200 exceeds the current amount of $75,900, the ''old-law'' contribution and benefit base is $79,200 for 2009.

Substantial Gainful Activity Amounts

General

A finding of disability under titles II and XVI of the Act requires that a person, except for a title XVI disabled child, be unable to engage in substantial gainful activity (SGA). A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability. Section 223(d)(4)(A) of the Act specifies a higher SGA amount for statutorily blind individuals under title II while Federal regulations (20 CFR 404.1574 and 416.974) specify a lower SGA amount for non-blind individuals. Both SGA amounts increase in accordance with increases in the national average wage index.

Computation

The monthly SGA amount for statutorily blind individuals under title II for 2009 shall be the larger of: (1) Such amount for 1994 multiplied by the ratio of the national average wage index for 2007 to that for 1992; or (2) such amount for 2008. The monthly SGA amount for non-blind disabled individuals for 2009 shall be the larger of: (1) Such amount for 2000 multiplied by the ratio of the national average wage index for 2007 to that for 1998; or (2) such amount for 2008. In either case, if the resulting amount is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

SGA Amount for Statutorily Blind Individuals

Multiplying the 1994 monthly SGA amount for statutorily blind individuals ($930) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1992 ($22,935.42) produces the amount of $1,638.39. We then round this amount to $1,640. Because $1,640 is larger than the current amount of $1,570, the monthly SGA amount for statutorily blind individuals is $1,640 for 2009.

SGA Amount for Non-Blind Disabled Individuals

Multiplying the 2000 monthly SGA amount for non-blind individuals ($700) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1998 ($28,861.44) produces the amount of $979.99. We then round this amount to $980. Because $980 is larger than the current amount of $940, the monthly SGA amount for non-blind disabled individuals is $980 for 2009.

Trial Work Period Earnings Threshold

General

During a trial work period, a beneficiary receiving Social Security disability benefits may test his or her ability to work and still be considered disabled. We do not consider services performed during the trial work period as showing that the disability has ended until services have been performed in at least 9 months (not necessarily consecutive) in a rolling 60-month period. In 2008, any month in which earnings exceed $670 is considered a month of services for an individual's trial work period. In 2009, this monthly amount increases to $700.

Computation

The method used to determine the new amount is set forth in our regulations at 20 CFR 404.1592(b). Monthly earnings in 2009, used to determine whether a month is part of a trial work period, is such amount for 2001 ($530) multiplied by the ratio of the national average wage index for 2007 to that for 1999, or, if larger, such amount for 2008. If the amount so calculated is not a multiple of $10, we round it to the nearest multiple of $10.

Amount

Multiplying the 2001 monthly earnings threshold ($530) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1999 ($30,469.84) produces the amount of $702.82. We then round this amount to $700. Because $700 is larger than the current amount of $670, the monthly earnings threshold is $700 for 2009.

Domestic Employee Coverage Threshold

General

The minimum amount a domestic worker must earn so that such earnings are covered under Social Security or Medicare is the domestic employee coverage threshold. For 2009, this threshold is $1,700. Section 3121(x) of the Internal Revenue Code provides the formula for increasing the threshold.

Computation

Under the formula, the domestic employee coverage threshold amount for 2009 shall be equal to the 1995 amount of $1,000 multiplied by the ratio of the national average wage index for 2007 to that for 1993. If the resulting amount is not a multiple of $100, it shall be rounded to the next lower multiple of $100.

Domestic Employee Coverage Threshold Amount

Multiplying the 1995 domestic employee coverage threshold amount ($1,000) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1993 ($23,132.67) produces the amount of $1,746.68. We then round this amount to $1,700. Accordingly, the domestic employee coverage threshold amount is $1,700 for 2009.

Election Worker Coverage Threshold

General

The minimum amount an election worker must earn so that such earnings are covered under Social Security or Medicare is the election worker coverage threshold. For 2009, this threshold is $1,500. Section 218(c)(8)(B) of the Act provides the formula for increasing the threshold.

Computation

Under the formula, the election worker coverage threshold amount for 2009 shall be equal to the 1999 amount of $1,000 multiplied by the ratio of the national average wage index for 2007 to that for 1997. If the amount so determined is not a multiple of $100, it shall be rounded to the nearest multiple of $100.

Election Worker Coverage Threshold Amount

Multiplying the 1999 election worker coverage threshold amount ($1,000) by the ratio of the national average wage index for 2007 ($40,405.48) to that for 1997 ($27,426.00) produces the amount of $1,473.25. We then round this amount to $1,500. Accordingly, the election worker coverage threshold amount is $1,500 for 2009.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

Dated: October 24, 2008.

Michael J. Astrue,

Commissioner of Social Security.

[FR Doc. E8–25905 Filed 10–29–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6418]

United States-Egypt Science and Technology Joint Board; Public Announcement of a Science and Technology Program for Competitive Grants To Support International, Collaborative Projects in Science and Technology Between U.S. and Egyptian Cooperators

AGENCY: Department of State.

ACTION: Notice.

DATES: *Effective Date:* September 11, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy Ahson, PhD, Program Administrator, U.S.-Egypt Science and Technology Grants Program, USAID/Cairo, Unit 64902, Box 5, APO AE 09839–4902; *phone:* 011-(20–2) 2522–6887; *fax:* 011-(20–2) 2522–7041; *E-mail: stfund@usaid.gov.*

The 2008 Program Announcement, including proposal guidelines for Competitive Grants to Support International, Collaborative Projects, will be available starting September 11, 2008 on the Joint Board Web site: *http://cairo.usembassy.gov/usegypt/grants.htm.*

SUPPLEMENTARY INFORMATION:

Authority: This program is established under 22 U.S.C. 2656d and the Agreement for Scientific and Technological Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt.

A solicitation for this program will begin September 11, 2008. This program will provide modest grants for successfully competitive proposals for bi-national collaborative projects and other activities submitted by U.S. and Egyptian experts. Projects must help the UnitedStates and Egypt utilize science and apply technology by providing opportunities to exchange ideas, information, skills, and techniques, and to collaborate on scientific and technological endeavors of mutual interest and benefit. Proposals which fully meet the submission requirements as outlined in the Program Announcement will receive peer reviews. Proposals considered for funding in fiscal year 2009 must be postmarked by November 15, 2008.

FOR FURTHER INFORMATION CONTACT: Please contact Chair of U.S.-Egypt S&T Joint Board, William Lawrence, Office of Science and Technology Cooperation, Bureau of Oceans, Environment and Science, U.S. Department of State at (202) 663–2619 or *e-mail: LawrenceWA@state.gov.*

Dated: October 23, 2008.

Robert S. Senseney,

Acting Director, Office of Science and Technology Cooperation, Bureau of Oceans, Environment and Science, Department of State.

[FR Doc. E8–25930 Filed 10–29–08; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 6416]

United States-Egypt Science and Technology Joint Board; Public Announcement of a Science and Technology Program for Competitive Grants To Support Junior Scientist Development Visits by U.S. and Egyptian Scientists

AGENCY: Department of State.

ACTION: Notice.

DATES: *Effective Date:* September 11, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy Ahson, PhD, Program Administrator, U.S.-Egypt Science and Technology Grants Program, USAID/Cairo, Unit 64902, Box 5, APO AE 09839–4902; *phone:* 011 (20–2) 2522–6887; *fax:* 011 (20–2) 2522–7041; *E-mail: stfund@usaid.gov.*

The 2008 Program guidelines for Junior Scientist Development visits will be available starting September 11, 2008 on the Joint Board Web site: *http://cairo.usembassy.gov/usegypt/jrgrants.htm.*

SUPPLEMENTARY INFORMATION:

Authority: This program is established under 22 U.S.C. 2656d and the Agreement for Scientific and Technological Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt.

A solicitation for this program will begin September 11, 2008. This program will provide modest grants for successfully competitive proposals for development visits by U.S. Junior Scientists to Egypt and Junior Egyptian Scientists to the United States. Applicants must be scientists who have received their PhD within the past ten years. U.S. applicants only may have a Master's degree or be currently enrolled in a PhD program. Applications considered for funding must be postmarked by November 15, 2008. All proposals which fully meet the submission requirements will be considered. More information and copies of the Program Announcement and Application may be obtained upon request.

FOR FURTHER INFORMATION CONTACT: Please contact Chair of U.S.-Egypt S&T Joint Board William Lawrence, Office of Science and Technology Cooperation, Bureau of Oceans, Environment and Science, U.S. Department of State at (202) 663–2619 or *e-mail: LawrenceWA@state.gov.*

Dated: October 23, 2008.

Robert S. Senseney,

Acting Director, Office of Science and Technology Cooperation, Bureau of Oceans, Environment and Science, Department of State.

[FR Doc. E8–25932 Filed 10–29–08; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Government/Industry Air Traffic Management Advisory Committee

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Government/Industry Air Traffic Management Advisory Committee.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Government/Industry Air Traffic Management Advisory Committee.

DATES: The meeting will be held December 4, 2008, from 1 p.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Holiday Inn Capitol, Columbia II Ballroom, 550 C Street, SW., Corner of 6th & C Streets, SW., Washington, DC 20024. (*Via Metro: L'Enfant Plaza Station, Use 7th & Maryland Exit*).

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for the Air Traffic Management Advisory Committee meeting. The agenda will include:

- Opening Plenary (Welcome and Introductions).
- Assessment of New York 77 Initiatives.
- FAA Airspace Management Program Review.
- NextGen Integration and Implementation.
- Closing Plenary (Other Business, Establish 2009 Meeting Schedule, ATMAC Member Discussion, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the "**FOR FUTHER INFORMATION CONTACT**" section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 24, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E8–25939 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2008–0629]

Operating Limitations for Unscheduled Operations at John F. Kennedy International Airport and Newark Liberty International Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Disposition of Comments to Proposed Order.

SUMMARY: On July 17, 2008, the FAA issued a proposed order requesting written views on the FAA's tentative determination to temporarily limit unscheduled aircraft operations at John F. Kennedy International Airport (JFK) and Newark Liberty International Airport (EWR). The temporary limit was intended to supplement previously issued FAA orders limiting scheduled operations at both airports by addressing congestion related delays that would otherwise occur pending the ongoing rulemaking action for JFK and EWR. This disposition of comments explains the FAA's rationale for not presently adopting the proposed order and discusses the comments received in response to the proposed order.

ADDRESSES: To read background documents or comments received, go to *http://www.regulations.gov* and follow the online instructions for accessing the docket. Alternatively, go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this disposition of comments contact: Gerry Shakley, System Operations Services, Air Traffic Organization; *telephone:* (202) 267–9424; *facsimile:* (202) 267–7277; *e-mail: gerry.shakley@faa.gov.* For legal questions concerning this disposition of comments contact: Rebecca B. MacPherson, Office of the Chief Counsel, Federal Aviation Administration; *telephone:* (202) 267–7240; *facsimile:* (202) 267–7971; *e-mail: rebecca.macpherson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You may obtain an electronic copy using the Internet by:

(1) Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

(2) Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/*; or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You also may obtain a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Discussion of Written Submissions and the Final Order

The FAA published the Notice of Proposed Order, "Operating Limitations for Unscheduled Operations at John F. Kennedy International Airport and Newark Liberty International Airport," on July 17, 2008. The FAA concludes that it is unnecessary to issue a final order because the limits proposed are imposed by a final rule, "Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport," ("Final Rule") issued on October 10, 2008.[1] However, if the Final Rule is rendered ineffective for any reason, the FAA may adopt the proposed order as final without an opportunity for further comment. Accordingly, the comments to the proposed order are discussed below.

The Notice requested comments on several aspects of the proposed order, as well as any general comments. The comment period closed on July 28, 2008. The FAA received one comment during the comment period and eleven additional comments after the closing date. These comments are from interested parties including airlines, all-cargo air carriers, a public charter operator, and industry organizations. Several commenters generally support the FAA's goal of reducing congestion at the New York area airports, and three commenters support the proposal in its entirety. Commenters opposing the

[1] 73 FR 60544.

proposed order contend that it fails to address the nature of charter, business, and general aviation operations and the effect of the proposed order on those segments of the aviation industry. Comments to the Notice are addressed below by topic. The FAA also received seven comments in response to ''Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport'' [2] regarding unscheduled operations that raised substantially the same issues and are discussed below.

All-Cargo Operations

The comments submitted by the Cargo Airline Association (CAA) best summarize the concerns of all-cargo air carriers. CAA contends that the proposed order will have a serious, adverse impact on all-cargo carriers, arguing that, although most operations are conducted during nighttime hours, these carriers cannot always plan in advance to meet service demands during congested hours. All-cargo carriers frequently conduct unscheduled operations on short notice, and many guarantee service by a time certain. Because of these combined circumstances, a failure to obtain a required reservation may result in liability to the shipper. CAA believes that reservations will not be available for last minute operations, which it argues constitutes an unfair and unlawful discrimination against all-cargo carriers and other unscheduled operations. Additionally, CAA contends that because of the nature of the all-cargo industry segment, it is not practical to use other area airports for unscheduled operations. One all-cargo carrier claims that the proposed order will preclude it from competing as an ''ad-hoc charter operator'' because its operations often are planned two hours in advance.

CAA suggests that all-cargo carriers be treated similarly to military and public aircraft, and aircraft operating under contracts with the Department of Defense or the United States Postal Service to carry mail, because of the ''mission-critical all-cargo business model.'' Under this treatment, all-cargo carriers would be subject to the order and would need a reservation, but they would be given preferential treatment. Another all-cargo carrier requests that a number of reservations be allocated to allow all-cargo operations on an as-needed basis.

The purpose of the reservation system is to allow for unscheduled operations, and the number of reservations available should accommodate operations in the desired hour of operation or in surrounding hours. It is impractical to allocate a certain number of reservations for last minute operations when the carriers themselves cannot identify when these operations will be needed.

Unscheduled operations can be accommodated under the Final Rule if operators are flexible in their arrival and departure times. Based on data from FAA's Enhanced Traffic Management System (ETMS) for the year ended May 31, 2008, most unscheduled flights can be accommodated in visual meteorological conditions or through capacity in an adjacent hour (one hour on either side of the actual hour of operation in the data). The ETMS data shows that fewer than one flight per day on average would be affected by the Final Rule at each airport, where there is insufficient capacity in the adjacent two hours to handle excess demand. Based on this data, with minor accommodations in flight plans, unscheduled operators should be able to obtain reservations and operate without incurring additional costs. However, if an operator cannot obtain a reservation for its preferred time, its planned flight times may need to be revised because of the limited available reservations. This is similar to the burden borne by scheduled operators that conduct flights during available reservation times.

Private Charter and Business Aviation

The National Air Carrier Association (NACA) contends that the proposed order unfairly targets a segment of the industry, unscheduled operations, that does not contribute significantly to the capacity constraints at the airports. Additionally, because of the nature of their business, these carriers cannot plan operations 72 hours in advance, and reservations may be unavailable at the last minute when they are needed to perform contractual obligations.

As discussed above, unscheduled operations can be accommodated under the Final Rule if operators are flexible in their arrival and departure times. Additionally, the FAA believes that general aviation demand and a segment of flights conducted as business and private charters can be accommodated within regional capacity.

Number of Reservations and Applicable Hours

NACA argues that the use of calendar year 2007 as a baseline is inappropriate because only LaGuardia was operating under an administrative order limiting the number of hourly operations. NACA further argues that with all three major New York airports operating under limitations, there is no alternative for unscheduled operations.

CAA contends that the FAA failed to disclose detailed information related to its analysis of unscheduled operations, including what types of operations comprise the baseline and at what time of day or night those operations occurred. The CAA contends that meaningful comment to the proposed order or analysis of possible alternatives cannot be made without this detailed information.

The FAA understands CAA's and NACA's concerns. However, the analysis of impact on JFK and EWR in the final regulatory evaluation for the Final Rule (contained in docket number FAA–2008–0517) assumed that the reservation restrictions were in place for the year ended May 31, 2008.[3] (See ''Availability of Rulemaking Documents'' section for information on how to access the docket.) Therefore, that analysis should reflect the conditions at the three major New York airports after the Final Rule becomes effective. Additionally, that analysis considered all operations during the slot-controlled hours, as indicated in the proposal. Unscheduled demand included operations that were not allocated Operating Authorizations under the FAA's order for scheduled flights. More detailed information regarding the exact times or type of operation would not change the net effect of the reservation system because the reservation system does not distinguish between the various types of unscheduled operations.

The Aircraft Owners and Pilots Association (AOPA) argues that a reservation system for visual flight rules (VFR) operations is not justified because air traffic control permits these operations only when weather and traffic conditions allow. AOPA also argues that the proposed order ignores recent announcements by airlines to reduce capacity and the effect of that reduced capacity on the congestion at JFK and EWR. AOPA contends that the proposed order unfairly burdens general aviation operators at JFK and EWR

The FAA appreciates AOPA's concerns, but the Final Rule permits additional operations when capacity exists and significant delays are not expected. A reservation system for additional VFR operations maintains an equitable and orderly mechanism for allowing additional traffic at JFK and

[2] Docket No. FAA–2008–0517.

[3] The FAA recently reduced the number of available hourly reservations at LaGuardia to reflect historic usage and in recognition that additional operations at LaGuardia would further increase delays and congestion in the region. 73 FR 48428 (Aug. 19, 2008).

EWR and provides greater opportunity to plan for airport demand. Additionally, although airlines may reduce capacity in the short term, many of the temporary reductions are in less congested hours. Moreover, it is important to have a comprehensive, long-term system in place to manage congestion and future growth at these airports. The FAA intends to use its authority under the Final Rule to provide reservations for unscheduled operations when reservations set aside for scheduled operations are not expected to be used, when capacity exists in the system, and when events or other local circumstances warrant special consideration. The FAA believes the flexibility to add reservations in positive operating conditions could allow greater access by general aviation and other unscheduled operations without the risks of having to implement restrictions later in the day.

Use of Reservations for Alternate Diversion Flights

NACA argues that the entire reservation allocation process will encourage individual carriers to hoard unscheduled reservations to protect their operations and then fail to use those reservations, especially for those awarded for alternate diversion scenarios. NACA contends that the proposed order encourages this behavior because there is no accountability for failure to use the reservation.

The FAA appreciates NACA's concerns regarding operators obtaining reservations and failing to use them. There are limited reservations, and operators should not hoard or fail to cancel unneeded ones because of the impact on other operators. The FAA did not propose a penalty for failing to use a reservation. However, the FAA will monitor reservations and actual operations to determine if abuse occurs and will work with individual operators to eliminate any abusive behavior. The final rule for JFK and EWR does not contain a requirement to obtain a reservation when filing flight plans listing those airports as alternates because such a requirement would result in unnecessary reservations that would remain unused in most cases. A reservation requirement applies only to actual operations at the airports, except in the case of a declared emergency. The FAA understands that there may be other safety or operational justifications that could dictate the use of an alternate airport. However, this is not expected to occur on a regular basis, and the FAA would consider the individual circumstances as part of any enforcement proceeding.

Delta and Continental suggest that the FAA eliminate all unscheduled operations during the peak hours to maximize the efficiency of the airports.

The FAA considered these comments but believes that the Final Rule strikes the appropriate balance between the operational needs of the various users of the airports.

Cost-Benefit Analysis of Limitations on Unscheduled Operations

NetJets contends that the economic analysis for limiting unscheduled operations did not demonstrate any congestion reduction benefit or properly quantify the costs to aircraft operators. Without this analysis, NetJets contends there is no evidence that the proposed limitations are justified, and the public has had no opportunity to comment on this justification.

The economic analysis addressed the costs and benefits of implementing the comprehensive congestion management plan and includes limits on unscheduled operations. Because all operations contribute to the congestion and delay problems at JFK and EWR, the solution must incorporate limitations on all operations. Under the Final Rule, scheduled operations bear the majority of the operational reduction. Even though unscheduled operations, which are a small fraction of the total operations at JFK and EWR, are not the root cause of the congestion and delay, the current situation where demand outstrips supply means that the addition of even one operation can have a disproportionate effect on congestion and delay. Accordingly, these limitations on unscheduled operations are part of the comprehensive plan to reduce congestion and delay.

Periodic Review of Orders

NACA requests the FAA to review the necessity of limitations on unscheduled operations on a semi-annual basis in conjunction with the submission of summer and winter flight schedules to ensure that all operators may share in any additional capacity.

The FAA agrees that available airport capacity could potentially be used by unscheduled operators. The Final Rule provides for additional reservations when weather and capacity conditions allow, which includes decreased demand by scheduled operators. Additionally the Air Traffic Organization, primarily through the Air Traffic Control System Command Center, constantly reviews demand at JFK and EWR, and will respond accordingly to changes in capacity by adding reservations that do not result in significant delay.

Issued in Washington, DC on October 23, 2008.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. E8–25850 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement, San Bernardino, CA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of withdrawal.

SUMMARY: The FHWA is providing this notice to advise the public that the California Department of Transportation (Caltrans) is withdrawing the Notice of Intent (NOI) published in the **Federal Register** (Vol. 71, No. 128) on Wednesday, July 5, 2006. That notice addressed the intent to prepare an Environmental Impact Statement (EIS) for the proposed U.S. 395 Realignment Freeway/Expressway project on U.S. 395 from Interstate 15 (I–15/U.S. 395 interchange) to Farmington Road. The original NOI was published by FHWA. Pursuant to 23 U.S.C. 327, environmental responsibilities for this project have been assigned to Caltrans.

FOR FURTHER INFORMATION CONTACT: Boniface Udotor, Senior Environmental Planner, California Department of Transportation, 464 West 4th Street, 6th Floor, MS823, San Bernardino, California 92401–1400; telephone (909) 388–1387.

SUPPLEMENTARY INFORMATION: Caltrans, District 8, will stop further studies of this proposed project to realign U.S. 395. The project is currently undergoing re-scoping for project modifications. The corridor, which was to be evaluated, was located on either side of existing U.S. 395 and to the west of existing U.S. 395. The proposed 45-mile project was to include studies within the communities of Oak Hills, Hesperia, Victorville, Adelanto and unincorporated areas of San Bernardino County.

(Catalog of Federal Domestic Assistance: Program Number 20.205, Highway Research Planning and Construction. The regulations implementing Executive Order 12372 regarding inter-governmental consultation on federal programs and activities apply to this program.)

Issued on: October 24, 2008.

Nancy E. Bobb,

Director, State Programs.

[FR Doc. E8–25889 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

CSX Transportation (Waiver Petition Docket Number FRA–2008–0111)

CSX Transportation (CSXT) petitioned FRA for a waiver from 49 CFR 213.113(a) to permit variance from the accepted practice of stop/start rail test hand verification for a continuous rail test pilot project for a period of 8 weeks on the main tracks of the North End subdivision between Richmond, Virginia, and Rocky Mount, North Carolina, milepost limits A0.0–123.2. Prior to beginning the pilot project, the North End subdivision main tracks will be rail tested with a conventional stop/start rail test vehicle and any normally scheduled intervals during the pilot project will be maintained by convention stop/start rail test vehicle.

The continuous high speed rail test vehicle will be a self propelled rail-bound ultrasound Sperry car operating at speeds up to 25 miles per hour in non-stop mode making weekly runs. Upon completion of each run, data will be analyzed offline by a group of experts with experience in this process. The analysis will categorize and prioritize suspect defect locations. Two teams of verifiers will then be sent out with field instruments to check locations based upon Global Positioning System (GPS) coordinates. Locations will be checked 60 feet either side of suspect GPS point. Remedial actions will be applied as per 49 CFR 213.113 for confirmed rail defects. CSXT states that continuous rail testing will provide the capability to test track more frequently, minimizing the risk of rail service failure.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0111) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on October 23, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–25844 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2008–0211]

Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration.

ACTION: Notice; extension of comment period.

SUMMARY: PHMSA is extending the period for public comment to its **Federal Register** Notice issued on September 4, 2008 (73 FR 51697) that proposes to revise forms PHMSA F 7100.2—Incident Report for Gas Transmission and Gathering Systems; PHMSA F 7100.1—Incident Report for Gas Distribution Systems; and PHMSA F 7000–1—Accident Report for Hazardous Liquid Pipeline Systems.

DATES: Interested parties are invited to submit comments on or before December 12, 2008.

ADDRESSES: Comments should reference Docket No. PHMSA–2008–0211 and may be submitted in the following ways:

- *E-Gov Web Site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* DOT Docket Operations Facility (M–30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* DOT Docket Operations Facility, U.S. Department of Transportation, West Building, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: In the E-Gov Web site: http://www.regulations.gov, access the Notice of Proposed Rulemaking by typing ''PHMSA–2008–0211'' under ''Search Documents'' and clicking ''Go.'' Submit your comment by clicking the yellow bubble or ''Send a Comment or Submission'' then following the instructions.

Identify docket number PHMSA–2008–0211 at the beginning of your comments. For comments by mail, please provide two copies. To receive PHMSA's confirmation receipt, include a self-addressed stamped postcard. Internet users may access all comments at *http://www.regulations.gov*, by searching for the docket number.

Note: PHMSA will post all comments without changes or edits to *http://www.regulations.gov* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Roger Little by telephone at 202–366–4569, by fax at 202–366–4566, or by mail at U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., PHP–10, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: In response to requests for extension of the

comment period made by trade association representatives from the Interstate Natural Gas Association of America, the American Petroleum Institute, the Association of Oil Pipelines and the American Gas Association, PHMSA is extending the comment period until December 12, 2008.

Issued in Washington, DC, on October 23, 2008.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. E8–25846 Filed 10–29–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Notice and Request for Comments

AGENCY: Surface Transportation Board.

ACTION: 30-day notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), the Surface Transportation Board (STB or Board) gives notice that it has submitted a request to the Office of Management and Budget (OMB) for an extension of approval without change of a currently approved collection: Application to Open a Billing Account. The Board previously published a notice about these collections in the **Federal Register** on June 16, 2008, at 73 FR 34068. That notice allowed for a 60-day public review and comment period. No comments were received.

This information collection is described in detail below. Comments are requested concerning (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether this collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility.

Description of Collection

Title: Application to Open a Billing Account.

OMB Control Number: 2140–0006.

STB Form Number: STB Form 1032.

Type of Review: Extension without change.

Respondents: Rail carriers, shippers, and others doing business before the STB.

Number of Respondents: 20.

Estimated Time per Response: Less than .08 hours, based on actual survey of respondents.

Frequency: One time per respondent.

Total Burden Hours (annually including all respondents): Less than 1.6 hours.

Total ''Non-hour Burden'' Cost: No ''non-hour cost'' burdens associated with this collection have been identified.

Needs and Uses: The Board is, by statute, responsible for the economic regulation of freight rail carriers and certain other carriers operating in interstate commerce. This form is used by persons doing business before the Board who wish to open an account with the Board to facilitate their payment of filing fees; fees for the search, review, copying, and certification of records; and other services rendered by the Board. An account holder is billed on a monthly basis for payment of accumulated fees. Data provided is also used for debt collection activities. The application form requests information as required by OMB and U.S. Department of Treasury regulations for the collection of fees. This information is not duplicated by any other agency. In accordance with the Privacy Act, 5 U.S.C. 552a, all taxpayer identification and social security numbers are secured and used only for credit management and debt collection activities.

DATES: Written comments are due on December 1, 2008.

ADDRESSES: Comments should be directed to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Surface Transportation Board Desk Officer, by fax at (202) 395–6974 or by mail at 725 17th Street, NW., Washington, DC 20503.

For Further Information or to Obtain a Copy of the STB Form, Contact: Anthony Jacobik, Jr., (202) 245–0346. [Federal Information Relay Service (FIRS) for the hearing impaired: (800) 877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: October 24, 2008.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. E8–25936 Filed 10–29–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 23, 2008.

The Department of Treasury is planning to renew the following public information collection requirement(s) for OMB clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

Bureau of Engraving and Printing (BEP)

OMB Number: 1520–0001.

Type of Review: Extension.

Form: BEP 5283.

Title: Owner's Affidavit of Partial Destruction of Mutilated Currency.

Description: The Office of Currency Standards, Bureau of Engraving & Printing requests owners of partially destroyed U.S. currency to complete a notarized affidavit (BEP 5283) for each claim submitted when substantial portions of notes are missing.

Respondents: Individuals or households.

Estimated Total Burden Hours: 90 hours.

OMB Number: 1520–0002.

Type of Review: Extension.

Title: Claim for Amounts Due in the Case of Deceased Owner of Mutilated Currency.

Form: BEP 5287.

Description: BEP 5287 is used when Treasury is required to determine ownership in cases of a deceased owner of damaged or mutilated currency.

Respondents: Individuals or households.

Estimated Total Burden Hours: 1,821 hours.

Clearance Officer: Cary Conn, (202) 874–2396, Bureau of Engraving and Printing,14th & C Streets, SW., Washington, DC 20228.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–25847 Filed 10–29–08; 8:45 am]

BILLING CODE 4840–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–248770–96 (Final)]

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–248770–96 (TD 8725). Miscellaneous Sections Affected by the Taxpayer Bill of Rights 2 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (§ 301.7430–2(c)).

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carolyn N. Brown (202) 622–6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the Internet at *Carolyn.N.Brown@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Miscellaneous Sections Affected by the Taxpayer Bill of Rights 2 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

OMB Number: 1545–1356.

Regulation Project Number: REG–248770–96.

Abstract: Under Internal Revenue Code section 7430 a prevailing party may recover the reasonable administrative or litigation costs incurred in an administrative or civil proceeding that relates to the determination, collection, or refund of any tax, interest, or penalty. Section 301.7430–2(c) of the regulation provides that the IRS will not award administrative costs under section 7430 unless the taxpayer files a written request in accordance with the requirements of the regulation.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations, not-for-profit institutions, farms, and the Federal government.

Estimated Number of Respondents: 38.

Estimated Time per Respondent: 2 hours, 16 minutes.

Estimated Total Annual Burden Hours: 86.

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: October 22, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25852 Filed 10–29–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–146459–05]

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 a final regulation, REG–146459–05 (TD 9324), Designated Roth Contributions under Section 402A.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Carolyn N. Brown, (202) 622–6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Carolyn.N.Brown@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Designated Roth Contributions Under Section 402A.

OMB Number: 1545–1922.

Regulation Project Number: REG–146459–05 (TD 9324).

Abstract: These final regulations provide guidanceconcerning the taxation of distributions from designated Rothaccounts under qualified cash or deferred arrangements undersection 401(k).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or

households, not-for-profit institutions, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 357,000.

Estimated Time per Respondent: 2 hrs, 19 minutes.

Estimated Total Annual Burden Hours: 828,000.

The following paragraph applies to all of the collections of information covered by this notice.

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 16, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–25853 Filed 10–29–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[PS–54–89]

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, PS–54–89 (TD 8444). Applicable Conventions Under the Accelerated Cost Recovery System (§ 1.168(d)–1(b)(7)).

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carolyn N. Brown (202) 622–6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Applicable Conventions Under the Accelerated Cost Recovery System.

OMB Number: 1545–1146.

Regulation Project Number: PS–54–89 Final.

Abstract: The regulations describe the time and manner of making the notation required to be made on Form 4562, under certain circumstances when the taxpayer transfers property in certain non-recognition transactions. The information is necessary to monitor compliance with section 168 of the Internal Revenue Code.

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, and farms.

Estimated Number of Respondents: 700.

Estimated Time per Respondent: 6 min.

Estimated Total Annual Burden Hours: 70 hours.

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: October 22, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25854 Filed 10–29–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Council to the Internal Revenue Service; Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Internal Revenue Service Advisory Council (IRSAC) will hold a public meeting on Wednesday, November 19, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds, IRSAC Program Manager, National Public Liaison, CL:NPL, 7559, 1111 Constitution Avenue, NW., Washington, DC 20224. *Telephone:* 202–622–5188 (not a toll-free number). *E-mail address:* **public_liaison@irs.gov* .

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRSAC will be held on Wednesday, November 19, 2008, from 9 a.m. to 1 p.m. at IRS Headquarters, 1111 Constitution Avenue, NW., Room 3313, Washington,

DC 20224. Issues to be discussed include: *Increased IRS Transparency in Issue Development, Compliance Risk Management Process, Identification of Paid Preparers, Extended Due Date of Partnerships, Real Estate Mortgage Investment Conduits (REMICS) and Certain Trusts that File Fiduciary Tax Returns, Irs.gov EITC Enhancements, and Communication Strategy—Changes to Regulations 301.7216—Disclosure and Use of Tax Return Data by Tax Return Preparers, Corporate Tax Gap—Yield Curves, National Research Project (NRP) Individual and S-Corp Studies.* Reports from the four IRSAC subgroups, Large and Mid-size Business, Small Business/Self-Employed, Wage & Investment, and Tax Gap Analysis will also be presented and discussed. Last minute agenda changes may preclude advanced notice. The meeting room accommodates approximately 80 people, IRSAC members and Internal Revenue Service officials inclusive. Due to limited seating, please call Lorenza Wilds to confirm your attendance. Ms. Wilds can be reached at 202–622–5188. Attendees are encouraged to arrive at least 30 minutes before the meeting begins. Should you wish the IRSAC to consider a written statement, please call 202–622–5188, or write to: Internal Revenue Service, Office of National Public Liaison, CL:NPL:7559, 1111 Constitution Avenue, NW., Washington, DC 20224 or *e-mail: *public_liaison@irs.gov*.

Dated: October 22, 2008.

Carl Medley,

Designated Federal Official, Branch Chief, Liaison/Tax Forum Branch.

[FR Doc. E8–25855 Filed 10–29–08; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Thursday,
October 30, 2008

Part II

Environmental Protection Agency

40 CFR Parts 260, 261, and 270
Revisions to the Definition of Solid Waste; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, and 270

[EPA–HQ–RCRA–2002–0031; FRL–8728–9]

RIN 2050–AG31

Revisions to the Definition of Solid Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is publishing a final rule that revises the definition of solid waste to exclude certain hazardous secondary materials from regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The purpose of this final rule is to encourage safe, environmentally sound recycling and resource conservation and to respond to several court decisions concerning the definition of solid waste.

DATES: This final rule is effective on December 29, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–RCRA–2002–0031. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OSWER Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is 202–566–0270.

FOR FURTHER INFORMATION CONTACT: For more detailed information on specific aspects of this rulemaking, contact Marilyn Goode, Office of Solid Waste, Hazardous Waste Identification Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, (703) 308–8800 (*goode.marilyn@epa.gov*) or Tracy Atagi, Office of Solid Waste, Hazardous Waste Identification Division, MC 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, at (703) 308–8672 (*atagi.tracy@epa.gov*).

SUPPLEMENTARY INFORMATION:

A. Does This Action Apply to Me?

Entities potentially affected by today's action include approximately 5,600 facilities in 280 industries in 21 economic sectors that generate or recycle hazardous secondary materials that are currently regulated as RCRA Subtitle C hazardous wastes (e.g., secondary materials, such as industrial co-products, by-products, residues, and unreacted feedstocks). Approximately 60% of these affected facilities are classified in NAICS code economic sectors 31, 32, and 33 (manufacturing). The remaining economic sectors, which have more than ten affected industries each, are in NAICS codes 48 (transportation), 42 (wholesale trade), and 56 (administrative support, waste management and remediation). About 1.5 million tons per year of hazardous secondary materials generated and handled by these entities may be affected, of which the most common types are metal-bearing hazardous secondary materials (e.g., sludges and spent catalysts) for commodity metals recovery and organic chemical liquid hazardous secondary materials for recovery as solvents. Today's action is expected to result in regulatory and materials recovery cost savings to these industries of approximately $95 million per year. Taking into account impact estimation uncertainty factors, today's action could result in cost savings ranging from $19 million to $333 million per year to these industries in any future year. More detailed information on the potentially affected entities, industries, and industrial materials, as well as the economic impacts of this rule (with impact uncertainty factors), is presented in section XXI.A of this preamble and in the ''Regulatory Impact Analysis'' available in the docket for this final rule.

B. Why Is EPA Taking This Action?

There are two primary purposes of this action. One purpose is to respond to a series of seven decisions by the U.S. Court of Appeals for the DC Circuit (1987 to 2000), which, taken together, have provided EPA with additional direction regarding the proper formulation of the RCRA regulatory definition of solid wastes for purposes of Subtitle C. A second purpose is to clarify the RCRA concept of ''legitimate recycling,'' which is a key component of EPA's approach to recycling hazardous secondary materials.

This action is not intended to bring new wastes into the RCRA hazardous waste regulatory system and it does not do so. By removing unnecessary controls over certain hazardous secondary materials, and by providing more explicit and consistent factors for determining the legitimacy of recycling practices, EPA expects that today's action will encourage and expand the safe, beneficial recycling of additional hazardous secondary materials. Today's action is consistent with EPA's longstanding policy of encouraging the recovery, recycling, and reuse of valuable resources as an alternative to disposal (i.e., landfilling and incineration), while at the same time maintaining protection of human health and the environment. It also is consistent with the resource conservation goal of the Congress in enacting the RCRA statute (as evidenced by the statute's name), and with EPA's vision of how the RCRA program could evolve over the long term to promote economic sustainability and more efficient use of resources. EPA's long-term vision of the future of the RCRA waste management program is discussed in the document ''Beyond RCRA: Prospects for Waste and Materials Management in the Year 2020,'' which is available on EPA's Web site at: *http://www.epa.gov/epaoswer/osw/vision.htm*.

Preamble Outline

I. Statutory Authority
II. Which Revisions to the Regulations Is EPA Finalizing?
III. What Is the History of These Rules?
IV. How Do the Provisions in the Final Rule Compare to Those Proposed on March 26, 2007?
V. How Does the Concept of Discard Relate to the Final Rule?
VI. When Will the Final Rule Become Effective?
VII. Exclusion for Hazardous Secondary Materials That are Legitimately Reclaimed Under the Control of the Generator
VIII. Exclusion for Hazardous Secondary Materials That are Transferred for the Purpose of Legitimate Reclamation
IX. Legitimacy
X. Non-Waste Determination Process
XI. Effect on Other Exclusions
XII. Effect on Permitted and Interim Status Facilities
XIII. Effect on CERCLA
XIV. Effect on Imports and Exports
XV. General Comments on the Proposed Revisions to the Definition of Solid Waste
XVI. Major Comments on the Exclusion for Hazardous Secondary Materials Legitimately Reclaimed Under the Control of the Generator
XVII. Major Comments on the Exclusion for Hazardous Secondary Materials Transferred for the Purpose of Legitimate Reclamation

XVIII. Major Comments on Legitimacy
XIX. Major Comments on the Non-Waste Determination Process
XX. How Will These Regulatory Changes Be Administered and Enforced in the States?
XXI. Administrative Requirements for This Rulemaking

I. Statutory Authority

These regulations are promulgated under the authority of sections 2002, 3001, 3002, 3003, 3004, 3007, 3010, and 3017 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6912, 6921, 6922, 6923, 6924, 6927, 6930, and 6938. These statutes, combined, are commonly referred to as ''RCRA.''

II. Which Revisions to the Regulations Is EPA Finalizing?

In today's rule, EPA is revising the definition of solid waste to exclude from regulation under Subtitle C of RCRA (42 U.S.C. 6921 through 6939(e)) certain hazardous secondary materials which are being reclaimed. We have defined hazardous secondary materials as those which would be classified as hazardous wastes if discarded. We are also promulgating regulatory factors for determining when recycling is legitimate. The Agency first proposed changes reflecting the court decisions on the definition of solid waste rules on October 28, 2003 (68 FR 61558). We then published a supplemental proposal on March 26, 2007 (72 FR 14172).

Today's preamble is organized as follows: This section of the preamble (Section II) describes the three principal regulatory revisions that are finalized in this rule: (1) An exclusion for certain hazardous secondary materials legitimately reclaimed under the control of the generator within the United States or its territories; (2) a conditional exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation; and (3) a case-by-case non-waste determination procedure. Section II also discusses EPA's treatment of legitimacy in the final rule. Section III describes the history of these revisions, including relevant court cases and the original proposal (October 28, 2003, 68 FR 61558). Section III also describes the Agency's independent analyses of successful recycling practices, environmental problems associated with recycling of hazardous secondary materials, and potential effects of market forces on the management of such materials, and provides an overview of the March 26, 2007, supplemental proposal (72 FR 14172). Section IV explains the ways in which the March 2007 supplemental proposal differs from today's rule. Section V discusses how this rule is related to the concept of ''discard,'' and section VI indicates the effective date of the rule. Sections VII–X contain detailed descriptions of all regulatory provisions promulgated today. Sections XI–XIV describe the effect of this rule on other exclusions, permitted and interim status facilities, Superfund, and imports/exports. Sections XV–XIX contain a discussion of all major public comments received on the March 26, 2007, supplemental proposal, along with the Agency's responses to these comments. Section XX describes how this rule will be administered and enforced in the states, and section XXI describes the administrative requirements for this rulemaking.

Below is a summary of the principal regulatory revisions promulgated today.

A. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator in Non-Land-Based Units

This provision—40 CFR 261.2(a)(2)(ii)—would exclude certain hazardous secondary materials (i.e., listed sludges, listed by-products, and spent materials) that are generated and legitimately reclaimed within the United States or its territories under the control of the generator, when such materials are handled only in non-land-based units (e.g., tanks, containers, or containment buildings). This provision applies to hazardous secondary materials that are not spent lead-acid batteries or listed wastes K171 or K172, or otherwise subject to the specific management conditions under 40 CFR 261.4(a). Under this provision, the hazardous secondary materials must be contained in such units and are subject to the speculative accumulation requirements of 40 CFR 261.1(c)(8), as well as the provisions for legitimate recycling at 40 CFR 260.43. In addition, under 40 CFR 260.42, the generator (and the reclaimer, if the generator and reclaimer are located at different facilities) must send a notification prior to operating under the exclusion and by March 1 of each even numbered year thereafter to the EPA Regional Administrator or, in an authorized state, to the state director.

Hazardous secondary materials would be considered ''under the control of the generator'' under the following circumstances:

(1) They are generated and then reclaimed at the generating facility; or

(2) They are generated and reclaimed at different facilities, if the generator certifies that the hazardous secondary materials are sent either to a facility controlled by the generator or to a facility under common control with the generator, and that either the generator or the reclaimer has acknowledged responsibility for the safe management of the hazardous secondary materials; or

(3) They are generated and reclaimed pursuant to a written agreement between a tolling contractor and toll manufacturer, if the tolling contractor certifies that it has entered into a tolling contract with a toll manufacturer and that the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process.

This exclusion does not include the recycling of hazardous secondary materials that are inherently waste-like under 40 CFR 261.2(d), hazardous secondary materials that are used in a manner constituting disposal or used to produce products that are applied to or placed on the land (40 CFR 261.2(c)(1)), or hazardous secondary materials burned to recover energy or used to produce a fuel or otherwise contained in fuels (40 CFR 261.2(c)(2)).

B. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator in Land-Based Units

This provision—40 CFR 261.4(a)(23)—contains requirements that are identical to those that apply to hazardous secondary materials generated and legitimately reclaimed under the control of the generator within the United States or its territories and are handled in non-land-based units in 40 CFR 261.2(a)(2)(ii), described above. Land-based units are defined in 40 CFR 260.10 as an area where hazardous secondary materials are placed in or on the land before recycling, but this definition does not include land-based production units. Examples of land-based units are surface impoundments and piles. This provision applies to hazardous secondary materials that are not spent lead-acid batteries or listed wastes K171 or K172, or otherwise subject to the specific management conditions under 40 CFR 261.4(a).

C. Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Legitimate Reclamation

This conditional exclusion—40 CFR 261.4(a)(24), hereinafter referred to as

the ''transfer-based exclusion''—applies to hazardous secondary materials (i.e., spent materials, listed sludges, and listed by-products) that are generated and subsequently transferred to a different person or company for the purpose of reclamation. As long as the conditions and restrictions to the exclusion are satisfied, the hazardous secondary materials would not be subject to Subtitle C regulation.

Hazardous secondary material generators, reclaimers, and intermediate facilities (i.e., other facilities storing hazardous secondary materials for more than 10 days) must all submit a notification prior to operating under the exclusion and by March 1 of each even numbered year thereafter to the EPA Regional Administrator or, in an authorized state, to the state director (see 40 CFR 260.42). In addition, hazardous secondary materials managed at such facilities may not be speculatively accumulated as defined in § 262.1(c)(8) (*see* 40 CFR 261.4(a)(24)(i)) and must be legitimately recycled as specified in § 260.43 (*see* 40 CFR 261.4(a)(24)(iv)).

Conditions applicable to generators of hazardous secondary materials are found at 40 CFR 261.4(a)(24)(v) and include containment of such materials, reasonable efforts to ensure that the intermediate facility or reclaimer intends to manage or recycle the hazardous secondary material properly and legitimately, and retention of records of off-site shipments for three years. Conditions applicable to intermediate facilities and reclaimers of hazardous secondary materials are found at 40 CFR 261.4(a)(24)(vi) and include containment of such materials, transmittal of confirmations of receipt to generators, maintenance of records for hazardous secondary materials received and sent off-site, financial assurance, and (for reclaimers) proper management of residuals. In addition, if any of the hazardous secondary materials excluded under 40 CFR 261.4(a)(24) are generated and then exported to another country for reclamation, the exporter must notify and obtain consent from the receiving country, and file an annual report. This requirement is codified in 40 CFR 261.4(a)(25).

Like the previously discussed exclusion for hazardous secondary materials reclaimed under the control of the generator, this exclusion would not apply to hazardous secondary materials that are inherently waste-like under 40 CFR 261.2(d), hazardous secondary materials that are used in a manner constituting disposal or used to produce products that are applied to or placed on the land (40 CFR 261.2(c)(1)), or hazardous secondary materials burned to recover energy or used to produce a fuel or are otherwise contained in fuels (40 CFR 261.2(c)(2)).

D. Codification of Legitimacy

Under the RCRA Subtitle C definition of solid waste, certain hazardous secondary materials, if recycled, are not solid wastes and, therefore, are not subject to RCRA's ''cradle to grave'' management system. The basic idea behind this principle is that recycling of these materials often closely resembles industrial manufacturing rather than waste management. However, due to economic incentives for managing hazardous secondary materials outside the RCRA regulatory system, there is a potential for some handlers to claim that they are recycling the hazardous secondary materials when, in fact, they are conducting waste treatment and/or disposal. To guard against this, EPA has long articulated the need to distinguish between ''legitimate'' (i.e., true) recycling and ''sham'' recycling, beginning with the preamble to the 1985 regulations that discussed the definition of solid waste (50 FR 638, January 4, 1985) and continuing through today's final rule.

In the October 28, 2003, proposed rule (68 FR 61581–61588) on the definition of solid waste, we proposed codifying four criteria (called ''factors'' in today's rule) to determine when recycling of hazardous secondary materials is legitimate. In the March 26, 2007, supplemental proposal in section XI of the preamble (72 FR 14197), we refined our original proposal in response to public comments. In today's final rule, we are codifying the factors to be used in determining whether recycling under the provisions finalized in this rule is legitimate, applying the structure basically as proposed in March 2007 (proposed at 40 CFR 261.2(g)). The legitimacy provision is finalized in 40 CFR 260.43.

E. Non-Waste Determinations

Today's rule establishes a non-waste determination process that provides persons with an administrative process for receiving a formal determination that their hazardous secondary materials are not discarded and, therefore, not solid wastes when legitimately reclaimed. This process is voluntary and is available in addition to the two self-implementing exclusions included in today's rule. There are two types of non-waste determinations: (1) A determination for hazardous secondary materials reclaimed in a continuous industrial process; and (2) a determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate.

For hazardous secondary materials reclaimed in a continuous industrial process, the non-waste determination will be based on the following four criteria: (1) The extent that the management of the hazardous secondary material is part of the continuous primary production process; (2) whether the capacity of the production process would use the hazardous secondary material in a reasonable time frame; (3) whether the hazardous constituents in the hazardous secondary material are reclaimed rather than discarded to the air, water, or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and (4) other relevant factors that demonstrate the hazardous secondary material is not discarded.

For hazardous secondary materials which are indistinguishable in all relevant aspects from a product or intermediate, the non-waste determination will be based on the following five criteria: (1) Whether market participants treat the hazardous secondary material as a product or intermediate rather than a waste; (2) whether the chemical and physical identity of the hazardous secondary material is comparable to commercial products or intermediates; (3) whether the capacity of the market would use the hazardous secondary material in a reasonable time frame; (4) whether the hazardous constituents in the hazardous secondary material are reclaimed rather than discarded to the air, water, or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and (5) other relevant factors that demonstrate the hazardous secondary material is not discarded.

The process for the non-waste determination is the same as that for the solid waste variances found in 40 CFR 260.30.

III. What Is the History of These Rules?

A. Background

RCRA gives EPA the authority to regulate hazardous wastes (*see, e.g.*, RCRA sections 3001–3004). The original statutory designation of the subtitle for the hazardous waste program was Subtitle C and the national hazardous waste program is referred to as the RCRA Subtitle C program. Subtitle C is codified at 42 U.S.C. 6921 through

6939e. ''Subtitle C'' regulations are found at 40 CFR Parts 260 through 279. ''Hazardous wastes'' are the subset of solid wastes that present threats to human health and the environment (*see* RCRA section 1004(5)). EPA also may address solid and hazardous wastes under its endangerment authorities in section 7003. (Similar authorities are available for citizen suits under section 7002.)

Materials that are not solid wastes are not subject to regulation as hazardous wastes under RCRA Subtitle C. Thus, the definition of ''solid waste'' plays a key role in defining the scope of EPA's authorities under Subtitle C of RCRA. The statute defines ''solid waste'' as ''* * * any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material* * * * resulting from industrial, commercial, mining, and agricultural operations, and from community activities * * *'' (RCRA Section 1004 (27) (emphasis added)).

Since 1980, EPA has interpreted ''solid waste'' under its Subtitle C regulations to encompass both materials that are destined for final, permanent treatment and placement in disposal units, as well as certain materials that are destined for recycling (45 FR 33090–95, May 19, 1980; 50 FR 604–656, Jan. 4, 1985 (*see* in particular pages 616–618)). EPA has offered three arguments in support of this approach:

- The statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling (*see* 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA,* 600 F. 2d 974 (DC Cir. 1979); 48 FR 14502–04, April 3, 1983; and 50 FR 616–618).
- Hazardous secondary materials stored or transported prior to recycling have the potential to present the same types of threats to human health and the environment as hazardous wastes stored or transported prior to disposal. In fact, EPA found that recycling operations have accounted for a number of significant damage incidents. For example, hazardous secondary materials destined for recycling were involved in one-third of the first 60 filings under RCRA's imminent and substantial endangerment authority, and in 20 of the initial sites listed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (48 FR 14474, April 4, 1983). Congress also cited some damage cases which involve recycling (H.R. Rep. 94–1491, 94th Cong., 2d Sess., at 17, 18, 22). More recent data (i.e., information on damage incidents occurring after 1982) included in the rulemaking docket for today's final rule corroborate the fact that recycling operations can result in significant damage incidents.
- Excluding all hazardous secondary materials destined for recycling would allow materials to move in and out of the hazardous waste management system depending on what any person handling the hazardous secondary material intended to do with them. This seems inconsistent with the mandate to track hazardous wastes and control them from ''cradle to grave.''

Hence, EPA has interpreted the statute to confer jurisdiction over at least certain hazardous secondary materials destined for recycling. The Agency has therefore developed in part 261 of 40 CFR a definition of ''solid waste'' for Subtitle C regulatory purposes. (**Note:** This definition is narrower than the definition of ''solid waste'' for RCRA endangerment and information-gathering authorities. (*See* 40 CFR 261.1(b)). Also *Connecticut Coastal Fishermen's Association* v. *Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) holds that EPA's use of a narrower and more specific definition of solid waste for Subtitle C purposes is a reasonable interpretation of the statute. *See also Military Toxics Project* v. *EPA,* 146 F.3d 948 (DC Cir. 1998).)

EPA has always asserted that hazardous secondary materials are not excluded from its jurisdiction simply because someone claims that they will be recycled. EPA has consistently considered hazardous secondary materials destined for ''sham recycling'' to be discarded and, hence, to be solid wastes for Subtitle C purposes (*see* 45 FR 33093, May 19, 1980; 50 FR 638–39, Jan. 4, 1985). The U.S. Court of Appeals for the DC Circuit has agreed that materials undergoing sham recycling are discarded and, consequently, are solid wastes under RCRA (*see American Petroleum Institute* v. *EPA,* 216 F.3d 50, 58–59 (DC Cir. 2000)).

B. A Series of DC Circuit Court Decisions on the Definition of Solid Waste

Trade associations representing mining and oil refining interests challenged EPA's 1985 regulatory definition of solid waste. In 1987, the DC Circuit held that EPA exceeded its authority ''in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste' '' (*American Mining Congress* v. *EPA (''AMC I''),* 824 F.2d 1177, 1178 (DC Cir. 1987)).

The Court held that certain of the materials EPA was seeking to regulate were not ''discarded materials'' under RCRA section 1004(27). The Court also held that Congress used the term ''discarded'' in its ordinary sense, to mean ''disposed of'' or ''abandoned'' (824 F.2d at 1188–89). The Court further held that the term ''discarded materials'' could not include materials ''* * * destined for beneficial reuse or recycling in a continuous process by the generating industry itself (because they) are not yet part of the waste disposal problem'' (824 F.2d at 1190). The Court held that Congress had directly spoken to this issue, so that EPA's definition was not entitled to deference under *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837 (1984) (824 F.2d at 1183, 1189–90, 1193).

At the same time, the Court did *not* hold that recycled materials could not be discarded. The Court mentioned at least two examples of recycled materials that EPA properly considered within its statutory jurisdiction, noting that used oil can be considered a solid waste (824 F.3d at 1187 (fn 14)). Also, the Court suggested that materials disposed of and recycled as part of a waste management program are within EPA's jurisdiction (824 F. 2d at 1179).

Subsequent decisions by the DC Circuit also indicate that some materials destined for recycling are ''discarded'' and therefore within EPA's jurisdiction. In particular, the Court held that emission control dust from steelmaking operations listed as hazardous waste ''K061'' is a solid waste, even when sent to a metals reclamation facility, at least where that is the treatment method required under EPA's land disposal restrictions program (*American Petroleum Institute* v. *EPA (''API I''),* 906 F.2d 729 (DC Cir. 1990)). In addition, the Court held that it is reasonable for EPA to consider as discarded (and solid wastes) listed wastes managed in units that are in part wastewater treatment units, especially where it is not clear that the industry actually reuses the materials (*AMC II,* 907 F. 2d 1179 (DC Cir. 1990)).

It also is worth noting that two other Circuits also have held that EPA has authority over at least some materials destined for reclamation rather than final discard. The U.S. Court of Appeals for the 11th Circuit found that ''[i]t is unnecessary to read into the term 'discarded' a congressional intent that the waste in question must finally and forever be discarded'' (*U.S.* v. *ILCO,* 996 F.2d 1126, 1132 (11th Cir. 1993) (finding that used lead batteries sent to

a reclaimer have been ''discarded once'' by the entity that sent the battery to the reclaimer)). In addition, the Fourth Circuit found that slag held on the ground untouched for six months before sale for use as road bed could be a solid waste (*Owen Electric Steel Co.* v. *EPA,* 37 F.3d 146, 150 (4th Cir. 1994)).

In 1998, EPA promulgated a rule in which EPA claimed Subtitle C jurisdiction over hazardous secondary materials recycled by reclamation within the mineral processing industry, the ''LDR Phase IV rule'' (63 FR 28556, May 26, 1998). In that rule, EPA promulgated a conditional exclusion for all types of mineral processing hazardous secondary materials destined for reclamation. EPA imposed a condition prohibiting land-based storage prior to reclamation because it considered hazardous secondary materials from the mineral processing industry that were stored on the land to be part of the waste disposal problem (63 FR 28581). The conditional exclusion decreased regulation over spent materials stored prior to reclamation, but increased regulation over by-products and sludges that exhibit a hazardous characteristic, and that are stored prior to reclamation. EPA noted that the statute does not authorize it to regulate ''materials that are destined for immediate reuse in another phase of the industry's ongoing production process.'' EPA, however, took the position that materials that are removed from a production process for storage are not ''immediately reused,'' and therefore are ''discarded'' (63 FR 28580).

The mining industry challenged the rule, and the DC Circuit vacated the provisions that expanded jurisdiction over characteristic by-products and sludges destined for reclamation (*Association of Battery Recyclers* v. *EPA (''ABR''),* 208 F.3d 1047 (DC Cir. 2000)). The Court held that it had already resolved the issue presented in ABR in its opinion in *AMC I,* where it found that ''* * * Congress unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away'' (208 F.2d at 1051). It repeated that materials reused within an ongoing industrial process are neither disposed of nor abandoned (208 F.3d at 1051–52). It explained that the intervening *API I* and *AMC II* decisions had not narrowed the holding in *AMC I* (208 F.3d at 1054–1056).

Notably, the Court did *not* hold that storage before reclamation automatically makes materials ''discarded.'' Rather, it held that ''* * * at least some of the secondary material EPA seeks to regulate as solid waste (in the mineral processing rule) is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away'' (208 F.3d at 1056).

In its most recent opinion dealing with the definition of solid waste, *Safe Food and Fertilizer* v. *EPA (''Safe Food''),* 350 F.3d 1263 (DC Cir. 2003), the Court upheld an EPA rule that excludes from the definition of solid waste hazardous secondary materials used to make zinc fertilizers, and the fertilizers themselves, so long as the recycled materials meet certain handling, storage and reporting conditions and the resulting fertilizers have concentration levels for lead, arsenic, mercury, cadmium, chromium, and dioxins that fall below specified thresholds (Final Rule, ''Zinc Fertilizers Made From Recycled Hazardous Secondary Materials'' (''Fertilizer Rule''), 67 FR 48393, July 24, 2002). EPA determined that if these conditions are met, the hazardous secondary materials used to make the fertilizer have not been discarded. The conditions apply to a number of recycled materials not produced in the fertilizer production industry, including certain zinc-bearing hazardous secondary materials, such as brass foundry dusts.

EPA's reasoning was that market participants, consistent with the EPA-required conditions in the rule, would treat the exempted materials more like valuable products than like negatively-valued wastes and, thus, would manage them in ways inconsistent with discard. In addition, the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from raw materials (350 F.3d at 1269). The Court upheld the rule based on EPA's explanation that market participants manage materials in ways inconsistent with discard, and the fact that the levels of contaminants in the recycled fertilizers were ''identical'' to the fertilizers made with virgin raw materials. The Court held that this interpretation of ''discard'' was reasonable and consistent with the statutory purpose. The Court noted that the identity principle was defensible because the differences in health and environmental risks between the two types of fertilizers are so slight as to be substantively meaningless.

However, the Court specifically stated that it ''need not consider whether a material could be classified as a non-discard exclusively on the basis of the market-participation theory'' (350 F.3d at 1269). The Court only determined that the combination of market participants' treatment of the materials, EPA required management standards, and the ''identity principle'' are a reasonable set of tools to establish that the recycled hazardous secondary materials and fertilizers are not discarded.

C. October 2003 Proposal To Revise the Definition of Solid Waste

Prompted by concerns articulated in various Court opinions decided up to that point, in October 2003, EPA proposed a rule that material generated and reclaimed in a continuous process within the same industry is not discarded for purposes of Subtitle C, provided the recycling process is legitimate (68 FR 61558, October 28, 2003). ''Same industry'' was defined as industries sharing the same 4-digit North American Industry Classification System (NAICS) code.

In the same notice, EPA also solicited comment on several different alternatives to the proposed exclusion. The first alternative was whether to exclude from the definition of solid waste those hazardous secondary materials that are generated and reclaimed in a continuous process on-site (as defined in 40 CFR 260.10), even if different industries were involved. This exclusion would be based on the premise that materials recycled on-site in a continuous process are unlikely to be discarded because they would be closely managed and monitored by a single entity that is intimately familiar with both the generation and reclamation of the hazardous secondary material. In addition, no off-site transport of the hazardous secondary material (with its attendant risks) would occur, and there would be few questions about potential liability in the event of mismanagement or mishap.

The second alternative was an exclusion for certain situations within the chemical manufacturing industry that might present unique recycling situations. Specifically, within the chemical manufacturing industry, the first manufacturer contracts out production of certain chemicals to another manufacturer (referred to as batch or tolling operations). The second manufacturer may generate hazardous secondary materials that could be returned to the first chemical manufacturer for reclamation.

The third alternative would have provided a broader conditional exclusion from the RCRA hazardous waste regulations for essentially all hazardous secondary materials that are legitimately recycled by reclamation. The purpose of this broader exclusion

would have been to encourage reclamation by lowering costs of recycling, while still protecting human health and the environment. The Agency suggested that additional requirements or conditions might be appropriate to protect human health and the environment for this broader exclusion, compared to the same-industry exclusion that we proposed. Examples of such additional conditions could include recordkeeping and reporting requirements, along with safeguards on storage or handling.

In response to the October 2003 proposal, a number of commenters criticized the Agency specifically for not having conducted a study of the potential impacts of the proposed regulatory changes. These commenters expressed the general concern that deregulating hazardous secondary materials that are reclaimed in the manner proposed could result in mismanagement of these materials and, thus, could create new cases of environmental damage that would require remedial action under federal or state authorities. Some of the commenters further cited a number of examples of environmental damage that were attributed to hazardous secondary material recycling, including a number of sites listed on the Superfund National Priorities List (NPL).

However, other commenters to the October 2003 proposal expressed the view that the great majority of these cases of recycling-related environmental problems occurred before RCRA, CERCLA, or other environmental programs were established in the early 1980s. These commenters further argued that these environmental programs—most notably, RCRA's hazardous waste regulations and the liability provisions of CERCLA—have created strong incentives for proper management of recyclable hazardous secondary materials and recycling residuals. Several commenters further noted that, because of these developments, industrial recycling practices have changed substantially since the early 1980s and present day generators and recyclers are much better environmental stewards than in the pre-RCRA/CERCLA era. Thus, they argued, cases of ''historical'' recycling-related environmental damage are not particularly relevant or instructive with regard to modifying the current RCRA hazardous waste regulations for hazardous secondary materials recycling.

D. Recycling Studies

In light of these comments on the October 2003 proposal, and in deliberating on how to proceed with this rulemaking effort, the Agency decided that additional information on hazardous secondary material recycling would benefit the regulatory decision-making process, and would provide stakeholders with a clearer picture of the hazardous secondary material recycling industry in this country. Accordingly, the Agency examined three basic issues that we believed were of particular importance to informing this rulemaking effort:

- How do responsible generators and recyclers of hazardous secondary materials ensure that recycling is done in an environmentally safe manner?
- To what extent have hazardous secondary material recycling practices resulted in environmental problems in recent years, and why?
- Are there certain economic forces or incentives specific to hazardous secondary material recycling that can explain why environmental problems can sometimes originate from such recycling activities?

Reports documenting these studies have been available for comment in the docket for this rulemaking, under the following titles:

- *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0354) (''successful recycling study'').
- *An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials* (EPA–HQ–RCRA–2002–0031–0355) (''environmental problems study'').
- *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (EPA–HQ–RCRA–2002–0031–0358) (''market forces study'').

The results of these three studies have informed and supported EPA's decision making in today's final rule.

The successful recycling study has provided information to the Agency that has helped us determine what types of controls would be appropriate for hazardous secondary materials sent for reclamation to determine that they are handled as commodities rather than wastes. EPA found that responsible recycling practices used by generators and recyclers to manage hazardous secondary materials fall into two general categories. The first category includes the audit activities and inquiries performed by a generator of a hazardous secondary material to determine whether the entity to which it is sending such material is equipped to responsibly manage it without the risk of releases or other environmental damage. These recycling and waste audits of other companies' facilities form a backbone of many of the transactions in the hazardous secondary materials market. The second category of responsible recycling practices consists of the control practices that ensure responsible management of any given shipment of hazardous secondary material, such as the contracts under which the transaction takes place and the tracking systems in place that can inform a generator that its hazardous secondary material has been properly managed.

As discussed later in today's preamble, these findings helped inform EPA's decision to require that a hazardous secondary material generator conduct reasonable efforts to ensure its materials are properly and legitimately recycled, and to require certain recordkeeping requirements.

The goal of the environmental problems study was to identify and characterize environmental problems that have been attributed to some types of hazardous secondary material recycling activity that are relevant for the purpose of this rulemaking effort. To address commenters' concerns that historic damages are irrelevant to current practices, EPA only included cases where damages occurred after 1982 (post-RCRA and -CERCLA implementation). The study identifies 208 cases in which environmental damages of some kind occurred from some type of recycling activity and that otherwise fit the scope of the study. The Agency believes that the occurrence of certain types of environmental problems associated with current recycling practices shows that discard has occurred. In particular, instances where materials were abandoned (e.g., in warehouses) and which required removal overseen by a government agency and expenditure of public funds clearly demonstrate that the hazardous secondary material was discarded. Of the 208 damage cases, 69 cases (33%) involve abandoned materials. The relatively high incidence of abandoned materials likely reflects the fact that bankruptcies or other types of business failures were associated with 138 (66%) of the cases.

In addition, the pattern of environmental damages that resulted from the mismanagement of recyclable materials (including contamination of soils, groundwater, surface water and air) is a strong indication that the hazardous secondary materials were generally not managed as valuable commodities and were discarded. Of the 208 damage cases, 81 cases (40%) primarily resulted from the

mismanagement of recyclable hazardous secondary materials. Mismanagement of recycling residuals was the primary cause in 71 cases (34%). Often, in the case of mismanagement of recycling residues, reclamation processes generated residuals in which the toxic components of the recycled materials were separated from the non-toxic components, and these portions of the hazardous secondary material were then mismanaged and discarded. Examples of this include a number of drum reconditioning facilities, where large numbers of used drums were cleaned out to remove small amounts of remaining product such as solvent, and these wastes were then improperly stored or disposed.

As discussed later in today's preamble, these findings helped inform EPA's decision to require that the hazardous secondary material be contained in the unit and managed in a manner that is at least as protective as an analogous raw material (where there is an analogous material), that the recycling residuals be properly managed, and that the reclamation facility and any intermediate facilities have financial assurance. In addition, the relatively small proportion of cases of damages from on-site recycling (13 of the 208 cases (6%)) lends support for EPA's decision to include fewer limitations on the exclusion for hazardous secondary materials recycled under the control of the generator.

The market forces study uses accepted economic theory to describe how various market incentives can influence a firm's decision-making process when the recycling of hazardous secondary materials is involved. This study helps explain some of the possible fundamental economic drivers of both the successful and unsuccessful recycling practices, which, in turn, helped the Agency to design the exclusions being finalized today.

As pointed out by some commenters to the October 2003 proposed rule, the economic forces shaping the behavior of firms that recycle hazardous secondary materials are often different from those at play in manufacturing processes using virgin materials. The market forces study uses economic theory to provide information on how certain characteristics can influence three different recycling models to encourage or discourage an optimal outcome. The three recycling models examined are: (1) Commercial recycling, where the primary business of the firms is recycling hazardous secondary materials that are accepted for recycling from off-site industrial sources (which usually pay a fee); (2) industrial intra-company recycling, where firms generate hazardous secondary materials as by-products of their main production processes and recycle the hazardous secondary materials for sale or for their own reuse in production; and (3) industrial inter-company recycling, where firms whose primary business is not recycling, but either use or recycle hazardous secondary materials obtained from other firms, with the objective of reducing the cost of their production inputs. The report looks at how the outcome from each model is potentially affected by three market characteristics: (1) Value of the recycled product, (2) price stability of recycling output or inputs, and (3) net worth of the firm.

While an individual firm's decision-making process is based on many factors and attempting to extrapolate a firm's likely behavior from a few factors could be an over-simplification, when used in conjunction with other pieces of information, the economic theory can be quite illuminating. For example, according to the market forces study, the industrial intra- and inter-company recyclers have more flexibility in adjusting to unstable recycling markets (e.g., during price fluctuations, these companies can more easily switch from recycling to disposal or from recycled inputs to virgin inputs). Therefore, they would be expected to be less likely to have environmental problems from over-accumulated materials. On the other hand, certain specific types of commercial recycling, where the product has low value, the prices are unstable, and/or the firm has a low net worth, could be more susceptible to environmental problems from the over-accumulation of hazardous secondary materials, especially when compared to recycling by a well-capitalized firm that yields a product with high value. In both cases, these predicted outcomes appear to be supported by the results of the environmental problems study, which show the majority of problems occur at off-site commercial recyclers.

However, as shown by the successful recycling study, generators who might otherwise bear a large liability from poorly managed recycling at other companies have addressed this issue by carefully examining the recyclers to which they send their hazardous secondary materials to ensure that they are technically and financially capable of performing the recycling. In addition, we have seen that successful recyclers (both commercial and industrial) have often taken advantage of mechanisms, such as long-term contracts to help stabilize price fluctuations, allowing recyclers to plan their operations better.

Further discussion of the recycling studies, including the methodology and limitations of the studies, can be found in the March 2007 supplemental proposal (72 FR 14178–83), and the studies themselves can be found in the docket for today's rulemaking.

E. March 2007 Supplemental Proposal To Revise the Definition of Solid Waste

To provide public notice on the recycling studies discussed above, in March 2007, EPA published a supplemental proposal (72 FR 14172, March 26, 2007). In addition, based on the comments received on the October 2003 proposal, EPA also decided to restructure our approach to revising the definition of solid waste to more directly consider whether particular materials are not considered ''discarded'' and thus are not solid and hazardous wastes subject to regulation under Subtitle C of RCRA. We agreed with the many commenters on the October 2003 proposal who said that whether materials are recycled within the same NAICS code is not an appropriate indication of whether they are discarded. NAICS designations are designed to be consistent only with product lines, so that the effect of our October 2003 proposal would be that hazardous secondary materials generated and reclaimed under the control of the generator would not be excluded, even though the generator has not abandoned the material and has every opportunity and incentive to maintain oversight of, and responsibility for, the material that is reclaimed (*see* ABR, 208 F.2d at 1051 (noting that discard has not taken place where the producer saves and reuses secondary materials)).

Instead, in March 2007, EPA proposed two exclusions for hazardous secondary materials recycled under the control of the generator (one exclusion would apply to hazardous secondary materials managed in non-land-based units, whereas the other exclusion would apply to hazardous secondary materials managed in land-based units) and an additional exclusion for hazardous secondary materials transferred to another party for reclamation.

For the exclusions for hazardous secondary materials reclaimed under the control of the generator, EPA described three circumstances under which we believe that discard does not take place and where the potential for environmental releases is low to non-existent. The three situations involve legitimate recycling of hazardous secondary materials that are generated and reclaimed at the generating facility, at a different facility within the same

company, or through a tolling arrangement. Under all three circumstances, the hazardous secondary materials must be generated and reclaimed within the United States or its territories. Because the hazardous secondary material generator in these situations still finds value in the hazardous secondary materials, has retained control over them, and intends to use them, EPA proposed to exclude these materials from being a solid waste and, thus, from regulation under Subtitle C of RCRA if the recycling is legitimate and if the hazardous secondary materials are not speculatively accumulated.

In those cases, however, where generators of hazardous secondary materials do not reclaim the materials themselves, it often may be a sound business decision to ship the hazardous secondary materials to a commercial facility or another manufacturer for reclamation in order to avoid the costs of disposing of the material. In such situations, the generator has relinquished control of the hazardous secondary materials and the entity receiving such materials may not have the same incentives to manage the hazardous secondary materials as a useful product, especially if they are paid a fee for managing the hazardous secondary materials.

Accordingly, for the exclusion for hazardous secondary materials transferred to another party for reclamation, the Agency proposed conditions that, when met, would indicate that these hazardous secondary materials are not discarded. One of the conditions would require the generator to make reasonable efforts to determine that its hazardous secondary materials will be properly and legitimately recycled (thus demonstrating the hazardous secondary material is not being discarded). Another condition would require the reclamation facility to have adequate financial assurance (thus demonstrating that the hazardous secondary material will not be abandoned). In addition, EPA proposed that both the generator and reclaimer would need to maintain shipping records (to demonstrate that the hazardous secondary material was sent for reclamation and was received by the reclaimer), and the reclaimer would be subject to additional storage and residual management standards (to address the instances of discard observed at off-site reclamation facilities in the damage cases).

In addition, in March 2007, EPA's supplemental proposal included a case-by-case petition process to allow applicants to demonstrate that their hazardous secondary materials are not discarded and therefore are not solid wastes.

Finally, in EPA's March 2007 supplemental proposal, EPA proposed a definition of legitimate recycling that restructured the legitimacy factors originally proposed in October 2003. The proposed legitimacy factors would be used to determine whether the recycling of hazardous secondary materials is legitimate.

IV. How Do the Provisions in the Final Rule Compare to Those Proposed on March 26, 2007?

EPA is finalizing the exclusions largely as proposed in March 2007, with some revisions and clarifications. The following is a brief overview of the revisions to the proposal, with references to additional preamble discussions for more detail.

For the exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator, we are clarifying the scope of the exclusion, including addressing issues with defining ''on-site,'' ''same company,'' and ''tolling arrangement.'' We have also added additional data elements to the notification requirement, clarified that the hazardous secondary materials must be contained when managed in non-land-based units, as well as in land-based units, because hazardous secondary materials that are released to the environment and not immediately recovered are discarded, and added a reference to the new legitimacy provision in § 260.43. We have also revised the definition of land-based unit to be ''an area where hazardous secondary materials are placed in or on the land before recycling,'' while also clarifying that the definition does not include production units. For further discussion of the generator-controlled exclusion, see section VII of this preamble.

For the exclusion for hazardous secondary materials that are transferred for the purpose of reclamation, we are clarifying that hazardous secondary materials held at a transfer facility for less than 10 days will be considered to be in transport. We are also allowing the use of intermediate facilities that store hazardous secondary materials for more than 10 days, provided the facilities comply with the same conditions applicable to reclamation facilities. In addition, the hazardous secondary material generator must select the reclamation facility (or facilities) that can be used and must perform reasonable efforts on both the intermediate facility and reclamation facility (or facilities), and the intermediate facility must send the hazardous secondary material to the reclamation facility that the generator selected. For the reasonable efforts condition, we have included specific questions in the regulatory language, and are requiring both documentation and certification. We are also clarifying how the financial assurance condition applies to reclamation and intermediate facilities excluded under the transfer-based exclusion, including tailored regulatory language for financial assurance specific to these types of facilities. We have also added a reference to the new legitimacy provision in § 260.43. For further discussion, see section VIII of this preamble.

Regarding legitimacy, we are adding legitimacy as a condition of the exclusions and the non-waste determinations in this rule, but are not finalizing the language proposed in § 261.2(g) for all recycling. The new legitimacy provision can be found at § 260.43. For further discussion, see section IX of this preamble.

Finally, for the non-waste determination process, we have limited the categories for non-waste determinations to materials reclaimed in a continuous industrial process and materials indistinguishable from products and we have revised the criteria to make them more consistent across the two categories of non-waste determinations. Furthermore, we are not finalizing the non-waste determination for materials reclaimed under the control of the generator via a tolling arrangement or similar contractual arrangement. For further discussion, see sections X and XIX of this preamble.

V. How Does the Concept of Discard Relate to the Final Rule?

In the March 2007 supplemental proposal, EPA explained how the concept of ''discard'' is the central organizing idea behind the revisions to the definition of solid waste being finalized today (72 FR 14178). Basing the revisions on ''discard'' reflects the fundamental logic of the RCRA statute. As stated in RCRA Section 1004(27), ''solid waste'' is defined as ''* * * any garbage, refuse, sludge from a waste treatment plant, or air pollution control facility and other discarded material * * * resulting from industrial, commercial, mining and agricultural activities. * * *'' Therefore, in the context of this final rule, a key issue is the circumstances under which a hazardous secondary material that is recycled by reclamation is or is not discarded.

The March 2007 supplemental proposal represented a shift from the approach taken in the October 2003 proposal, which proposed to exclude from the definition of solid waste any hazardous secondary material generated and reclaimed in a continuous process within the same industry, provided the reclamation was legitimate. ''Same industry'' was defined as industries sharing the same 4-digit NAICS code. The basis for that proposed exclusion was the holding in *American Mining Congress* v. *EPA (''AMC I''),* 824 F.2d 1177 (DC Cir. 1987) that materials destined for beneficial reuse in a continuous process by the generating industry are not discarded (68 FR 61563, 61564–61567).

Commenters critical of the October 2003 proposal argued, among other things, that EPA failed to present a reasoned analysis of the indicia of discard (72 FR 14184–14185). In evaluating these comments, EPA determined that the effect of our October 2003 proposal would be that some hazardous secondary materials generated and reclaimed under the control of the generator would not be excluded, even though the generator had not abandoned the material and had every opportunity and incentive to maintain oversight of, and responsibility for, the hazardous secondary material being reclaimed. Under these circumstances, we determined in March 2007 that discard has generally not occurred (72 FR 14185). Therefore, in the March 2007 supplemental proposal, EPA decided to examine the concept of discard, which is the driving principle behind the court's holdings on the definition of solid waste, rather than trying to fit materials into specific fact patterns addressed by the court (*see* 72 FR 14175).

EPA continues to believe that the concept of discard is the most important organizing principle governing the determinations we have made in today's final rule. In the series of decisions discussed above relating to the RCRA definition of solid waste, the Court of Appeals for the DC Circuit has consistently cited a plain language definition of discard, as meaning ''disposing, abandoning or throwing away.'' Today's final rule is consistent with that definition. Below is a discussion of each provision of the final rule with an explanation of how it relates to discard. Further discussion of the concept of discard and its relationship to specific provisions and ways of implementing this rule is found in sections V.A through V.D, below.

The Agency also incorporates in this preamble to the final rule all determinations in the March 2007 supplemental proposal, except to the extent they are inconsistent with the determinations in this preamble, regarding the conditions for the solid waste exclusions. In addition, EPA notes that it did not reopen the specific details of the speculative accumulation regulation regarding the time periods under which materials are to be recycled, since these periods have been part of the Agency's regulations for many years and are familiar to persons who are affected by the regulations.

A. Discard and the Generator-Controlled Exclusions

In the March 2007 supplemental proposal, EPA determined that if the generator maintains control over the recycled hazardous secondary material, the material is legitimately recycled under the standards established in the proposal, and the material is not speculatively accumulated within the meaning of EPA's regulations, then the hazardous secondary material is not discarded. This is because the hazardous secondary material is being treated as a valuable commodity rather than as a waste. By maintaining control over, and potential liability for, the recycling process, the generator ensures that the hazardous secondary materials are not discarded (*see* ABR 208 F.3d 1051 (''Rather than throwing these materials [destined for recycling] away, the producer saves them; rather than abandoning them, the producer reuses them.'')) (72 FR 14178).

EPA continues to believe that when a generator legitimately recycles hazardous secondary material under its control, the generator has not abandoned the material and has every opportunity and incentive to maintain oversight of, and responsibility for, the hazardous secondary material that is reclaimed.

In determining when recycling occurs ''under the control'' of the generator, EPA looked at three scenarios: Recycling performed on-site, recycling performed within the same company, and recycling performed under certain specific tolling arrangements.

In the March 2007 supplemental proposal, EPA noted that, of the 208 recycling cases that caused environmental damage, only 13 (approximately 6%) occurred as a result of on-site recycling. We also agreed with commenters on the October 2003 proposal who asserted that ''generators who recycle materials on-site (even if the reclamation takes place in a different NAICS code) are likely to be familiar with the material and more likely to maintain responsibility for the materials'' (72 FR 14185).

EPA also determined that this rationale applies to legitimate reclamation taking place within the same company. In the case of same-company recycling, both the generating facility and the reclamation facility (if they are different) would be familiar with the hazardous secondary materials and the company would be ultimately liable for any mismanagement of the hazardous secondary materials. Under these circumstances, the incentive to avoid such mismanagement would be so strong that mismanagement also would be unlikely.

In the case of certain tolling operations, EPA determined in the March 2007 supplemental proposal that a certain specific type of tolling arrangement provides equivalent assurance that recycling is performed ''under the control of the generator'' and does not constitute discard. Under this type of arrangement, one company (the tolling contractor) contracts with a second company (the toll manufacturer) to produce a specialty chemical from specified unused materials identified in the tolling contract. The toll manufacturer produces the chemical and the production process generates a hazardous secondary material (such as a spent solvent) which is routinely reclaimed at the tolling contractor's facility. The typical toll manufacturing contract contains detailed specifications about the product to be manufactured, including management of any hazardous secondary materials that are produced and returned to the tolling contractor for reclamation. Under this scenario, the hazardous secondary material continues to be managed as a valuable product, so discard has not occurred. Moreover, because the contract specifies that the tolling contractor retains ownership of, and responsibility for, the hazardous secondary materials, there is a strong incentive to avoid any mismanagement or release. In essence, the tolling contractor has outsourced a step in its manufacturing process, but continues to take responsibility and maintain control of the process as a whole, including both the unused materials going into the process and the product and hazardous secondary materials resulting from the process.

For all three of these generator-controlled exclusions—reclamation performed on-site, within the same company, and via certain tolling arrangements—EPA continues to find that the facility owner still finds value in the hazardous secondary materials, has retained control over them, and intends to reclaim them. Therefore, EPA

is finalizing an exclusion for these materials, with certain restrictions discussed below.

In the March 2007 supplemental proposal, EPA also noted that management in a land-based unit does not automatically indicate a hazardous secondary material is being discarded. As long as the hazardous secondary material is contained and is destined for recycling under the control of the generator, it would still meet the terms of the exclusion. However, if the hazardous secondary material is not managed as a valuable product and, as a result, a significant release to the environment from the unit occurs and is not immediately recovered, the hazardous secondary material in the land-based unit would be considered discarded (72 FR 14186). Thus, EPA proposed that the hazardous secondary material must be contained in the land-based unit in order for the exclusion to be applicable.

However, in making this finding that hazardous secondary materials managed in a land-based unit must be contained in order to retain the exclusion, EPA did not intend to imply that hazardous secondary materials managed in non-land-based units do not need to be contained. Hazardous secondary materials released to the environment are not destined for recycling and are clearly discarded whether they originated from a land-based unit or not. Because non-land-based units do not involve direct contact with the land, in the March 2007 supplemental proposal, EPA did not include an explicit ''contained'' restriction for these units. However, as commenters noted, it is still possible for non-land-based units to leak or otherwise release significant amounts of hazardous secondary materials to the environment, even if they are not in direct contact with the land, resulting in those materials being discarded. Thus, for today's final rule, EPA is requiring that hazardous secondary materials must be contained (whether it is managed in land-based units or non-land-based units) in order to identify the hazardous secondary materials that are not being discarded and, therefore, are not solid wastes.

Another restriction on the generator-controlled exclusions is the prohibition against speculative accumulation. As noted in the March 2007 supplemental proposal, restrictions on speculative accumulation (40 CFR 261.1(c)(8)) have been an important element of the RCRA hazardous waste recycling regulations since they were promulgated on January 4, 1985. Historically, hazardous secondary materials excluded from the definition of solid waste generally become wastes when they are speculatively accumulated, because, at that point, they are considered to be unlikely to be recycled and therefore discarded. According to this regulatory provision, a hazardous secondary material is accumulated speculatively if the person accumulating it cannot show that the material is potentially recyclable; further, the person accumulating the hazardous secondary material must show that during a calendar year (beginning January 1) the amount of such material that is recycled, or transferred to a different site for recycling, must equal at least 75% by weight or volume of the amount of that material at the beginning of the period. As noted in the March 2007 supplemental proposal, this provision already applies to hazardous secondary materials that are not otherwise considered to be wastes when recycled, such as materials used as ingredients or commercial product substitutes, materials that are recycled in a closed-loop production process, or unlisted sludges and by-products being reclaimed (72 FR 14188). Given that a significant portion of the damage cases stemmed from over-accumulation of hazardous secondary materials, EPA continues to believe that a restriction on speculative accumulation is needed to determine that the hazardous secondary material is being recycled and is not discarded.

In addition, as with all recycling exclusions under RCRA, the excluded hazardous secondary materials must be recycled legitimately. As discussed in section IX of this preamble, EPA has long articulated the need to distinguish between ''legitimate'' (i.e., true) recycling and ''sham'' recycling, beginning with the preamble to the 1985 regulations that established the definition of solid waste (50 FR 638, January 4, 1985) and continuing with the October 2003 proposed codification of criteria for identifying legitimate recycling. Because there can be a significant economic incentive to manage hazardous secondary materials outside the RCRA regulatory system, there is a potential for some handlers to claim that they are recycling, when, in fact, they are conducting waste treatment and/or disposal in the guise of recycling. While the legitimacy construct applies to both excluded recycling and the recycling of regulated hazardous wastes, hazardous secondary materials that are not legitimately recycled (i.e., that are being treated and/or disposed in the guise of recycling) are discarded materials and, therefore, are solid wastes.

A final restriction on the generator-controlled exclusion from the definition of solid waste is that the hazardous secondary material must be generated and recycled within the United States.[1] Because hazardous secondary materials that are exported for recycling passes out of the regulatory control of the federal government, making it difficult to determine if these activities are ''under the control of the generator'' and because, as noted in the March 2007 supplemental proposal, we do not have sufficient information about most recycling activities outside of the United States to decide whether discard is likely or unlikely (72 FR 14187), EPA continues to find that this restriction is needed to properly define when the hazardous secondary material is not being discarded.

B. Discard and the Transfer-Based Exclusion

As EPA noted in the March 2007 supplemental proposal, in cases where generators of hazardous secondary materials do not reclaim the materials themselves, it often may be a sound business decision to ship the hazardous secondary materials to be reclaimed to a commercial facility or another manufacturer in order to avoid the costs of disposing of the material.

In such situations, EPA determined that the generator has relinquished control of the hazardous secondary materials and the entity receiving such materials may not have the same incentives to manage them as a useful product (72 FR 14178). This is evidenced by the results of the environmental problems study, found in the docket of today's final rule. Of the 208 damage cases EPA identified for the March 2007 supplemental proposal, 195 (about 94%) were from off-site third-party recyclers, with clear instances of discard resulting in risk to human health and the environment, including cases of large-scale soil and ground water contamination with remediation costs in some instances in the tens of millions of dollars.

In addition, the market forces study in the docket for today's rulemaking supports the conclusion that the pattern of discard at off-site, third party reclaimers is a result of inherent differences between commercial

[1] As discussed in section VII.C., persons taking advantage of the generator-controlled option must also notify the regulatory authority. This notification requirement is needed to enable credible evaluation of the status of hazardous secondary materials under RCRA and to ensure the terms of the exclusions are being met by generators and reclaimers. These types of notification requirements in this rule are being promulgated under the authority of RCRA section 3007.

recycling and normal manufacturing. As opposed to manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, hazardous secondary materials recycling can involve generating revenue primarily from receipt of the hazardous secondary materials (72 FR 14182). Recyclers of hazardous secondary materials in this situation may thus respond differently from traditional manufacturers to economic forces and incentives, accumulating more inputs (hazardous secondary materials) than can be processed (reclaimed). In addition, commercial recyclers appear to have less flexibility than in-house recyclers (e.g., during price fluctuations, in-house recyclers can more easily switch from recycling to disposal or from recycled inputs to virgin inputs, which commercial recyclers cannot) (72 FR 14183).

After reviewing public comments on the recycling studies (see section XV.D. of today's preamble), EPA continues to believe that conditions are needed under the transfer-based exclusion for the Agency to determine that these hazardous secondary materials are not discarded.[2]

One key condition that reflects the basic premise underlying the exclusion is the condition that the hazardous secondary material generator perform and document reasonable efforts to ensure that its hazardous secondary material will be properly and legitimately recycled. As EPA explained in the March 2007 supplemental proposal, in order to demonstrate that hazardous secondary materials will not be discarded, generators who transfer their hazardous secondary materials to a third party must have a reasonable understanding of who will be reclaiming the materials and how they will be managed and reclaimed and a reasonable assurance that the recycling practice is safe and legitimate (72 FR 14194). In order for a generator to determine whether its hazardous secondary materials are not solid wastes because they are not discarded, the generator must make a reasonable effort to ensure that the reclaimer intends to legitimately recycle the material and not discard it, and that the reclaimer (and any intermediate facility) will properly manage the material.

EPA continues to find that the reasonable efforts condition is critical in determining when hazardous secondary materials sent to another party for reclamation are not discarded. According to the successful recycling study found in the docket for today's rulemaking, generators of hazardous secondary materials frequently perform audit activities and inquiries to determine whether the entity to which they are sending hazardous secondary materials is equipped to responsibly and legitimately reclaim and manage those materials without the risk of releases or other environmental damage. These recycling and waste audits of other companies' facilities form a backbone of many of the transactions in the hazardous secondary materials markets. As noted in the March 2007 supplemental proposal, EPA's successful recycling study quotes one large recycling and disposal vendor as stating that of its new customers, 60% of the large customers and 30–50% of the smaller customers now perform audits on them (72 FR 14191). Thus, although these practices are not universal, they do indicate that there are currently many generators who recognize the risk of third-party recyclers discarding their hazardous secondary materials and who take responsibility to ensure that this discard does not occur. By codifying the reasonable efforts condition of the transfer-based exclusion, EPA believes that hazardous secondary materials generated by companies who take this type of responsibility are not being discarded.

EPA has developed a reasonable efforts condition that is objective and is based on the types of information that are typically gathered in environmental audits currently performed by generators. However, one piece of information that is not included under the reasonable efforts provision being finalized today is the financial health of the reclamation facility. While EPA agrees with comments received that state that evaluating the financial health of a company can be a useful exercise, and encourages companies to do so, it is not an activity that lends itself to an objective standard that would be workable in a solid waste identification regulation.

However, the financial health of a reclamation facility can still be a crucial consideration in determining whether discard is taking place. According to the successful recycling study, an examination of a company's finances is an important part of many environmental audits. In addition, the environmental problems study showed that bankruptcies or other types of business failures were associated with 138 (66%) of the damage cases, and the market forces study identified a low net worth of a firm as a strong indication of a sub-optimal outcome of recycling.

To address the issue of the correlation of financial health with the absence of discard, EPA proposed in the March 2007 supplemental proposal to require that reclamation facilities obtain financial assurance. The financial assurance requirements are designed to help EPA determine that the hazardous secondary material generator is not discarding the hazardous secondary material by sending it to a reclamation facility that is financially unsound.

In addition, by obtaining financial assurance, the owner/operator of the reclamation facility (or intermediate facility) is making a direct demonstration that it will not abandon the hazardous secondary material. Discard through abandonment was a major cause of damages identified in the environmental problems study. Of the 208 damage cases, 69 (33%) cases involved abandoned materials. By obtaining financial assurance, a reclaimer (or intermediate facility) is demonstrating that even if events beyond its control make its operations uneconomical, the hazardous secondary material will not be abandoned.

Another major cause of damages identified in the environmental problems study was mismanagement of recyclable materials, constituting the primary cause of damage in 81 (40%) of the 208 cases. Accordingly, in the March 2007 supplemental proposal, EPA proposed a condition for reclaimers that they must manage the hazardous secondary materials in at least as protective a manner as they would an analogous raw material, and in such a way that the hazardous secondary materials would not be released into the environment (72 FR 14195). After reviewing the comments, EPA continues to find that such a condition is needed for the Agency to determine that the hazardous secondary materials are not discarded.

The third major source of damages identified in the environmental problems study was mismanagement of residuals generated from the reclamation activity, constituting the primary cause of damage in 71 (34%) of the 208 cases. As discussed in the March 2007 supplemental proposal, EPA found that in many cases, the

[2] These are conditions beyond the prohibition on speculative accumulation, the requirement that the hazardous secondary material be contained, and the requirement that the materials be legitimately recycled, as described in section VII.C., which would also apply to the transfer-based exclusion. The transfer-based exclusion also includes a notification requirement, which is needed to enable credible evaluation of the status of hazardous secondary materials under section 3007 of RCRA and to ensure the terms of the exclusions are being met by generators, intermediate facilities, and reclaimers.

residuals were comprised of the most hazardous components of the hazardous secondary materials (e.g., polychlorinated biphenyls (PCBs) from transformers) and were simply disposed of in on-site landfills or piles, with little regard for the environmental consequences of such mismanagement or possible CERCLA liabilities associated with cleanup of these releases. Therefore, EPA proposed that ''any residuals that are generated from reclamation processes will be properly managed. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or themselves are listed hazardous wastes, they are hazardous wastes (if discarded) and must be managed according to the applicable requirements of 40 CFR parts 260 through 272'' (72 FR 17195). EPA continues to find that this condition is important to clarify the regulatory status of these waste materials, and to emphasize in explicit terms that the residuals generated from reclamation operations must be managed properly (i.e., consistent with federal and state requirements).

Finally, other provisions of the transfer-based exclusion help ensure that the hazardous secondary material is properly transferred to the reclamation facility for recycling. Only the hazardous secondary material generator, transporter, intermediate facility and reclaimer can handle the material. (Note that, as with hazardous waste, a hazardous secondary material can be held up to 10 days at a transfer facility and still be considered as being in transport.) The hazardous secondary material generators, intermediate, and reclamation facilities claiming the exclusion must keep records of the hazardous secondary material shipments, and reclamation and intermediate facilities must send confirmations of receipt back to the hazardous secondary material generator. Thus, all parties responsible for the excluded hazardous secondary materials will be able to demonstrate that the materials were in fact sent for reclamation and arrived at the intended facility and were not discarded in transit. For hazardous secondary material generators who are exporting to other countries for reclamation, notice and consent must be obtained, thus facilitating oversight of the hazardous secondary material when sent beyond the borders of the United States, helping to ensure that it is recycled rather than discarded.

C. Discard and Non-Waste Determinations

In addition to the exclusions discussed above, the Agency is also finalizing a process for obtaining a case-specific non-waste determination for certain hazardous secondary materials that are recycled. This process allows a petitioner to receive a formal determination from EPA (or the state, if the state is authorized for this provision) that its hazardous secondary material is not discarded and therefore is not a solid waste. The procedure allows EPA or the authorized state to take into account the particular fact pattern of the reclamation operation to determine that the hazardous secondary material in question is not a solid waste.

The determination is available to applicants who demonstrate (1) that their hazardous secondary materials are reclaimed in a continuous industrial process, or (2) that the materials are indistinguishable in all relevant aspects from a product or intermediate.

As discussed earlier, court decisions have made it clear that hazardous secondary materials reclaimed in a continuous industrial process are not discarded and, therefore, are not solid waste. As discussed in the March 2007 supplemental proposal, EPA believes that the generator-controlled exclusion also excludes from the definition of solid waste hazardous secondary materials recycled in a continuous industrial process (72 FR 14202). In effect, hazardous secondary materials reclaimed in a continuous process are a subset of the hazardous secondary materials reclaimed under the control of the generator that are excluded under today's rule.

However, EPA also recognized in the March 2007 supplemental proposal that production processes can vary widely from industry to industry. Thus, in some cases, EPA may need to evaluate case-specific fact patterns to determine whether an individual hazardous secondary material is reclaimed in a continuous industrial process, and therefore not a solid waste.[3] EPA continues to believe that this is best done through a case-by-case procedure and is, therefore, finalizing the non-waste determination process today.

In addition to ruling that hazardous secondary materials recycled within a continuous industrial process are not discarded and therefore not solid waste, the courts have also said that hazardous secondary materials destined for recycling in another industry are not automatically discarded. In the *Safe Food* decision, the Court stated, ''[n]obody questions that virgin * * * feedstocks are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat [recycled] materials that are indistinguishable in the relevant respects as products as well'' (350 F.3d at 1269). In *Safe Food,* the court accepted EPA's determination that the ''relevant respects'' were that ''market participants treat the * * * materials more like valuable products rather than like negatively-valued wastes managing them in ways inconsistent with discard, and that the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from virgin materials.'' *Id.* As a result, EPA recognized in the March 2007 supplemental proposal, and continues to believe today, that there may be some instances that would benefit from a non-waste determination (72 FR 14203). Thus, we are also finalizing the non-waste determination process for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate.

VI. When Will the Final Rules Become Effective?

This final rule is effective on December 29, 2008. Section 3010(b) of RCRA allows EPA to promulgate a rule with a period for the effective date shorter than six months where the Administrator finds that the regulated community does not need additional time to come into compliance with the rule. This rule does not impose any requirements on the regulated

[3] *See,* for example the ABR decision, where the Court acknowledged that the term ''discard'' could be ''ambiguous as applied to some situations, but not as applied to others,'' and particularly cited the difficulty in examining the details of the many processes in the mineral processing industry (208 F.3d at 1056). While the court overturned EPA's regulations for casting too wide a net over continuous industrial processes, it acknowledged that there are a large number of processes, some of which may be continuous and some of which may not. Determining what is a continuous process in the mineral processing industry, according to the Court, would require examination of the details of the processes and does not lend itself, well, to broad abstraction. Specifically, the Court stated, ''Some mineral processing secondary materials covered under the Phase IV Rule may not proceed directly to an ongoing recycling process and may be analogous to the sludge in AMC II. The parties have presented this aspect of the case in broad abstraction, providing little detail about the many processes throughout the industry that generate residual material of the sort EPA is attempting to regulate under RCRA, * * *'' 208 F.3d at 1056.

In the case of today's final rule, which applies across industries, there are far larger and more diverse processes. While EPA believes it is establishing a reasonable set of principles, they must still be applied to the details of the industrial processes in question.

community; rather, the rule provides flexibility in the regulations with which the regulatory community is required to comply. The Agency finds that the regulatory community does not need six months to come into compliance.

VII. Exclusion for Hazardous Secondary Materials That Are Legitimately Reclaimed Under the Control of the Generator

A. What Is the Purpose of This Exclusion?

Sections 261.2(a)(2)(ii) and 261.4(a)(23), being finalized today, excludes from the definition of solid waste those hazardous secondary materials which remain under the control of the generator when legitimately reclaimed. By maintaining control over, and potential liability for, the hazardous secondary materials and the reclamation process, the generator ensures that such materials have not been discarded. When reclaimed under the control of the generator, the hazardous secondary materials are being treated as a valuable commodity rather than a waste. However, if such hazardous secondary materials are released into the environment and are not recovered immediately, they have been discarded and the generator is subject to all applicable federal and state regulations, as well as applicable cleanup authorities.

B. Scope and Applicability

EPA is today excluding from the definition of solid waste those hazardous secondary materials that are legitimately reclaimed under the control of the generator, provided they are not speculatively accumulated and they are reclaimed within the United States or its territories. In addition, the generator must submit a notification of the exclusion to EPA or the authorized state and the hazardous secondary material must be contained in the units in which it is stored. The provision excluding hazardous secondary materials that are under the control of the generator and that are managed in land-based units is found at 40 CFR 261.4(a)(23), while the provision excluding such materials that are managed in non-land-based units is found at 40 CFR 261.2(a)(2)(ii). A land-based unit is defined in 40 CFR 260.10 as an area where hazardous secondary materials are placed in or on the land before recycling, but this definition does not include land-based production units. Examples of land-based units include surface impoundments and piles.

The definition of ''hazardous secondary material generated and reclaimed under the control of the generator'' is finalized in 40 CFR 260.10 and consists of three parts. The first part applies to hazardous secondary materials generated and legitimately reclaimed at the generating facility. For purposes of this exclusion, ''generating facility'' means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator, and ''hazardous secondary material generator'' means any person whose act or process produces hazardous secondary materials at the generating facility. A facility that collects hazardous secondary materials from other persons (for example, when mercury-containing equipment is collected through a special collection program) is not the hazardous secondary material generator of those materials.

Under this definition, if a generator contracts with a different company to reclaim hazardous secondary materials at the generator's facility, either temporarily or permanently, the materials would be considered under the control of the generator. However, generators sometimes contract with a second company to collect hazardous secondary materials at the generating facility and the materials are subsequently reclaimed at the facility of the second company. In that situation, the hazardous secondary materials would no longer be considered ''under the control of the generator'' and would instead be managed under the exclusion for materials transferred for reclamation.

The second part of the definition applies to hazardous secondary materials generated and legitimately reclaimed at different facilities if the reclaiming facility is controlled by the generator or if a person as defined in § 260.10 controls both the generator and the reclaimer. For purposes of this exclusion, ''control'' means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to ''control'' such facilities. Thus, when a contractor operates two facilities, each of which is owned by a different company, hazardous secondary materials generated at the first facility and reclaimed at the second facility are not considered ''under the control of the generator'' and must use the exclusion for such materials that are transferred for reclamation.

Under the definition promulgated in today's final rule, the generating facility must provide one of two certifications: (1) That the generating facility will send the indicated hazardous secondary materials to the reclaiming facility, which is controlled by the generating facility, and that either the generating facility or the reclaiming facility has acknowledged full responsibility for the safe management of such hazardous secondary materials; or (2) that the generating facility will send the hazardous secondary materials to the reclaiming facility, that both facilities are under common control, and that either the generating facility or the reclaiming facility has acknowledged full responsibility for the safe management of such hazardous secondary materials. This certification should be made by an official familiar with the corporate structure of both the generating and the reclaiming facilities. The certification should be retained at the site of the generating facility.

The third part of the definition applies to hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and a toll manufacturer and legitimately reclaimed by the tolling contractor. For purposes of this exclusion, a tolling contractor is a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. The toll manufacturer is the person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor. Under today's final rule, the tolling contractor must certify that it has a written contract with the toll manufacturer to manufacture a product or intermediate made from specified unused materials, and that the tolling contractor will reclaim the hazardous secondary materials generated during the manufacture of the product or intermediate. The tolling contractor must also certify that it retains ownership of, and liability for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process at the toll manufacturer's facility. This certification should be made by an official familiar with the terms of the written contract and should be retained at the site of the tolling contractor.

C. Restrictions and Requirements

Hazardous secondary materials must be contained. The regulations at 40 CFR 261.2(a)(2)(ii) and 40 CFR 261.4(a)(23) apply to hazardous secondary materials that are generated and legitimately reclaimed under the control of the generator in the United States or its

territories. Under these provisions, the hazardous secondary materials must be contained, whether they are stored in land-based units or non-land-based units. Generally, such material is ''contained'' if it is placed in a unit that controls the movement of the hazardous secondary material out of the unit and into the environment. These restrictions support EPA's determination that materials managed in this manner are not discarded.

In the event of a release from a unit to the environment, the hazardous secondary materials that remain in the unit may or may not meet the terms of the exclusion. They would be considered solid wastes if they are not managed as a valuable raw material, intermediate, or product, and as a result, a ''significant'' release of hazardous secondary materials from the unit to the environment were to take place and the materials were not immediately recovered. If such a significant release were to occur, the hazardous secondary materials remaining in the unit would be considered solid and hazardous wastes and the unit would be subject to the appropriate hazardous waste regulations. For example, an acidic hazardous secondary material undergoing reclamation could be stored in a tank that experienced a failure. A facility might fail to monitor the structural integrity of the tank, as most product tanks are monitored, or the tank might not be constructed to contain acidic hazardous secondary materials, causing a significant release of such materials into the environment that is not immediately recovered. The unit itself would consequently be considered a hazardous waste management unit because the hazardous secondary materials were not being managed as a valuable raw material, intermediate, or product, as evidenced by the failure to monitor it for structural integrity, resulting in the release. Thus, the unit and any remaining waste would be subject to Subtitle C controls because the hazardous secondary materials in the unit have been discarded. In addition, any of the released materials that were not immediately recovered would also be considered discarded and, if hazardous, subject to appropriate federal or state regulations and applicable authorities. Thus, to be excluded from the definition of solid waste, the facility has an obligation to manage the material as it would any raw material, intermediate or product because of its value. This includes, for example, operating and maintaining storage units in the same manner as product units. In the above example, whether by mismanagement of the hazardous secondary materials or by storing acidic materials in a tank not constructed to handle them or because of the failure to monitor the structural integrity of the unit, the result is that the unit would come under Subtitle C regulation.

Conversely, a tank or a surface impoundment in good condition may experience small releases resulting from normal operations of the facility. Sometimes a material may escape from primary containment and may be captured by secondary containment or some other mechanism that would prevent the material from being released to the environment or would allow immediate recovery of the material. In that case, the unit would retain its exclusion from RCRA hazardous waste regulation and the hazardous secondary materials in the unit would still be excluded from the definition of solid waste, even though any such materials that had been released would be considered discarded if not immediately recovered and would be subject to appropriate regulation. One specific example of ''contained'' hazardous secondary materials would be furnace bricks collected from production units and stored on the ground in walled bins before being used as feedstocks in the metals production process. If there were very small releases from the walled bins due to precipitation runoff, such releases would not cause the storage bins to be subject to Subtitle C controls.

It should be noted that a ''significant'' release is not necessarily large in volume. Such a release could include an unaddressed small release to the environment from a unit that, if allowed to continue over time, could cause significant damage. Any one release may not be significant in terms of volume. However, if the cause of such a release remains unaddressed over time and hazardous secondary materials are managed in such a way that the release is likely to continue, the materials in the unit would not be contained. For example, a rusting tank or containers that are deteriorating may have a slow leak that, if unaddressed, could, over time, cause a significant environmental impact. Similarly, a surface impoundment with a slow, unaddressed leak to groundwater could result, over time, in significant damage. Another example would be a large pile of lead-contaminated finely ground dust without any provisions to prevent wind dispersal of the dust. Such releases, if unaddressed over time and likely to continue, would mean that the hazardous secondary materials remaining in the unit were not being managed as a valuable raw material, intermediate, or product and that the materials had been discarded. As a result, the hazardous secondary materials in the unit would be hazardous wastes and these units would be subject to the RCRA hazardous waste regulations.

Speculative accumulation. In addition to the containment provision, hazardous secondary materials that are generated and legitimately reclaimed under the control of the generator are subject to the speculative accumulation provisions of 40 CFR 261.1(c)(8). If these materials are speculatively accumulated, they are considered discarded. EPA did not propose changes to the speculative accumulation provisions in its March 26, 2007 proposal.

Legitimate Recycling. Under this exclusion, hazardous secondary materials under the control of the generator must be legitimately reclaimed, as specified under 40 CFR 260.43. Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or product and the recycling process must produce a valuable product or intermediate. In addition, as part of a legitimacy determination, persons must consider whether the hazardous secondary material is managed as a valuable product and must consider the levels of toxics in the product of the recycling process as compared to analogous products made from virgin materials. The details of the legitimacy provision are discussed in section IX of this preamble.

Notification. Under today's rule, hazardous secondary material generators, tolling contractors, toll manufacturers, and reclaimers (where the generator and reclaimer are part of the same company, but located at different facilities) managing hazardous secondary materials reclaimed under the control of the generator are required to submit a notification prior to operating under this exclusion and by March 1 of each even numbered year thereafter to the EPA Regional Administrator using EPA Form 8700–12. In states authorized by EPA to administer the RCRA Subtitle C hazardous waste program, notifications may be sent to the state Director. The notice must include:

- The name, address and EPA ID number (if applicable) of the facility;
- The name and telephone number of a contact person;
- The NAICS code of the facility;
- The exclusion under which the hazardous secondary materials will be managed (e.g., 40 CFR 261.2(a)(2(ii)

and/or 40 CFR 261.4(a)(23) for hazardous secondary materials managed in a land-based unit);

- When the facility expects to begin managing the hazardous secondary materials in accordance with the exclusion;
- A list of hazardous secondary materials that will be managed according to the exclusion (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous waste);
- For each hazardous secondary material, whether the material, or any portion thereof, will be managed in a land-based unit;
- The quantity of each hazardous secondary material to be managed annually; and
- The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

Generators and reclaimers are required to notify on a per facility basis. In other words, facilities managing hazardous secondary materials will need to submit a notification form in accordance with the exclusion. One notification cannot cover two or more facilities. Furthermore, each facility need only use one notification form to list all of the hazardous secondary materials to be managed under the exclusion (i.e., facilities need not file separate notifications for each hazardous secondary material).

We are also requiring facilities that stop managing hazardous secondary materials in accordance with the exclusion to notify the Regional Administrator within 30 days using the same EPA Form 8700–12. Notification in this instance serves two objectives: (1) It allows states to follow up with the facility to verify that the hazardous secondary material has not been discarded; and (2) it maintains the usability of the database to enable states to monitor compliance and, for today's transfer-based exclusion, to assist generators with performing reasonable efforts on potential reclaimers. We consider a facility to have 'stopped' managing hazardous secondary materials when a facility no longer generates, manages and/or reclaims hazardous secondary materials under the exclusion and does not expect to manage any amount of hazardous secondary material under the exclusion for at least one year. This includes if the facility chooses to manage the hazardous secondary materials as hazardous waste or the facility chooses to temporarily suspend management of hazardous secondary materials and does not expect to manage any amount of hazardous secondary materials for at least one year. For example, a facility that has previously notified it is managing hazardous secondary materials under the exclusion, but then subsequently chooses to stop managing all hazardous secondary materials for a period of at least one year, must notify the Regional Administrator. However, if this same facility only stopped managing one type of hazardous secondary material (but continued to manage another type of hazardous secondary material under the exclusion) it would not need to notify, and could just update its list of hazardous secondary materials during the next periodic re-notification submitted every two years. Additionally, if a reclaimer or intermediate facility managing hazardous secondary materials under the transfer-based exclusion requests release of financial assurance under 40 CFR 261.143(h), it is clear the facility has 'stopped' managing hazardous secondary materials, and, therefore, must notify the Regional Administrator (for additional clarification, notification does not 'trigger' the process for releasing financial assurance; instead, a facility wishing to be released from financial assurance obligations must notify it has 'stopped' managing hazardous secondary materials). Of course, a facility could certainly choose to begin managing hazardous secondary materials again and would simply have to submit a notification in compliance with 40 CFR 260.42.

We note that the requirement to provide this notification is not a condition of the exclusion. Thus, failure to comply with the requirement constitutes a violation of RCRA, but does not affect the excluded status of the hazardous secondary materials.

We believe our authority to request such information is inherent in our authority to determine whether a material is discarded, and we consider this to be the minimum information needed to enable credible evaluation of the status of hazardous secondary materials under section 3007 of RCRA and to ensure that the terms of the exclusions are being met by generators and reclaimers. EPA further believes that RCRA section 3007 allows us to gather information about any material when we have reason to believe that it may be a solid waste and possibly a hazardous waste within the meaning of RCRA section 1004(5). Section 2002 also gives EPA authority to issue regulations necessary to carry out the purposes of RCRA.

We also note that after EPA promulgates regulations listing a material as a hazardous waste or identifying it by its characteristics, section 3010 of RCRA requires generators of such materials to submit a notification to EPA within 90 days. Since the changes finalized today could substantially affect the universe of facilities in the Subtitle C system, we believe the notifications are appropriate.

The intent of this notification requirement is to provide basic information to the regulatory agencies about who will be managing hazardous secondary materials under the exclusion. The specific information included in today's notification requirement will enable regulatory agencies to monitor compliance adequately and to ensure hazardous secondary materials are managed according to the exclusion and not discarded. For example, in the notification, EPA requires facilities to include the quantity of hazardous secondary materials that will be managed according to the exclusion and whether certain types of hazardous secondary materials will be managed in land-based units. This information can be used to assist RCRA inspectors in determining which facilities may warrant greater oversight and provides a basis for setting enforcement priorities. Furthermore, requiring facilities to notify when they have stopped managing hazardous secondary materials allows states to follow-up and ensure that hazardous secondary materials were not discarded. Notification information is collected in EPA's RCRAInfo database, which is the national repository of all RCRA Subtitle C site identification information, whether collected by a state authority or EPA. EPA provides public access to this information through EPA's public Web site at *http://www.epa.gov/enviro/html/rcris/* (or other successor Web site).

This notification requirement is the same as the notification requirement for today's transfer-based exclusion found in section VIII.C. of today's preamble.

Sending to an intermediate facility. We note that under this exclusion, hazardous secondary materials may not be sent to an intermediate facility as defined in 40 CFR 260.10 (i.e., a facility, other than a generator or reclaimer, that stores hazardous secondary materials for more than 10 days). If hazardous secondary materials are sent to intermediate facilities, they would not meet the definition of hazardous secondary materials reclaimed under the control of the generator, and they are subject to the conditions of the transfer-based exclusion, discussed below.

D. Terminating the Exclusion

Units managing excluded hazardous secondary materials are not subject to the closure regulations in 40 CFR parts 264 and 265 subpart G. However, when the use of these units is ultimately discontinued, all owners and operators must manage any remaining hazardous secondary materials that are not reclaimed and remove or decontaminate all hazardous residues and contaminated containment system components, equipment structures, and soils. These hazardous secondary materials and residues, if no longer intended for reclamation, would also no longer be eligible for the exclusion (which only applies to materials that will be reclaimed). Failure to remove these materials within a reasonable time frame after operations cease could cause the facility to become subject to the full Subtitle C requirements if the Agency determines that recycling is no longer feasible. While this final rule does not set a specific time frame for these activities, the Agency believes that they typically should be completed within the time frames established for analogous activities. For example, the requirements for product tanks under 40 CFR 261.4(c) allow 90 days for removal of hazardous material after the unit ceases to be operated for manufacturing. This time frame should serve as a guideline for regulators in determining on a case-by-case basis whether owners and operators have completed these activities within a reasonable time frame. In any event, these hazardous secondary materials remain subject to the speculative accumulation restrictions in 40 CFR 261.1(a)(8), which includes both a time limitation and a requirement that the facility be able to show there is a feasible means of recycling the hazardous secondary material.

E. Enforcement

Under today's rule, hazardous secondary materials generated and legitimately reclaimed within the United States under the control of the generator are excluded from RCRA Subtitle C regulation, but are subject to certain restrictions, principally speculative accumulation, legitimate recycling, and containment. Persons that handle these hazardous secondary materials are responsible for maintaining the exclusion by ensuring that these restrictions are met. If the hazardous secondary materials are not managed pursuant to these restrictions, they are not excluded. They would then be considered solid and hazardous wastes if they were listed or they exhibited a hazardous waste characteristic for Subtitle C purposes from their point of generation. Persons operating under the exclusion are also required to notify EPA or the authorized state.

Persons taking advantage of today's exclusion that fail to meet the requirements may be subject to an enforcement action. EPA could choose to bring an enforcement action under RCRA section 3008(a) for violations of the hazardous waste requirements occurring from the time the hazardous secondary materials are generated through the time they are ultimately disposed of or reclaimed. The Agency affirms in this preamble that § 261.2(f) applies to claims that hazardous secondary materials are not solid waste because they are being legitimately recycled. Respondents in enforcement cases should be prepared to demonstrate that they meet the terms of the exclusion or exemption, which includes demonstrating that the recycling is legitimate. Appropriate documentation must be provided to the enforcing agency to demonstrate that the material is not a solid waste or is exempt from regulation. In addition, the recycler of the hazardous secondary materials should be prepared to show they have the necessary equipment to perform the recycling operation. Furthermore, any release of the hazardous secondary materials to the environment that is not immediately cleaned up would be considered discarded and, thus, the hazardous secondary materials that were released would be a solid waste and potentially subject to the RCRA hazardous waste regulations.

The Agency believes that this approach provides hazardous secondary material generators with an incentive to handle or (in the case of tolling) to ensure that their contractors handle the hazardous secondary materials pursuant to the requirements. It also encourages each hazardous secondary material generator to take appropriate steps to ensure that such materials are properly handled and legitimately reclaimed by others in the management chain. If there is a release of the hazardous secondary materials into the environment, they are considered discarded and subject to all applicable hazardous waste regulations and cleanup authorities.

VIII. Exclusion for Hazardous Secondary Materials That Are Transferred for the Purpose of Legitimate Reclamation

Today, EPA is also finalizing an exclusion from the definition of solid waste for hazardous secondary materials that are generated and subsequently transferred to another company or person for the purpose of reclamation (i.e., ''transfer-based exclusion''), provided that certain conditions are met. Reclamation that conforms to these conditions would not involve discard, and therefore the hazardous secondary materials would not be regulated as solid waste. As with all recycling-related exclusions and exemptions, such excluded hazardous secondary materials would also need to be recycled legitimately. For further discussion on how the transfer-based exclusion relates to the concept of discard, see section V.B. of this preamble.

The conditions that must be met for this exclusion are based on our analysis of how successful third-party recycling currently operates (and, conversely, how unsuccessful third-party recycling practices can result in recyclable hazardous secondary materials being discarded), and are supported by the information contained in the rulemaking record, including the recycling studies found in the public docket for today's rulemaking and discussed previously in section III.D. of today's preamble and in the preamble to the March 2007 supplemental proposal at 72 FR 14178–14183. For example, the successful recycling study indicates that many responsible generators examine the recycler's technical capabilities, business viability, environmental track record, and other relevant questions before sending hazardous secondary materials for recycling. Currently, these recycler audits, which can be thought of as a form of environmental ''due diligence,'' are in essence a precaution to minimize the prospect of incurring CERCLA liability in the event that the recycling, or lack thereof, results in the release of material to the environment. The fact that these companies are willing to incur the expense of auditing recyclers as a business practice is of itself a marketplace affirmation that sending hazardous secondary materials to other companies for recycling involves some degree of risk. Although these risks may be small when the recycler is a well-established, successful enterprise with a good record of environmental stewardship, it also is apparent that not all recyclers fit this profile, as evidenced in the study of environmental problems associated with hazardous secondary materials recycling. Thus, we believe that there is sufficient basis for the Agency to place certain conditions on this exclusion for the generator to determine that the hazardous secondary material is not discarded, particularly since we expect that this rulemaking could encourage

some companies that are currently not involved with hazardous secondary materials recycling to enter the business.

A. What Is the Purpose of This Exclusion?

In finalizing this conditional exclusion, EPA's objectives are to encourage the reclamation of hazardous secondary materials and reduce unnecessary regulatory compliance costs to industry, while still maintaining protection of human health and the environment. After considering the entire rulemaking record, including comments submitted by the public, we continue to believe that this exclusion is a workable, common-sense approach to meeting these objectives; is well supported by the record for this rulemaking, including the recycling studies that EPA has conducted; and, in important ways, reflects current good industry practices that are used by responsible generators for recycling hazardous secondary materials.

B. Scope and Applicability

The conditional exclusion for the transfer-based approach applies to hazardous secondary materials that are currently regulated as hazardous wastes because their recycling involves reclamation—specifically, spent materials, listed sludges, and listed by-products. It would not be available for hazardous secondary materials that are regulated as hazardous wastes for other reasons, such as ''inherently waste-like materials,'' materials that are ''used in a manner constituting disposal,'' or ''materials burned for energy recovery.'' The conditional exclusion also does not apply to materials that are currently excluded from the definition of solid waste according to other, existing provisions of 40 CFR part 261. For example, the exclusion for broken cathode ray tubes requires them to be transported in closed containers per 40 CFR 261.4(a)(22). Today's exclusion does not supersede or otherwise affect these other exclusions, and such hazardous secondary materials will need to be managed in accordance with those existing exclusions. For a discussion of how this exclusion relates to particular existing exclusions and additional details involving these exclusions, see section XI of today's preamble.

This exclusion is available to hazardous secondary material generators, transporters, intermediate facilities, or reclaimers. In the March 2007 supplemental proposal, EPA proposed that the hazardous secondary material must be transferred directly from the generator to the reclaimer and not be handled by anyone else other than a transporter. Thus, as proposed, a generator that wished to maintain the excluded status of its hazardous secondary materials would not be able to ship those materials to a middleman, such as a broker. We said that we believed that a generator who ships materials to a middleman, such as a broker typically does not know who will ultimately manage and reclaim them, or how they will be reclaimed (72 FR 14189). However, we requested comment on allowing middlemen to participate in the exclusion.

Comments on the proposal disputed the assumption that the generator does not know the final destination when shipping to an intermediate facility, saying, that in certain cases, the generator works with an intermediate facility to choose the reclamation facility and the final destination is arranged by contract before the hazardous secondary materials are shipped. Commenters also asserted that such arrangements allow for consolidation of shipments, making recycling economical for small businesses who generate hazardous secondary materials.

EPA agrees with the comments that some types of intermediate facilities could participate in the exclusion, while still allowing the hazardous secondary material generator to perform reasonable efforts to ensure that the hazardous secondary material is properly and legitimately recycled. Thus, in the final rule, EPA has determined that intermediate facilities will be allowed under the transfer-based exclusion. However, to limit the exclusion to those intermediate facilities where discard will not occur, if the hazardous secondary material will be passing through an intermediate facility, the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent on to the reclamation facility or facilities identified by the generator and must perform reasonable efforts on the intermediate facility, as well as on the reclamation facility. Also, the intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the generator.

In addition, the intermediate facility must meet the same conditions as the reclamation facility for the same reasons the reclamation facility must meet them. Section VIII.C.4. below discusses additional details as to why these conditions need to apply to the reclamation facilities and this reasoning applies equally to intermediate facilities involved in the process. Of the 208 damage cases in the environmental problems study, 45 (22%) cases were from intermediate facilities. Therefore, EPA believes the record for requiring the conditions for the reclamation facility also supports promulgation of the same conditions for intermediate facilities.

In addition, in the March 2007 supplemental proposal, the Agency recognized that, in some cases, recycling of an excluded hazardous secondary material may involve more than one reclamation step. For example, a recyclable hazardous secondary material, such as an electroplating secondary material, might have a relatively high moisture content and a somewhat variable chemical composition. Such materials might need to be dried and blended to a suitable, consistent specification before they are amenable to a ''final'' reclamation process (e.g., metals smelting). In this example, the two different reclamation processes might be conducted by different companies and/or at different facilities. The Agency continues to see no reason to discourage this kind of recycling. The transfer-based exclusion finalized today is available for hazardous secondary materials that are recycled by means of one or more reclamation processes, including when they occur at more than one reclamation facility.

The conditions for generators and reclaimers under the terms of this exclusion would apply in the same way, regardless of how many reclamation steps were involved with recycling of an excluded material. For example, if the excluded hazardous secondary material was reclaimed by more than one facility or company, the generator of such material would need to make reasonable efforts to examine each facility or company involved in the reclamation process to ensure that the hazardous secondary materials would be properly and legitimately recycled. We believe that this is a consistent application of the idea of requiring ''reasonable efforts'' as a condition of this exclusion. Where recycling of a hazardous secondary material involves more than one reclamation step at more than one facility, generators should be well informed as to how the materials will be reclaimed, and by whom, throughout the recycling process. Additionally, each reclaimer (including 'partial reclaimers') managing hazardous secondary materials must meet all the reclaimer conditions listed under 40 CFR 261.4(a)(24), as well as the recordkeeping requirements.

C. Conditions and Requirements

1. Provisions Applicable to the Hazardous Secondary Materials Generator, the Reclamation Facility, and Any Intermediate Facility

Prohibition on speculative accumulation. As a condition of the transfer-based exclusion, hazardous secondary materials cannot be speculatively accumulated (40 CFR 261.1(c)(8)) at the hazardous secondary material generator, reclamation facility, or intermediate facility. Restrictions on speculative accumulation have been an important element of the RCRA hazardous waste recycling regulations since they were promulgated on January 4, 1985. According to this regulatory provision, hazardous secondary materials are accumulated speculatively if the person accumulating them cannot show that the material is potentially recyclable; further, the person accumulating the hazardous secondary material must show that during a calendar year (beginning January 1) the amount of such material that is recycled or transferred to a different site for recycling is at least 75% by weight or volume of the amount of the hazardous secondary material present at the beginning of the period. It is also the same prohibition that is being promulgated today for the generator-controlled exclusions.

Legitimate recycling. Under the transfer-based exclusion, hazardous secondary materials must be legitimately reclaimed, as specified under 40 CFR 260.43. Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or product and the recycling process must produce a valuable product or intermediate. In addition, as part of a legitimacy determination, persons must consider whether the hazardous secondary material is managed as a valuable product and must consider the levels of toxics in the product of the recycling process as compared to analogous products made from virgin materials. The details of the legitimacy provision are discussed in section IX of this preamble.

Notification. Under today's transfer-based exclusion, hazardous secondary material generators, reclaimers, and intermediate facilities are required to send a notification prior to operating under this exclusion and by March 1 of each even numbered year thereafter to the EPA Regional Administrator using EPA Form 8700–12. In states authorized by EPA to administer the RCRA Subtitle C hazardous waste program, notifications may be sent to the state Director. The notice must include:

- The name, address, and EPA ID number (if applicable) of the facility;
- The name and telephone number of a contact person;
- The NAICS code of the facility;
- The exclusion under which the hazardous secondary materials will be managed (e.g., whether the hazardous secondary materials are managed under the transfer-based exclusion in 40 CFR 261.4(a)(24) and/or under the exclusion for hazardous secondary materials exported for reclamation in 40 CFR 261.4(a)(25));
- For reclaimers and intermediate facilities managing hazardous secondary materials, whether the reclaimer or intermediate facility has financial assurance for the management of such hazardous secondary materials (not applicable for hazardous secondary material generators);
- When the facility expects to begin managing the hazardous secondary materials in accordance with the exclusion;
- A list of hazardous secondary materials that will be managed according to the exclusion (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous waste);
- For each hazardous secondary material, whether the material, or any portion thereof, will be managed in a land-based unit;
- The quantity of each hazardous secondary material to be managed annually; and
- The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

If a facility has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the exclusion, the facility must re-notify the Regional Administrator within 30 days using the same EPA Form 8700–12. We consider a facility to have 'stopped' managing hazardous secondary materials when a facility no longer generates, manages and/or reclaims hazardous secondary materials under the exclusion and does not expect to manage any amount of hazardous secondary material under the exclusion for at least one year. Of course, a facility could certainly choose to begin managing hazardous secondary materials again and would simply have to submit a notification in compliance with 40 CFR 260.42.

The requirement to provide this notification is not a condition of the exclusion. Thus, failure to comply with the requirement constitutes a violation of RCRA, but does not affect the excluded status of the hazardous secondary materials.

This notification requirement is the same as the notification requirement for the generator-controlled exclusion. For further discussion on the notification, including examples of when a facility must re-notify that it has stopped managing hazardous secondary materials, see section VII.C. of today's preamble.

Hazardous secondary materials must be contained. Another condition of the transfer-based exclusion applicable to hazardous secondary material generators, reclamation facilities, and intermediate facilities is that the hazardous secondary materials must be contained in their management units. Hazardous secondary materials released to the environment from any unit are discarded and would be subject to the hazardous waste regulations, unless they are immediately cleaned up. Hazardous secondary materials remaining in a unit that experiences a release may also be considered discarded in certain cases. This is the same as the restriction that is being promulgated for the generator-controlled exclusions. For further discussion on the containment provisions, including examples of how they might be applied in case-specific situations, see section VII.C. of today's preamble.

2. Provisions Applicable to the Hazardous Secondary Material Generator

Reasonable efforts. Today's final rule requires generators to make reasonable efforts to ensure that their hazardous secondary materials are properly and legitimately recycled before shipping or otherwise transferring them to a reclamation facility or any intermediate facility. As discussed previously, this condition effectively requires that generators perform a type of environmental ''due diligence'' on a reclaimer or any intermediate facility to ensure that those facilities intend to properly manage the hazardous secondary materials as commodities and legitimately recycle rather than discard them. We believe that this condition reflects the existing best practices of many responsible generators who audit and assess recyclers to maintain their commitment to sound environmental stewardship, minimize their potential regulatory and liability exposures, and make decisions about with whom they should do business.

Our successful recycling study quotes one large recycling and disposal vendor

as stating that with respect to its new customers, 60% of its large customers and 30%–50% of its smaller customers now perform audits on them. Under current practices, such audits can involve a site visit to the recycling facility and an examination of the company's finances, technical capability, environmental compliance record, and housekeeping practices. (**Note:** Audits that are currently conducted may or may not cover all of these areas.) Through the codification of this condition, we want to reinforce this best practice among all generators who use the transfer-based exclusion to send hazardous secondary materials to reclamation and intermediate facilities. We believe that this condition is critical for generators who currently may not evaluate reclaimers and intermediate facilities because this condition provides these generators with a framework for making reasonable efforts to ensure their hazardous secondary materials are properly managed and reclaimed, and not discarded.

Currently, under 40 CFR part 262, a generator must make a hazardous waste determination and, thus, already has an obligation to determine whether the waste is subject to regulation as a hazardous waste. EPA believes that to make a parallel determination under 40 CFR 261.4(a)(24) that hazardous secondary materials are not solid wastes because they are destined for reclamation and are not discarded, the generator must meet the reasonable efforts condition. A reasonable efforts inquiry by the hazardous secondary material generator ensures that the reclaimer intends to recycle the hazardous secondary material legitimately pursuant to 40 CFR 260.43 and not discard it, and that the reclaimer or any intermediate facility will manage the hazardous secondary materials in compliance with 40 CFR 261.4(a)(24)(vi).

The reasonable efforts condition for generators applies when hazardous secondary materials are transferred to intermediate facilities (as defined in 40 CFR 260.10) and reclamation facilities operating without a RCRA Part B permit or under the interim status standards that extend to management of the hazardous secondary materials in question. If the permit or interim status standards address the units being used to manage the hazardous secondary materials, we do not require generators to conduct reasonable efforts because we believe that a Part B permit or the interim status standards provide some assurance to generators that the facility has a measure of financial stability and that the hazardous secondary materials will be well managed. RCRA permitted or interim status facilities where the permit or interim status standards extend to the management of the hazardous secondary materials being reclaimed are already subject to stringent design and operating standards, must demonstrate financial assurance, and are subject to the corrective action requirements in the event of environmental problems. Not requiring reasonable efforts for generators that transfer hazardous secondary materials to these RCRA permitted or interim status recycling or intermediate facilities would likely be of particular benefit to relatively smaller volume generators who may not have the resources required to satisfy this condition.

Of course, if a permitted facility later modifies its permit terms in a way that the permit no longer extends to the management of the hazardous secondary materials, the generator would need to perform reasonable efforts in accordance with this exclusion. EPA recommends that any hazardous secondary material generator transferring hazardous secondary materials to a permitted facility request that it get placed on the facility mailing list, so they can then receive notice of changes to the permit status of the reclaimer or intermediate facility (*see* 40 CFR 270.42 and 40 CFR 124.10).

In contrast, if the permit or interim status standards do not extend to the hazardous secondary materials being reclaimed, the same level of assurance is not guaranteed. Therefore, if a reclamation or intermediate facility only has a RCRA permit or complies with the interim status standards for another on-site operation unrelated to the hazardous secondary materials of interest to the generator, then the hazardous secondary material generator is required to make a reasonable efforts inquiry of the facility as if it were a non-permitted facility.

EPA believes that a generator should be allowed to use any credible evidence available in making reasonable efforts, including information gathered by the generator, provided by the reclaimer or intermediate facility, and/or provided by a third party, in lieu of personally performing an assessment. For example, the hazardous secondary material generator might hire an independent auditor to review the operations, produce audit reports as a consortium of generators, or rely on an assessment of a recycler or intermediate facility by a parent corporation or trade association that is used by several generating facilities. In fact, EPA believes that many reputable third-party auditors, parent companies, and trade associations already assemble the types of information based on credible evidence that would be needed for a generator to satisfy the reasonable efforts condition. EPA would encourage this type of pooling of information to reduce the burden on generators and to take advantage of specialized technical expertise.

EPA is also finalizing in the regulatory text a series of questions, which together represent a minimum standard for reasonable efforts, to provide generators and overseeing agencies with regulatory certainty regarding fulfillment of the condition. We believe that these questions are objective and must be answered affirmatively. Hazardous secondary material generators wishing to take advantage of the exclusion must be able to answer all questions affirmatively to determine that their hazardous secondary materials are or will be properly and legitimately recycled and will not be discarded. The reasonable efforts questions are straight-forward by design and will allow generators to use a common sense approach in answering the questions and satisfy the condition. These questions can be found at 40 CFR 261.4(a)(24)(v)(B) and are discussed below.

Of course, a generator could choose to seek additional information or ask additional questions to determine that its hazardous secondary materials will not be discarded due to concerns about CERCLA liability. One example of additional information that many responsible generators currently seek from recyclers, but that EPA is not including in today's final rule, is information about a reclamation facility's financial health. Based on EPA's successful recycling study and comments on the proposed rule, we know that responsible generators often inquire about a reclamation facility's financial health. These inquiries can include reviews of liability insurance coverage, company annual reports, bankruptcy filings, investments in capital improvements, markets for recycled products, and business reports, such as Dun & Bradstreet reports. EPA believes that evaluating the financial health of a company can benefit a generator's reasonable efforts inquiry of a reclamation or intermediate facility and encourages generators to do so, although we acknowledge that it is not an activity that lends itself to an objective standard that would be appropriate for regulation. Instead, EPA is requiring that, under the transfer-based exclusion and reasonable efforts condition, reclamation and intermediate

facilities have financial assurance and generators affirm that facilities have notified the appropriate authorities that the financial assurance condition is satisfied.

EPA intends that if a hazardous secondary material generator has met the reasonable efforts condition prior to transferring hazardous secondary materials to the reclamation or intermediate facility, then the reclaimer or intermediate facility, not the generator, would be liable under RCRA if the materials were discarded (i.e., not properly and legitimately recycled). However, if the generator does not meet the reasonable efforts condition, then the generator is ineligible for the transfer-based exclusion and would be potentially liable in the event its hazardous secondary materials were discarded by a reclamation or intermediate facility. (*See* section VIII.E. for more information.) EPA acknowledges that meeting this condition will not affect CERCLA liability. (*See* section XIII for more information on CERCLA liability.)

The following five questions represent a minimum standard for satisfying the reasonable efforts condition:

(1) Does the available information indicate that the reclamation process is legitimate pursuant to § 260.43? In answering this question, the hazardous secondary material generator can rely on its existing knowledge of the physical and chemical properties of the hazardous secondary material, as well as information from other sources (e.g., the reclamation facility, audit reports, etc.) about the reclamation process. (By responding to this question, the hazardous secondary material generator has also satisfied its requirement in § 260.43(a) to be able to demonstrate that the recycling is legitimate.)

(2) Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to 40 CFR 260.42 and have they notified the appropriate authorities that the financial assurance condition is satisfied per 40 CFR 261.4(a)(24)(vi)(F)? In answering these questions, the hazardous secondary material generator can rely on the available information documenting the reclamation facility's and any intermediate facility's compliance with the notification requirements per § 260.42, including the requirement in § 260.42(a)(5) to notify EPA whether the reclaimer or intermediate facility has financial assurance.

(3) Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified a significant noncomplier with RCRA Subtitle C? In answering this question, the hazardous secondary material generator can rely on the publicly available information from EPA or the state. If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly? In answering this question, the hazardous secondary material generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials.

(4) Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material? In answering this question, the generator may rely on a description by the reclamation facility or by an independent third party of the equipment and trained personnel to be used to recycle the generator's hazardous secondary material.

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment? In answering these questions, the hazardous secondary material generator can rely on publicly available information from EPA or the state, or information provided by the facility itself.

Question (1) focuses on whether the reclamation facility receiving hazardous secondary materials from a generator legitimately recycles such materials. EPA believes that any generator ''regulated under § 260.34 or claiming to be excluded from the hazardous waste regulations under § 261.2(a)(2)(ii), § 261.4(a)(23), (24), or (25) because they are engaged in recycling, must be able to demonstrate that the recycling is legitimate'' (40 CFR 260.43). Determining whether a recycling operation is legitimate is a fundamental basis for establishing that a generator's hazardous secondary materials will not be discarded after being transferred to a reclamation facility.

Since reclaimers must also be able to demonstrate that the recycling is legitimate under 40 CFR 260.43, EPA believes that generators can work with the owner or operator of the reclamation facility to verify that they have made a determination that the recycling is legitimate, which would answer question (1) for the purposes of satisfying the condition. We would expect that a reclaimer would be willing and able to adequately explain to the hazardous secondary material generator how the recycling activity satisfies the legitimacy requirements pursuant to 40 CFR 260.43, such that we would not expect that a generator would have to examine in detail the legitimacy factors. Of course, in order to answer question (1), a generator may also rely on its existing knowledge of the physical and chemical properties of the hazardous secondary material. Based on our discussions with the generating industry, we would expect that a hazardous secondary material generator that produces and manages a material that is more like an ingredient (i.e., a hazardous secondary material to be recycled) than a waste to be discarded would have a good understanding of the material's valuable components and useful contribution to a process. Since the generator manages the process that generates the hazardous secondary material, it would be knowledgeable about the makeup of the material and the value and usefulness of its components.

However, if questions or concerns remain regarding the legitimacy of the recycling activity, a generator could request additional information on how the definition of legitimacy is met. (*See* section IX of this rulemaking preamble for a discussion of determining legitimacy.)

Question (2) concentrates on whether the recycler or intermediate facility (to

the extent that the hazardous secondary material generator uses an intermediate facility) has met the following obligations under the exclusion before accepting hazardous secondary materials: Notification of the appropriate regulatory authorities that it plans to reclaim (or, in the case of the intermediate facility, properly store the hazardous secondary material) excluded hazardous secondary materials, and notification of the appropriate regulatory authorities that the facility has the necessary financial assurance to cover the costs of managing any hazardous secondary materials that remain if the facility closes. If a facility was found to have failed to meet the notification requirement and condition to have financial assurance, then it also would have failed to show a good faith effort towards demonstrating that it intends to recycle the hazardous secondary materials (or, in the case of the intermediate facility, properly store the hazardous secondary material) and not discard them.

For the purposes of reasonable efforts, generators will be able to determine that a facility has satisfied both the notification requirement and financial assurance condition if the reclamation or intermediate facility has submitted a notification. The notification form will include a section indicating the facility has satisfied the financial assurance condition. Generators may access the notification information, including the facility's notification that it has financial assurance, through EPA's public Web site at *http://www.epa.gov/enviro/html/rcris/* or other successor Web sites.

Question (3) focuses on the compliance history of the recycler or the intermediate facility (to the extent that the hazardous secondary material generator uses an intermediate facility). Although consideration of compliance data is an imperfect tool for determining whether a recycler would properly manage the hazardous secondary materials, we believe that publicly available compliance data are a reasonable starting point for evaluating a facility's environmental performance. Facility-specific enforcement data on compliance status, ongoing enforcement actions by both EPA and states, and specific case information for formal enforcement actions are readily available on EPA's public Web site at *http://www.epa.gov/echo.* ''Formal enforcement'' is a written document that mandates compliance and/or initiates a civil or administrative process, with or without appeal rights before a trier of fact that results in an enforceable agreement or order and an appropriate sanction. For EPA, formal enforcement action is a referral to the U.S. Department of Justice for the commencement of a civil action in the appropriate U.S. District Court, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. For states, formal enforcement action is a referral to the state's Attorney General for the commencement of a civil or administrative action in the appropriate forum, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. ''Significant non-complier'' is a defined term in EPA's *Hazardous Waste Civil Enforcement Response Policy* and means the violators have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement, or from the RCRA statutory or regulatory requirements. In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, EPA and the states consider both the environmental and human health concerns, including the potential exposure of workers to hazardous waste or hazardous waste constituents. For both terms, see EPA's *Hazardous Waste Civil Enforcement Response Policy (Dec. 2003)* at *http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf.*

We do not believe that evaluating this publicly available information, which a generator would likely already be familiar with based on its own regulated activities, is difficult for a generator, nor is interpreting the data and deriving conclusions about facilities, since the database specifically notes whether a facility is alleged to be a ''significant non-complier'' (i.e., identified as a ''SNC'' or in ''significant non-compliance''). We also note that since many states already provide compliance information to EPA and the public through the EPA Web site, we do not believe that requiring hazardous secondary material generators to review such information would pose a significant new burden for state agencies.

While a facility designated as a significant non-complier and the subject of a formal enforcement action does not mean that the facility would not reclaim the hazardous secondary materials properly, it does raise questions that we believe the hazardous secondary material generator should investigate. That is, if any formal enforcement actions were taken against the facility in the previous three years for such non-compliance and the facility was alleged to be a significant non-complier, we would expect that the reclaimer would adequately explain to the hazardous secondary material generator how it has resolved any issues or how the reclamation facility will properly manage the hazardous secondary materials to avoid future violations and/or enforcement actions. Additionally, if the generator obtains reasonable information that the enforcement matters are unrelated to the facility's commitment to manage the hazardous secondary materials properly or that the violation has been corrected and the facility is back in compliance, then that would satisfy this aspect of the reasonable efforts determination. The generator also may wish to make a similar investigation of facilities designated as significant non-compliers by EPA or a state even if no formal enforcement action has been taken.

Question (4) concentrates on the technical capability of the recycler or intermediate facility, the most basic requirement for ensuring proper and legitimate recycling of hazardous secondary materials. If a reclamation or intermediate facility was found to have no equipment or inadequate equipment for storing the hazardous secondary material or was found to have personnel who have not been trained for reclaiming the hazardous secondary materials, it raises serious questions as to whether the facility would properly manage such materials and avoid discarding them to the environment.

In public comments on this question, which was included in the preamble to the proposed rule, commenters pointed out that a determination of what specific equipment and training would be appropriate to safely recycle hazardous secondary materials may be beyond the expertise of some generators. EPA agrees that, as drafted in the proposed rule, answering this question may require specialized knowledge and expertise. Accordingly, EPA is changing this question to allow the generator to rely on the reclamation facility to explain why its equipment and personnel are appropriate. Of course, the generator must have an objectively reasonable belief based on this information that the reclamation facility's equipment and trained personnel are adequate for safe recycling. Accordingly, if the equipment and personnel described by the reclamation facility would be, to an objective and reasonable person, clearly inadequate for safe recycling of the generator's hazardous secondary material, then the generator would not have met this condition. However, EPA

does not require or expect the generator to have specialized knowledge or expertise of the recycling process.

Of course, generators of hazardous secondary materials also are already familiar with equipment and personnel needed to manage their hazardous secondary materials properly at their own site. Therefore, a generator may also choose to answer question (4) using its existing knowledge of the physical and chemical properties of the hazardous secondary materials, technologies involved with managing and recycling such materials, and applicable regulations or industry standards based on the generator's experience producing and managing such materials.

Generators may also at their discretion use relevant third-party information sources to answer questions about a facility's equipment and personnel, including audit reports; information provided by industry or waste management associations related to the reclamation or intermediate facility; documents provided by the reclaimer or intermediate facility; and as noted in the successful recycling study, an evaluation by a qualified engineer.

Question (5) focuses on another major cause of environmental problems from recycling hazardous secondary materials: The management of residuals. This question relates to discard through the concept that a generator or reclaimer may actually be discarding hazardous secondary materials through the release of residuals from the recycling process. While the product made from recycling may be a legitimate product, the whole recycling process could be considered a discard activity if hazardous constituents from the recycled hazardous secondary materials are released to the environment. Roughly one-third of the damage cases documented in EPA's environmental problems study were caused by mismanagement of the residuals from recycling. Because the residuals from recycling can contain the hazardous constituents that originated with the hazardous secondary materials, it is important that the hazardous secondary material generator understands how a reclamation facility will manage any residuals generated.

Many generators of hazardous waste already understand and comply with the requirements for residuals management. Therefore, they may rely on their existing knowledge to answer question (5) and we do not anticipate that answering it will pose a significant challenge to them. We also anticipate that new generators will use the same resources that are publicly available to current hazardous secondary material generators for determining applicable regulatory requirements. In addition, a reclamation facility would likely assist the generator in understanding any requirements applicable to residuals management. For example, the reclamation facility could identify the types of residuals generated by the recycling process and explain to the generator how they are managed, whether any requirements apply, and how the requirements are met.

To answer question (5), a generator should determine that the reclamation facility has practices in place to ensure that residuals are managed in a manner that is protective of human health and the environment and according to applicable federal or state standards. For example, residuals may or may not be regulated hazardous wastes. If a residual is a hazardous waste, generators could access information about a facility's permit for managing the material on EPA's public Web site at *http://www.epa.gov/enviro/html/rcris* (or successor Web sites) or through a state Web site if such information is made publicly available. If a residual is a non-hazardous waste, a generator could access permit information from state agencies or a state Web site if available. A reclamation facility may also send its residuals to a waste management facility, in which case, a generator could ask about contracts with appropriately permitted disposal facilities. If a reclamation facility does not have permits for managing residuals or disposal contracts with permitted facilities, then the generator should determine that a reclamation facility has a system in place for managing residuals in a manner that is protective of human health and the environment.

Any inquiry into a reclamation facility's system for analyzing options for residuals management should acknowledge that various options do exist and that price fluctuations may be a determining factor for selecting an option.

In today's final rule, EPA is requiring that hazardous secondary material generators make reasonable efforts every three years, at a minimum, in order to ensure that the generators adequately manage their risk and are attune to changes at reclamation and intermediate facilities with which they are partners. We believe that this schedule reflects an average time frame for re-evaluating facilities, based on public comments, although we acknowledge that shorter time frames could be appropriate for certain industries, as suggested by some commenters. By specifying periodic updates for reasonable efforts every three years at a minimum, EPA in no way intends to limit a generator to conducting evaluations only every three years. In fact, EPA expects that any generator who has concerns about a reclamation or intermediate facility, or who gains new knowledge of significant changes or extraordinary situations at such facilities, would conduct reasonable efforts regardless of the required schedule. For example, if a hazardous secondary material generator conducted reasonable efforts in the first year it took advantage of the exclusion, prior to transferring materials to an intermediate facility, and then again conducted reasonable efforts in the second year upon learning about a significant change at the intermediate facility (such as bankruptcy), the hazardous secondary material generator would be required to update reasonable efforts three years later during the generator's fifth year of taking advantage of the exclusion.

EPA is requiring that generators maintain documentation showing that they satisfied the reasonable efforts condition under 40 CFR 261.4(a)(24)(v)(B) prior to transferring the hazardous secondary materials to the intermediate facility or the reclamation facility. Such records could include copies of audit reports and/or other relevant information that was used as the basis for affirmatively responding to inquiries about a reclamation or intermediate facility. Specifying that hazardous secondary material generators document these questions helps EPA and authorized states determine whether the generator made reasonable efforts to ensure that the hazardous secondary materials were not discarded. Documenting reasonable efforts is also beneficial for generators because EPA intends that if a generator has met the reasonable efforts condition prior to transferring the hazardous secondary materials to the reclamation or intermediate facility, then the reclaimer or intermediate facility, not the generator, would be liable under RCRA if the materials were discarded (*see* section VIII.E. for more information).

Generators are also required to certify for each reclamation and intermediate facility that reasonable efforts were made to ensure that hazardous secondary materials will be properly and legitimately recycled, and not discarded. This certification should be signed and dated by an authorized representative of the generating company prior to transferring the excluded hazardous secondary materials to a reclamation or intermediate facility under 40 CFR 261.4(a)(24). The

certification should also incorporate the certification language in 40 CFR 261.4(a)(24)(v)(C)(*2*). EPA believes that requiring a certification creates a necessary level of oversight from an authorized representative, who can be any appointed company representative, and who must affirm that the condition is met and that hazardous secondary materials will not be discarded.

Documentation and certification are both necessary requirements of the reasonable efforts condition. Documentation of questions (1)–(5) will support a hazardous secondary material generator's assertion that it affirmatively answered the questions and is in compliance with the regulations. It will also facilitate any review by regulatory authorities investigating whether the conditions of the transfer-based exclusion are satisfied and help delineate liability under RCRA if the materials were discarded. Having an authorized representative certify reasonable efforts is critical for guaranteeing accountability at the generator facility for meeting the condition and for ensuring that the act of making reasonable efforts is in fact genuine. The certification is also necessary in order to allow for the ''flexible'' documentation requirement that does not specify a particular format. Since individual generators may use any form of documentation, we believe it is critical for all generators to uniformly certify that the condition is satisfied. Furthermore, we find both reasonable efforts requirements (documentation and certification) to be appropriate based on our understanding that third-party auditors do not generally draw any conclusions based on their audits, but simply report the results to generators. While a generator may use any information for making reasonable efforts, the certification statement would affirm that a generator used information that is gathered and documented during the reasonable efforts inquiry, similar to how generators currently draw conclusions based on third-party audit documents.

The requirement for documentation and certification of reasonable efforts is not unlike existing forms of RCRA documentation that incorporate certifications, such as the RCRA Site ID Form, RCRA financial assurance requirements, and the Uniform Hazardous Waste Manifest.

Documentation of reasonable efforts and the certification statement must be maintained by the generator for a minimum of three years and it must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. Requiring documentation will help EPA and authorized states to determine that hazardous secondary material generators have made reasonable efforts to ensure that hazardous secondary materials were reclaimed and not discarded. We understand that many generators may maintain this kind of documentation and certification at their company headquarters or at another off-site facility; therefore, we are not requiring that they be maintained on-site. However, we do believe that generators, having satisfied the reasonable efforts condition and certified reasonable efforts prior to transferring the hazardous secondary materials, should be able to produce the documentation and certification readily. Moreover, we understand that since generators today conduct business in an age of near-instantaneous communication, retrieving documentation from company headquarters or another off-site facility should be relatively easy. EPA also notes that time frames for producing documentation are generally determined by regulatory authorities on a case-by-case basis and time frames are clearly outlined by authorities within RCRA section 3007 information request letters.

Recordkeeping. In addition to documentation and certification of reasonable efforts (discussed above in section VIII.C.2.), EPA is requiring hazardous secondary material generators to maintain at the generating facility certain records that document off-site shipments (i.e., transfers) of hazardous secondary materials for a period of three years. Specifically, for each shipment of hazardous secondary material, the generator must maintain documentation of when the shipment occurred, who the transporter was, the name and address of the reclaimer(s) and, if applicable, each intermediate facility, and the type and quantity of the hazardous secondary materials in the shipment. This recordkeeping requirement may be fulfilled by ordinary business records, such as bills of lading.

In addition, hazardous secondary material generators are required to maintain confirmations of receipt from each reclaimer and intermediate facility for all off-site shipments of hazardous secondary materials in order to verify that the hazardous secondary materials reached their intended destination and were not discarded. These receipts must be maintained at the generating facility for a period of three years. Specifically, the hazardous secondary material generator must maintain documentation of receipt that includes the name and address of the reclaimer or intermediate facility, the type and quantity of hazardous secondary materials received, and the date which the hazardous secondary materials were received. The Agency is not requiring a specific template or format for confirmations of receipt and anticipates that routine business records (e.g., financial records, bills of lading, copies of Department of Transportation (DOT) shipping papers, electronic confirmations of receipt) would contain the appropriate information sufficient for meeting this requirement.

We recognize that, in some cases, reclamation of a hazardous secondary material may involve more than one reclamation step. In these cases, the recordkeeping conditions for generators and reclaimers under the terms of the exclusion applies for each reclaimer and intermediate facility, regardless of how many reclamation steps were involved. For example, if a hazardous secondary material generator transferred hazardous secondary materials to one reclaimer for partial reclamation and then arranged for the partially-reclaimed material to be subsequently transferred to another reclaimer for 'final' reclamation, the generator must maintain confirmations of receipt from each reclaimer involved in the reclamation process.

The Agency believes that the recordkeeping requirements in today's rule comprise the minimum information needed to enable effective oversight to ensure the hazardous secondary materials were transferred for reclamation and were not discarded.

3. Provisions Applicable to the Transportation of Hazardous Secondary Materials

Hazardous secondary materials may be stored for up to 10 days at a transfer facility and still be considered in transit. The 10-day storage standard for defining transfer facilities is the same as that used for hazardous waste transportation, and EPA has revised the definition of ''transfer facility'' at 40 CFR 260.10 to clarify that such facilities may store hazardous secondary materials, as well as hazardous waste. However, if the facility stores the hazardous secondary materials for more than 10 days, then it would be considered an intermediate facility and subject to the conditions in 40 CFR 261.4(a)(24)(vi). While at the transfer facility, the hazardous secondary materials must continue to meet all applicable DOT standards. Hazardous secondary materials may be consolidated for shipping, but cannot be intermingled in a way that would constitute waste management.

4. Provisions Applicable to the Reclamation Facility and Any Intermediate Facilities

Recordkeeping. Reclaimers and intermediate facilities who operate under the transfer-based exclusion must maintain certain records, similar to the records we are requiring for hazardous secondary material generators. Specifically, reclaimers and intermediate facilities must maintain at their facilities for a period of three years records of all shipments of hazardous secondary materials that were received at the facility and, if applicable, of all shipments of hazardous secondary materials sent off-site from the facility. For hazardous secondary materials received at the reclamation and intermediate facility, such records must document the name and address of the hazardous secondary material generator, the type and quantity of hazardous secondary materials received at the facility, any intermediate facilities that managed the hazardous secondary materials, the name of the transporter that brought the hazardous secondary materials to the facility, and the date such materials were received at the facility.

For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, are subsequently transferred off-site for further reclamation, reclaimers and intermediate facilities must document the name and address of the hazardous secondary material generator, when the shipment occurred, who the transporter was, the name and address of the (subsequent) reclaimer and, if applicable, each (subsequent) intermediate facility, and the type and quantity of hazardous secondary materials in the shipment. This recordkeeping requirement may be fulfilled by ordinary business records, such as bills of lading.

Reclaimers and intermediate facilities must also send confirmations of receipt to the hazardous secondary material generator for all off-site shipments of hazardous secondary materials received at the facility in order to verify for the hazardous secondary material generator that their materials reached the intended destination and were not discarded. Specifically, the reclaimer (or each reclaimer, when more than one reclamation step is required) and, if applicable, each intermediate facility, must send documentation of receipt to the hazardous secondary material generator that includes the name and address of the reclaimer or intermediate facility, the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. The Agency is not requiring a specific template or format for confirmations of receipt and anticipates that routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, electronic confirmations of receipt) would contain the appropriate information sufficient for meeting this requirement.

In addition, reclaimers and intermediate facilities must also meet the recordkeeping requirements under financial assurance discussed below in this section.

Storage of Recyclable Hazardous Secondary Materials. In addition to the condition that the hazardous secondary materials must be contained (40 CFR 261.4(a)(24)(v)(A)), reclamation facilities and intermediate facilities must also manage the hazardous secondary materials in a manner that is at least as protective as that employed for the analogous raw material, where there is an analogous raw material. An ''analogous raw material'' is a material for which a hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the hazardous secondary material. A raw material that has significantly different physical or chemical properties would not be considered analogous even if it serves the same function. For example, a metal-bearing ore might serve the same function as a metal-bearing air pollution control dust, but because the physical properties of the dust would make it more susceptible to wind dispersal, the two would not be considered analogous. Similarly, hazardous secondary materials with high levels of toxic volatile chemicals would not be considered analogous to a raw material that does not have these volatile chemicals or that has only minimal levels of volatile chemicals.

Storage conditions for reclamation facilities and intermediate facilities that operate under today's exclusion will show that the materials are not discarded, but instead are treated as commodities which the handler considers valuable and would be used and not be lost to the environment. The great majority of damage cases documented in the environmental problems study occurred at commercial reclamation and intermediate storage facilities, and mismanagement of hazardous secondary materials was found to be a cause of environmental problems in 40% of the incidents. Accordingly, EPA believes that this condition for storage is necessary and appropriate for reclamation facilities and intermediate facilities that take advantage of this exclusion to show that storage of these materials is not just another way of disposing of them. In addition, it will establish an expectation for the owner/operators of such facilities that they must manage hazardous secondary materials in at least as protective a manner as they would an analogous raw material, and in such a way that materials would not be released into the environment.

Management of recycling residuals. Another condition of the transfer-based exclusion is that any residuals that are generated from the reclamation processes must be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or themselves are listed hazardous wastes, they are hazardous wastes (if discarded) and must be managed according to the applicable requirements of 40 CFR parts 260 through 273.

The purpose of this condition is to clarify the regulatory status of these waste materials and to emphasize in explicit terms that residuals that are generated from the reclamation of hazardous secondary materials must be managed properly so that the reclamation operation does not become another way of avoiding waste management and simply becomes another way of discarding unwanted material. The study of recent (i.e., post-CERCLA and post-RCRA) recycling-related environmental problems revealed that mismanagement of residuals was the cause of such problems in one-third of the incidents that were documented. Some common examples of these mismanaged residuals were acids and casings from the processing of lead-acid batteries, solvents and other liquids generated from cleaning drums at drum reconditioning facilities, and PCBs and other oils generated from disassembled transformers. In many of these damage incidents, the residuals were simply disposed of on-site with little regard for the environmental consequences of such mismanagement or possible CERCLA liabilities associated with cleanup of these releases. By making proper management of the recycling residuals a condition of the exclusion, EPA ensures that the reclamation operation is not just another way of discarding hazardous constituents. This has the added benefit of ensuring that the reclamation operation does not pose a significant risk to human health and the environment.

EPA notes that the ''derived from'' rule articulated in 40 CFR 261.3(c)(2) does not apply to residuals from the reclamation of hazardous secondary materials excluded under today's rule. These residuals are a new point of generation for the purposes of applying the hazardous waste determination requirements of 40 CFR 262.11. If the residuals exhibit a hazardous characteristic, or they themselves are a listed hazardous waste, they would be considered hazardous wastes (unless otherwise exempted) and would have to be managed accordingly. If they did not exhibit a hazardous characteristic, or were not themselves a listed hazardous waste, they would need to be managed in accordance with applicable state or federal requirements for non-hazardous wastes.

Financial Assurance

For the transfer-based exclusion, EPA proposed in its March 2007 supplemental proposal that reclamation facilities comply with the 40 CFR part 265 subpart H financial assurance requirements as a condition of the exclusion. As discussed in section V.B of this preamble, by obtaining financial assurance, the reclamation or intermediate facility is making a direct demonstration that it will not abandon the hazardous secondary materials, it will properly decontaminate equipment, and it will clean up any unacceptable releases, even if events beyond its control make its operations uneconomical. Moreover, financial assurance also addresses the issue of the correlation of the financial health of a reclamation or intermediate facility with the absence of discard. In essence, financial assurance will help demonstrate that the reclamation or intermediate facility owner/operators who would operate under the terms of this exclusion are financially sound and will not discard the hazardous secondary materials.

An implementation issue for the financial assurance condition stems from the fact that the 40 CFR part 265 subpart H financial assurance requirements directly reference and rely on the provisions of the 40 CFR part 265 subpart G closure requirements. For example, in 40 CFR part 265 subpart H, a facility owner uses the ''closure plan'' in 40 CFR part 265 subpart G to calculate closure cost estimates, which then set the amount of financial assurance required under subpart H. Similarly, the financial assurance requirements remain in place until EPA has reviewed the closure plan, and the facility has closed according to the plan. At that point, EPA releases the financial assurance instruments. Commenters expressed some confusion on this issue and requested that EPA clarify that the provisions of subpart G which are required to implement financial assurance be made explicit.

Thus, in today's final rule, for the convenience of the regulated community, EPA has detailed the applicable requirements in a separate regulation, subpart H of 40 CFR part 261, using terminology appropriate for excluded facilities, that specifically identifies the processes by which a facility determines the amount of financial assurance required and by which it secures release of financial assurance when it no longer wishes to operate under the transfer-based exclusion. The financial assurance requirements detailed in 40 CFR part 261 subpart H incorporate those aspects of the hazardous waste closure and financial assurance regulations as they apply to the financial assurance condition for excluded hazardous secondary material reclamation and intermediate facilities. However, since these facilities are not regulated hazardous waste facilities, new subpart H does not include a stand-alone closure requirement, although some aspects of the closure process (described below) are included as being necessary for the implementation of the financial assurance condition.

Substantively, these requirements generally mirror the interim status standards in 40 CFR part 265 for hazardous waste treatment, storage and disposal facilities (TSDFs), but have been tailored for hazardous secondary material reclamation and intermediate facilities. The provision in the new subpart H in 40 CFR part 261 are linked to equivalent provisions under 40 CFR part 265, which, as we noted in the March 2007 supplemental proposal, ''outline how owners and operators should determine cost estimates, explain the acceptable mechanisms for providing financial assurance, and set the minimum amounts of liability coverage required'' (*see* 72 FR 14196).

In addition to the closure requirements, 40 CFR part 265 subpart H includes requirements for post-closure care. Post-closure care (e.g., groundwater monitoring, maintenance of waste containment systems) only applies to land disposal units, where hazardous waste remains in the unit or other contamination is present after Subtitle C closure. However, the conditional exclusion being promulgated today only applies to hazardous secondary materials intended for reclamation. In no cases should the storage of these materials be designed or managed with the intent of leaving these hazardous secondary materials in place. Unlike the need for closure, which could occur at a reclamation or intermediate facility which meets all the conditions of the exclusion, but then becomes subject to forces beyond its control (such as a sudden downturn in the market for its recycled product), the need for post-closure care would only apply to a facility that does not meet the condition that the hazardous secondary materials are contained in the unit. Thus, the Agency has determined that the issue of post-closure care is most appropriately dealt with by enforcement of the condition that the hazardous secondary materials must be contained. If, during the life of the unit, there is a significant release that indicates that the hazardous secondary materials are discarded, and thus are wastes, then such waste is subject to the RCRA Subtitle C requirements, including the post-closure care requirements. See discussion of the condition that the hazardous secondary materials must be ''contained'' found in section VII.C.

Cost Estimate

Under subpart H of 40 CFR part 261, as it is under subpart H of 40 CFR part 265 for hazardous waste treatment storage and disposal facilities, the first step in obtaining financial assurance is to develop a detailed written estimate on the amount of financial assurance required. The cost estimate determines the amount of financial assurance that will be available to the state or EPA for a third party to close a facility if the owner or operator fails to do so. The requirements for a cost estimate in 40 CFR 261.142 generally tracks the procedures in 265.142 with changes to accommodate the absence of a closure plan. Because hazardous secondary materials that lose the exclusion may have to be disposed of as a hazardous waste and the facility may have to be closed as a hazardous waste facility in accordance with the requirements of 40 CFR part 265, the owner or operator must have a detailed written estimate in current dollars of performing this work. The detailed cost estimate should include all necessary information which will allow the state or EPA to assess whether the assumptions underlying the estimate are consistent with what could be required to close the facility. For example, do the estimates for disposal, including transportation charges, reflect the distance to available disposal facilities? What level of personal protective equipment is needed to protect workers? Is there sufficient sampling of equipment to determine that it has been decontaminated? Where

there is uncertainty about the scope of the work, is there a reasonable contingency factor included? While not required by this rule for developing a cost estimate, some owners or operators may find that developing a plan similar to the requirements in 40 CFR 265.112 would be beneficial for assessing the potential costs of closing the facility. (Note, however, that the cost estimate must reflect the costs of closure under the Subtitle C hazardous waste requirements, and any remaining hazardous secondary material must be managed as a hazardous waste, and therefore the procedures used as the basis of the cost estimate may differ from the actual procedures a compliant facility will carry out when it completes operations and exits from the exclusion.) The owner or operator can be required to provide the documentation of the cost estimate upon request.

The cost estimating requirements in 40 CFR 265.142 and 40 CFR 261.142 are designed so that if a state or EPA must close a facility because of an owner or operator's failure, there will be adequate funds to do so. The requirements for the cost estimate are therefore based upon the point when the extent and manner of the facility's operation would make these activities the most expensive.

The cost estimate must, at minimum, be based on the costs of hiring a third party or parties to conduct these activities. The cost estimate may not include any salvage value for the hazardous secondary materials as hazardous waste or non-hazardous waste and the owner or operator may not incorporate a zero cost for such materials that might have economic value.

The financial assurance provisions are intended, in part, to demonstrate that the owner and operator is not discarding the hazardous secondary materials. As noted earlier, 69 of the 208 incidents of environmental damage identified in EPA's environmental problems study involve abandonment of the hazardous secondary materials as the primary cause of damage. These cost estimate provisions, found in 40 CFR 261.142(a) are equivalent to those required to estimate financial assurance under 40 CFR 265.142(a).

In addition, the financial assurance cost estimate must be revised and additional financial assurance must be obtained to adjust annually for inflation or in the event that changes in the reclaimer's or intermediate facility's operations or unexpected events result in an increase in the cost of managing any hazardous secondary materials that are not reclaimed and the cost of removing or decontaminating all hazardous residues. These cost estimate provisions, found in 40 CFR 261.142(b) and 40 CFR 261.142(c) are equivalent to those required under 40 CFR 265.142(b) and 40 CFR 265.142(c), and incorporates language from 40 CFR 265.112(c)(2) requiring the owner or operator to amend the estimates at least 60 days prior to a planned change in facility design or operation or no later than 60 days after an unexpected event has occurred that affects cost estimates. The financial assurance cost estimate must be documented and this documentation maintained at the facility. This information must be furnished upon request, and made available at all reasonable times for inspection. The requirement in 40 CFR 261.142(d) to maintain documentation at the facility is from the requirement in 40 CFR 265.142(d) and 40 CFR 265.73(b)(7), and the responsibility to make it available upon request, which will allow Agency representatives to review the cost estimate, is from 40 CFR 265.74(a) which covers information required in 40 CFR 265.73.

Interaction of the Cost Estimate and the Financial Assurance Instruments

As with the interim status regulations in 40 CFR part 265 subpart H, the interaction of the cost estimating requirements in 40 CFR 261.142 and the instrument requirements in 40 CFR 261.143 result in adjustments in the amount of financial assurance as facility operations change. If changes in the reclaimer's or intermediate facility's operations result in a reduction in the cost estimate, the owner or operator may submit a new cost estimate. If the new cost estimate is less than the amount of financial assurance provided, the amount of the financial assurance instrument may be reduced to the amount of the new cost estimate following written approval by the Regional Administrator (*see*, for example, 40 CFR 261.143(b)(7)). For example, a facility with three units managing hazardous secondary materials that use a single surety bond could close one unit according to the plan in 40 CFR 261.143(h). With a new cost estimate submitted by the facility that reflects the lower costs for the two remaining units, the Regional Administrator can approve a reduction in the value of the surety bond. On the other hand, a change in the facility's operating plan or design that increases the cost of closing necessitates a new cost estimate (40 CFR 261.142(c)) and an increase in the amount of financial assurance (*see*, for example, 40 CFR 261.143(b)(7)).

Establishment of the Instrument, Plan for Removal of All Hazardous Secondary Material Residues, and Release From Financial Assurance

Under 40 CFR 261.4(a)(24)(vi)(F), an owner or operator of a reclamation or intermediate facility must establish financial assurance as a condition of the exclusions under 40 CFR 261.4(a)(24) and 261.4(a)(25). The same general types of instruments that are available for interim status facilities under 40 CFR part 265 subpart H are also available to owners or operators of reclamation or intermediate facilities. Owners or operators may use trust funds, payment surety bonds, letters of credit, insurance, or a financial test and corporate guarantee to demonstrate financial assurance.

The regulations governing the financial assurance instruments that an owner or operator must provide to qualify for the exclusions have been modified to reflect that they apply to hazardous secondary materials and not hazardous wastes. The financial assurance instruments for the trust fund, surety bond, letter of credit, and corporate guarantee have been revised so that EPA can direct the financial assurance funds at the point the hazardous secondary material reclamation or intermediate facility no longer meets the exclusion and, therefore, is managing a hazardous waste. As long as a facility is operating under the transfer-based exclusion so that the hazardous secondary material is not being discarded, there would be no need to invoke the financial assurance instruments.

The regulations allow the same flexibility as in 40 CFR part 265 subpart H for using a combination of trust funds, surety bonds, letters of credit and insurance at a single facility (*see* 40 CFR 261.143(f)), and allow the use of a single mechanism for multiple facilities (*see* 40 CFR 261.143(g)).

The provisions for releasing the reclamation or intermediate facility from the financial assurance requirements, found in 40 CFR 261.143(h), are functionally equivalent to those under 40 CFR 265.143(h). ''Within 60 days after receiving certifications from the owner or operator and a qualified Professional Engineer that all hazardous secondary materials have been removed from the unit and the unit has been decontaminated in accordance with the approved plan per paragraph (i), the Regional Administrator will notify the owner or operator in writing that he is no longer required under § 261.4(a)(24)(vi)(F) to maintain financial assurance for that

unit, unless the Regional Administrator has reason to believe that that all hazardous secondary materials have not been removed from the unit or that the unit has not been decontaminated in accordance with the approved plan.''

Under 40 CFR part 265 subpart H, the provisions for releasing financial assurance rely on receiving a certification that the unit was closed per the approved closure plan in 40 CFR 265.112. However, as noted earlier, under today's exclusion, units managing hazardous secondary materials are not subject to closure. Thus, the provision for releasing financial assurance for these units adapts language from the closure plan requirement found in 40 CFR 265.112 and from the certification requirement found in 40 CFR 265.115. Instead of a hazardous waste ''closure plan,'' the 40 CFR 261.143(i) provisions for releasing financial assurance require submission of a plan for removing hazardous secondary materials and decontaminating the unit at least 180 days prior to the date that owner or operator expects to cease operating under the exclusion. The contents of the plan are detailed in 40 CFR 261.153(i)(2) and have been tailored to reflect the fact that, although the hazardous secondary material management units are not subject to closure, when reclamation operations or storage operations (in the case of an intermediate facility) ceases, the hazardous secondary materials must be removed or the unit would become subject to the Subtitle C hazardous waste requirements (see section VIII.D). Briefly, the plan must include, at least, (a) a description of how all excluded hazardous secondary materials will be reclaimed or sent for reclamation and how all residues, contaminated containment systems (liners, etc), contaminated soils, subsoils, structures, and equipment will be removed or decontaminated as necessary to protect human health and the environment (for guidance, see the March 16, 1998, memorandum entitled ''Risk-Based Clean Closure,'' from Elizabeth Cotsworth, Acting Director, Office of Solid Waste, to RCRA Senior Policy Advisors. Available at *http://www.epa.gov/correctiveaction/resource/guidance/risk/cclosfnl.pdf*; (b) a description of the steps necessary to remove or decontaminate all hazardous secondary material residues and contaminated containment system components, equipment, structures, and soils including, but not limited to, procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination necessary to protect human health and the environment; (c) a description of any other activities necessary to protect human health and the environment during this time frame, including, but not limited to, leachate collection, run-on and run-off control, etc.; and (d) a schedule for conducting the activities.

This plan, which is essentially the subset of information required in a 40 CFR part 265 closure plan that would apply to excluded hazardous secondary material units, would still need to be reviewed by the Regional Administrator (or State Director, in authorized states) because that would ensure that EPA would agree that the hazardous secondary materials, or equipment contaminated with hazardous secondary materials, will not remain unregulated at the facility after it is no longer operating under an exclusion and no longer maintains financial assurance. As with the financial assurance release provision of 40 CFR part 264, the Regional Administrator will provide notice to the owner or operator and the public and an opportunity to submit written comments on the plan and request modifications to the plan. The Regional Administrator will approve, modify, or disapprove the plan within 90 days of its receipt.

Once residuals (and any hazardous secondary materials) have been removed and the unit has been decontaminated according to the plan, the facility would send a certification to that effect from the owner or operator and a qualified Professional Engineer to the regulatory agency, and that agency would then authorize the release of the financial assurance for those specific units, unless there is reason to believe that the hazardous secondary materials and residues were not removed (in which case the regulatory authority would send a written explanation of this fact). Again, this process is similar to that required under 40 CFR 265.115, as referenced in 40 CFR part 265 subpart H.

Operation of the Instruments if the Exclusion Is No Longer Applicable

As noted above, as long as a facility is operating under the transfer-based exclusion and the hazardous secondary material is not being discarded, there would be no need to invoke the financial assurance instruments. However, if the exclusion is no longer applicable, then the hazardous secondary material is a hazardous waste subject to the Subtitle C requirements and the Regional Administrator can invoke the instruments consistent with RCRA 3004(t) and related laws. Similarly, as in 40 CFR part 265, if an owner or operator fails to obtain an approved replacement instrument within 90 days after a notice of cancellation from a surety, issuer of a letter of credit, insurer, or guarantor, the Regional Administrator can invoke the instrument. The following descriptions of the instruments contain additional information on how the instruments operate under this rule.

Trust Funds

If facilities choose to use a trust fund, they must fully fund the trust before they can rely on it for financial assurance. This is consistent with the proposal, which was based on the pay-in provisions under 40 CFR part 265. In part 265, the pay-in period for trust funds is limited to the remaining operating life of a facility or 20 years from the effective date of the 40 CFR part 265 regulations, which became effective in 1982. Thus, under the exclusion, the pay-in period, which would allow a trust to build over time, is not available. This means that facilities that are not financially strong enough to qualify for the financial test and that cannot obtain a guarantee, such as a surety bond or a letter of credit from a third party (potentially because the surety or bank is not confident that it will be repaid if the instrument is called upon) will need to fully fund the trust before qualifying for the exclusion.

While the hazardous secondary materials retain the exclusion, EPA has no access to these funds. The trustee must meet the qualifications in 40 CFR 261.143(a)(1) and the wording of the trust agreement must be identical to the wording specified in § 261.151(a)(1). The trust agreement must include a Schedule A that lists each facility, including the units with hazardous secondary materials, and the amounts of the current cost estimates, or portions thereof, for which financial assurance is demonstrated by the trust. Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current cost estimate covered by the agreement.

Whenever the current cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new cost estimate, the owner or operator, within 60 days after the change in the cost estimate, must either (1) deposit an amount into the trust fund so that its value after this deposit at least equals the amount of the current cost estimate, or (2) obtain other financial assurance,

such as a letter of credit, to cover the difference.

There are also circumstances when the owner or operator may request a release of funds from the trust fund. If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate. This could occur as a result of the closing of a unit at the facility and the submission of a revised cost estimate. Alternatively, the earning of the trust fund could exceed the increase in the cost estimate due to inflation. Further, if an owner or operator substitutes other financial assurance as specified in the regulations for all or part of the trust fund, he may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate covered by the trust fund.

Within 60 days after receiving a request from the owner or operator for release of funds, the Regional Administrator will instruct the trustee to release to the owner or operator such funds that exceed the amount of the current cost estimate, as the Regional Administrator deems appropriate and specifies in writing. Alternatively, in the event that the owner or operator begins final closure of the unit under subpart G of 40 CFR part 264 or 265, an owner or operator may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Regional Administrator.

The Regional Administrator will agree to termination of the trust fund when the owner or operator substitutes alternate financial assurance, such as receiving approval for an insurance policy to replace the trust, or if the owner or operator demonstrates that he meets the requirements of the financial test. It should be noted that both surety bonds and letters of credit require a standby trust, as discussed below. The Regional Administrator will also agree to the termination of the trust fund when he releases the owner or operator from the requirements of this section in accordance with 40 CFR 261.143(i).

The preceding discussion explained the operation of the regulations during the exclusion. The regulations also address the situation where the hazardous secondary materials lose their exclusion. The requirements in 40 CFR 261.151(a) for the trust fund provide that if the hazardous secondary materials lose their exclusion, EPA becomes the beneficiary of the trust, consistent with RCRA section 3004(t) and federal law. The trust fund also receives the proceeds of a payment surety bond or letter of credit if the hazardous secondary materials lose the exclusion. The trustee shall make payments from the Fund as the EPA shall order or direct, in writing, to provide for the payment of the costs of the performance of closure activities required under subpart G of 40 CFR parts 264 or 265 for the facilities covered by the trust agreement. This provision allows funds from the trust to be used to close facilities as hazardous waste facilities.

An owner or operator whose hazardous secondary materials have lost their exclusion, but subsequently meets the requirements for the exclusion, including establishing financial assurance in accordance with the provisions of 40 CFR 261.143, may request a reduction in the amount of the trust fund and the Regional Administrator may instruct the trustee to return funds to the owner or operator under Section 4 of the trust agreement in 40 CFR 261.151(a). For example, hazardous secondary materials could lose their exclusion and the Regional Administrator could draw upon a letter of credit being used to establish financial assurance and have it deposited into the trust fund. If the hazardous secondary materials regained their exclusion and the owner or operator substituted a new approved letter of credit, the Regional Administrator may direct the trustee to refund funds to the owner or operator.

Surety Bonds

The surety bond operates similarly to the payment surety bond in 40 CFR part 265, with some modifications to reflect the differences between a conditionally exempt hazardous secondary material and a hazardous waste. The surety bond must conform to the requirements of 40 CFR 261.143(b) and the owner or operator must submit the bond to the Regional Administrator. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the U.S. Department of the Treasury. The wording of the surety bond must be identical to the wording specified in 40 CFR 261.151(b).

The owner or operator who uses a surety bond must also establish a standby trust fund and submit an originally signed duplicate of the trust agreement with the surety bond. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements specified in § 261.143(a), except that until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 261.143(a);

(B) Updating of Schedule A of the trust agreement (see § 261.151(a)) to show current cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in 40 CFR 261.143(f). The regulations at 40 CFR 261.143(f) allow the use of certain combinations of instruments so long as their sum is at least equal to the total cost estimates.

Whenever the current cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current cost estimate and submit evidence of such increase to the Regional Administrator or obtain other financial assurance as specified in the regulations in 40 CFR 261.143 to cover the increase. Whenever the current cost estimate decreases, the penal sum may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator. So long as the owner or operator meets the exclusion, the Regional Administrator will not access the bond.

The Regional Administrator will agree to termination of the surety bond when the owner or operator substitutes alternate financial assurance, such as an approved insurance policy to replace the surety bond, or if the owner or operator demonstrates that he meets the requirements of the financial test. The Regional Administrator will also agree to the termination of the surety bond when he releases the owner or operator from the requirements of this section in accordance with 40 CFR 261.143(i). Under 40 CFR 261.151(b), the Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

Under 40 CFR part 261, the surety becomes liable for funding the trust if the owner or operator has failed to fund the trust before the loss of the exclusion. The cancellation provisions for the

surety bond in 40 CFR part 261 operate similarly to the provisions in 40 CFR part 265. If the surety has issued a notice of cancellation, and the owner or operator has not funded the trust or obtained approval by the Regional Administrator of a replacement instrument within 90 days, the surety becomes liable for payment into the trust fund. Under the hazardous waste rules, if the surety issues a notice of cancellation and the owner or operator does not fund the trust or obtain approved alternative financial assurance within 90 days, the Regional Administrator may access the funds.

Reclamation and intermediate facilities, as under 40 CFR part 265, may not use a performance surety bond because there is no closure plan that has undergone review under the permitting process. The performance surety bond, which is allowed under the permitting standards in 40 CFR part 264 subpart H, requires the surety, in the event of a failure by the owner or operator to comply with the requirements of the closure requirements of 40 CFR part 264, to perform closure in accordance with the closure plan and permitting requirements or to deposit the penal sum of the bond into the standby trust. Closure plans for permitted facilities undergo detailed review as part of the permitting process, so it is appropriate to allow a surety to perform closure in this circumstance. However, like interim status facilities, reclamation and intermediate facilities do not have closure plans that undergo this type of review. ''During interim status, the closure and post-closure plans for a facility are generally not reviewed by the Regional Administrator until shortly before the time of closure. Upon such review, the Regional Administrator may find that major changes are needed in the plans. The Agency believes a performance bond is not appropriate when the actual required performance for the particular facility may not be specified in any detail during most of the term of the bond'' (47 FR 15040).

Letters of Credit

The letter of credit requirements generally operate similarly to the requirements in 40 CFR part 265, except that they reflect the status of conditionally exempt hazardous secondary materials. An owner or operator may satisfy the requirements of 40 CFR 261.143 by obtaining an irrevocable standby letter of credit which conforms to the requirements of 40 CFR 261.143(c) and submitting the letter to the Regional Administrator. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency.

The wording of the letter of credit must be identical to the wording specified in § 261.151(c). As with the surety bond, an owner or operator who uses a letter of credit must also establish a standby trust fund and submit to the Regional Administrator an originally signed duplicate of the trust agreement with the letter of credit. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Regional Administrator will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements specified in § 261.143(a), except that until the standby trust fund is funded pursuant to the requirements of this section, the requirements, as noted above, that are not necessary for a surety bond are also not required for a letter of credit.

The letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in 40 CFR 261.143(f). The regulations in 40 CFR 261.143(f) allow the use of certain combinations of instruments so long as their sum is at least equal to the total cost estimates.

Whenever the current cost estimate increases to an amount greater than the amount of the letter of credit, the owner or operator, within 60 days after the increase, must either cause the amount of the letter of credit to be increased so that it at least equals the current cost estimate and submit evidence of such increase to the Regional Administrator or obtain other financial assurance as specified in the regulations in 40 CFR 261.143 to cover the increase. Whenever the current cost estimate decreases, the amount of the letter of credit may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

The Regional Administrator will return the letter of credit to the issuing institution for termination when an owner or operator substitutes alternate financial assurance as specified in 40 CFR 261.143, or when the Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 261.143(i).

So long as the owner or operator meets the exclusion and maintains financial assurance, the Regional Administrator will not access the letter of credit. Access to the letter of credit only occurs upon the loss of the exclusion. For the letter of credit, in the event that the hazardous secondary materials at the covered reclamation or intermediate facilities no longer meet the conditions of the exclusion, EPA may draw upon the letter of credit. If the owner or operator does not establish alternate financial assurance and obtain written approval of such alternate assurance from the Regional Administrator within 90 days after a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Regional Administrator will draw on the letter of credit. When the Regional Administrator draws on the letter of credit, the proceeds are deposited into the standby trust fund, and the funds in the trust become available for the payment of the costs of closure in compliance with subpart G of 40 CFR parts 264 or 265.

Insurance

Insurance operates similarly to the insurance instrument in 40 CFR part 265, with some modifications to reflect differences between conditionally exempt hazardous secondary materials and hazardous wastes. An owner or operator may satisfy the requirements of 40 CFR 261.143 by obtaining insurance that conforms to the requirements of 40 CFR 261.143(d) and submitting a certificate of such insurance to the Regional Administrator At a minimum, the insurer must be licensed to transact the business of insurance or be eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

The wording of the certificate of insurance must be identical to the wording specified in § 261.151(d). As part of the certificate, the insurer warrants that the policy conforms in all respects with the requirements of 40 CFR 261.143(d), as applicable, and agrees that any provision of the policy inconsistent with 40 CFR 261.143(d) is hereby amended to eliminate such inconsistency. The insurer also agrees to furnish to the EPA Regional Administrator(s) a duplicate original of the policy listed above, including all its endorsements, whenever requested by the Regional Administrator.

The insurance policy must be issued for a face amount at least equal to the current cost estimate, except as provided in § 261.143(f), which allows the use of certain combinations of instruments so long as their sum is at least equal to the total cost estimates.

Whenever the current cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current cost estimate

and submit evidence of such increase to the Regional Administrator or obtain other financial assurance as specified in 40 CFR 261.143 to cover the increase. Whenever the current cost estimate decreases, the face amount may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

In 40 CFR 261.143(d)(4), the insurance policy must guarantee that funds will be available to pay the cost of removal of all hazardous secondary materials from the unit, to pay the cost of decontamination of the unit, and to pay the costs of the performance of any activities required under subpart G of 40 CFR parts 264 or 265 for the facilities covered by this policy, if they become necessary. This provision, as that in 40 CFR part 265, allows the owner or operator to recover the costs of removing hazardous secondary materials and is similar to the provisions in § 265.143(d) that allow the owner or operator of a facility to be reimbursed for the costs of closure. This provision also allows the Regional Administrator to allow reimbursement for the same activities that are allowed under the trust fund. The insurance provisions that allow for reimbursement for the cost of removal of hazardous secondary materials are broader than the provisions in 40 CFR 261.151(a) for payment from the trust fund. This difference is due to the fact that the monies in the trust fund are returned to the owner or operator once the facility exits the exclusion, but there is no such provision for insurance; in order to make the insurance provisions functionally equivalent to their counterparts in 40 CFR part 265, the insurance provisions must cover the cost of removing the hazardous secondary materials when the unit exits the exclusion. However, the owner or operator may request reimbursements only if the remaining value of the policy is sufficient to cover the maximum costs for the facility.

The Regional Administrator will give written consent to the owner or operator that he may terminate the insurance policy when the owner or operator substitutes alternate financial assurance as specified in § 261.143, or the Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 261.143(i).

Under 40 CFR 261.143(d)(8), cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration, the conditional exclusion terminates or is revoked. This is analogous to the provisions for surety bonds and letters of credit that ensure that payments under those instruments will occur if the conditionally excluded hazardous secondary materials lose the exclusion.

Under the insurance provisions of § 265.143, failure of the owner or operator to pay the premiums of a policy without the substitution of an alternative mechanism constitutes a significant violation of the regulations. EPA was faced with a decision of how to implement that provision here. Since the exclusion relies upon compliance with the conditions, failure to pay the premium is significant and may result in loss of the exclusion. Similarly, loss of the exclusion will preclude the cancellation or termination of the policy. Under the circumstances, EPA recognizes that insurers may carefully screen applicants to ensure that they will meet the requirements of the exclusion and establish premiums, possibly with a substantial portion up front or collateralized, that reduce the insurer's risk of non-payment.

In 40 CFR 265.143(d)(1), there is a provision allowing an owner or operator of a treatment, storage, and disposal facility an additional 90 days from the effective date of the regulations to provide a certificate of insurance. The effective date of the interim status regulations was in 1982, and therefore this provision is no longer applicable and today's rule does not allow this additional 90 days. In keeping with the proposal to use requirements in subpart H of 40 CFR part 265, the additional 90-day period has been deleted from these regulations.

Financial Test

EPA had solicited comment on whether to use the financial assurance provisions in the standardized permit rule rather than those in 40 CFR part 265, but commenters generally did not support the standardized permit rule alternative. Therefore, certain provisions that are available under the standardized permit rule will not be available to reclamation and intermediate facilities, with one exception. The financial test provision referenced by subpart H of 40 part CFR 265 includes an obsolete requirement that the Certified Public Accountant's report state that ''[i]n connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.'' This is referred to by the auditing profession as a ''negative assurance.'' However, the American Institute of Certified Public Accountants, Inc.'s (AICPA's) *Statement on Auditing Standards* no longer permits independent auditors to express negative assurance. Thus, to ensure that today's final rule conforms with current professional auditing standards, EPA is using the language from the standardized permit rule for this aspect of the financial test.[4]

As noted in the March 2007 supplemental proposal, the Agency currently has underway a review of the subpart H financial assurance regulations, which will address this issue among others in the broader context of 40 CFR parts 264 and 265. As part of any rulemaking that addresses the results of that review, EPA will include any necessary changes to the financial assurance condition being finalized today.

In today's regulation, the letter from the chief financial officer (*see* § 261.151(e) or (f)) contains a requirement to account for obligations assured through a financial test or corporate guarantee for facilities handling conditionally excluded hazardous secondary materials. This addition is necessary because the chief financial officer's letter required in the 40 CFR part 265 regulations does not anticipate these obligations.

The financial test and the letter from the chief financial officer use accounting terms, such as current assets, current liabilities, and liabilities. Under 40 CFR 261.141, which defines the terms used in this subpart, these and other accounting terms follow their definition in 40 CFR 265.141(f). As noted in 40 CFR 265.141(f), ''The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.'' This is an important provision of the financial assurance regulations because it allows the terms used in the test to reflect evolving definitions. For example, if the accounting standards covering retiree obligations change, this provision ensures that the accounting in the financial test submission to EPA reflects the new standards. Companies may not use an obsolete definition of these terms.

Like the 40 CFR part 265 regulations, this regulation includes a provision

[4] For current EPA guidance for companies using the financial test in 40 CFR part 264 or 265, please see the February 27, 1997 Memorandum from Elizabeth Cotsworth to Senior RCRA Policy Advisors entitled ''Obsolete Language in the Financial Test for Subtitle C Treatment Storage and Disposal Facilities,'' at *http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C68C99D730932BE28525670F006C2B4A/$file/14066.pdf.*

allowing an owner or operator to obtain a corporate guarantee as a method of complying with the financial assurance requirements. The provisions governing who may extend a guarantee are the same as those in 40 CFR part 265. Since there is no requirement for an up-front closure plan, the text of the guarantee in 40 CFR part 261 differs somewhat from the language in 40 CFR part 265. In § 261.151(g)(1), the guarantor ''guarantees that in the event of a determination by the Regional Administrator that the hazardous secondary materials at the owner or operator's facility covered by this guarantee do not meet the conditions of the exclusion under § 261.4(a)(24), the guarantor will manage any hazardous secondary material in accordance with applicable regulations and close the facility in accordance with closure requirements found in parts 264 and 265 of this chapter or establish a trust fund as specified in § 261.143(a) in the name of the owner or operator in the amount of the current cost estimate.''

Liability Requirements

The liability coverage requirements for sudden and nonsudden accidental occurrences in subpart H of 40 CFR part 261 are essentially the same as those for TSDFs in 40 CFR 265.147, with revised terminology so that the regulatory language applies to hazardous secondary material reclamation and intermediate facilities. Sudden accidental coverage for bodily injury and property damage to third parties is required for all units, and nonsudden accidental coverage is required for land-based units. Land-based units are defined in 40 CFR 260.10 as an area where hazardous secondary materials are placed in or on the land before recycling and are functionally equivalent to the units required to have nonsudden accidental coverage under 40 CFR 265.147(b) (e.g., surface impoundments). In addition, the provisions for requesting a variance or adjusting the coverage are the same as 40 CFR 265.147(c) and (d) respectively, except the reference that ties these procedures to the Subtitle C permit modification procedures under 40 CFR 270.41(a)(5) and 40 CFR 124.5 has been removed, because these provisions would not apply to excluded hazardous secondary material.

Other Financial Assurance Provisions

Finally, the provisions for incapacity of owners or operators, guarantors, or financial institutions (40 CFR 261.148), use of state-required mechanisms (40 CFR 261.149), and state assumption of responsibility (40 CFR 261.150) are essentially the same as their counterparts in 40 CFR part 265, with one exception. The state-required mechanism provisions have been expanded to indicate that states may allow facilities to use their existing Subtitle C financial assurance policies to address the financial assurance condition of 40 CFR 261.4(a)(24)(vi)(F), provided they can ensure that the instruments actually cover the financial assurance cost estimate.

5. Provisions Applicable to Hazardous Secondary Materials That Are Exported and Imported

Under today's final rule, generators who export hazardous secondary materials are required to notify the receiving country through EPA and obtain consent from that country before shipment of the hazardous secondary materials takes place (*see* 40 CFR 261.4(a)(25)). These notice and consent requirements provide notification to the receiving country so that it can ensure that the hazardous secondary materials are reclaimed rather than disposed of or abandoned. As an additional benefit, these requirements allow the receiving country the opportunity to consent or not consent based on its analysis of whether the reclamation facility can properly recycle the hazardous secondary materials and manage the process residuals in an environmentally sound manner within its borders. EPA believes that sections 2002, 3002, 3007, and 3017 of RCRA provide authority to impose this condition because such notice and consent help determine that the materials are not discarded.

Specifically, hazardous secondary materials that are exported from the United States and its territories and recycled at a reclamation facility located in a foreign country are not solid wastes, provided the hazardous secondary material generator complies with the requirements of 40 CFR 261.4(a)(25), including notifying EPA of the proposed export and obtaining subsequent consent from the receiving country.

Included by reference in 40 CFR 261.4(a)(25), the generator must comply with the requirements of 40 CFR 261.4(a)(24)(i)–(v), which comprise the hazardous secondary material generator requirements under the transfer-based exclusion, such as speculative accumulation and reasonable efforts. However, hazardous secondary material generators who export hazardous secondary materials for reclamation are not required to comply with 40 CFR 261.4(a)(24)(v)(B)(*2*) for foreign reclaimers and intermediate facilities because, as part of satisfying reasonable efforts, this question requires the generator to affirmatively answer if the reclaimer or intermediate facility has notified the appropriate authorities pursuant to § 260.42 and if the reclaimer or intermediate facility has financial assurance as required under § 261.4(a)(24)(vi)(F). Since foreign reclaimers and foreign intermediate facilities are not subject to U.S. regulations, they cannot comply with the notification and financial assurance requirements under today's rule (however, hazardous secondary material generators must affirmatively answer this question for domestic intermediate facilities).

The provisions that we are finalizing today in 40 CFR 261.4(a)(25) require hazardous secondary material generators to notify EPA of an intended export 60 days before the initial shipment is intended to be shipped off-site. The notification may cover export activities extending over a 12-month or shorter period. The notification must include contact information for the hazardous secondary material generator, as well as for the reclaimer and intermediate facility, including any alternate reclaimer or alternate intermediate facilities.[5] The notification must also include a description of the type(s) of hazardous secondary materials and the manner in which the hazardous secondary materials will be reclaimed, the frequency and rate at which they will be exported, the period of time over which they will be exported, the means of transport, the estimated total quantity of hazardous secondary materials to be exported, and information about transit countries through which such hazardous secondary materials will pass.

Notifications must be sent to EPA's Office of Enforcement and Compliance Assurance,[6] which will then notify the receiving country and any transit countries. For purposes of 40 CFR 261.4(a)(25), the terms ''Acknowledgement of Consent,'' ''receiving country,'' and ''transit country'' are used as defined in 40 CFR 262.51 with the exception that the terms in this section refer to hazardous

[5] Hazardous secondary material generators may choose, in the notice of export, to designate alternate reclaimers or alternate intermediate facilities to which the hazardous secondary materials may be exported in the event that delivery to the primary reclaimer or intermediate facility cannot take place. Hazardous secondary material generators, of course, must comply with all conditions (e.g., reasonable efforts) for each alternate reclaimer and alternate intermediate facility as with a primary reclaimer and intermediate facility.

[6] The Office of Enforcement and Compliance Assurance (OECA) is the office within EPA that implements the notice and consent process for exports.

secondary materials, rather than hazardous waste.

When the receiving country consents (or objects) to the receipt of the hazardous secondary materials, EPA will inform the hazardous secondary material generator, through an Acknowledgement of Consent, of the receiving country's response, as well as any response from any transit countries.

For exports to Organization for Economic Cooperation and Development (OECD) Member countries, the receiving country may choose to respond to the notification with tacit, rather than written, consent. With respect to exports to such OECD Member countries, if no objection has been lodged by the receiving country or transit countries to a notification within 30 days after the date of issuance of the acknowledgement of receipt of notification by the competent authority of the receiving country, the U.S. understands that an export may commence at that time. In such cases, EPA will send an Acknowledgment of Consent to inform the hazardous secondary material generator that the receiving country and any relevant transit countries have not objected to the shipment, and are thus presumed to have consented tacitly. Tacit consent expires one calendar year after the close of the 30-day period; re-notification and renewal of all consents is required for exports after that date. This tacit consent procedure for exports of hazardous secondary materials to OECD Member countries in this rule is similar to the tacit consent procedure for hazardous waste exports to OECD Member countries under 40 CFR part 262 subpart H. We note that Canada and Mexico, though they are OECD Member countries, typically require written consent for exports to their countries.

The hazardous secondary material generator may proceed with the shipment of the hazardous secondary materials only after it has received an Acknowledgment of Consent from EPA indicating the receiving country's consent (actual or tacit). If the receiving country does not consent to the receipt of the hazardous secondary materials or withdraws a prior consent, EPA will notify the hazardous secondary material generator in writing. EPA also will notify the hazardous secondary material generator of any responses from transit countries. Hazardous secondary material generators must keep copies of any notifications and consents for a period of three years following receipt of the consent.

Hazardous secondary material generators must also file with the Administrator, no later than March 1 of each year, a report containing its name, mailing and site address, and EPA ID number (if applicable); the calendar year covered by the report; the name and site address of each reclaimer and intermediate facility; and, for each hazardous secondary material exported, a description of the hazardous secondary material, the type of hazardous secondary material (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes), the DOT hazard class, the name and U.S. EPA ID number (where applicable) for each transporter used, the total amount of hazardous secondary material shipped and the number of shipments pursuant to each notification. Hazardous secondary material generators must also sign a certification statement (found under 40 CFR 261.4(a)(25)(xi)(E)). These procedures are similar to those required for exports of hazardous waste under 40 CFR part 262 subpart E, except for the use of the hazardous waste manifest which is not required under today's exclusions.

Imports of hazardous secondary materials are eligible for today's transfer-based exclusion, provided that the person who imports the hazardous secondary material fulfills all requirements and conditions (*e.g.*, notification, reasonable efforts, recordkeeping) for a hazardous secondary material generator under 40 CFR 261.4(a)(24) of today's rule. Persons who import hazardous secondary materials are not eligible for today's generator-controlled exclusion since EPA would not be able to ensure the close management and monitoring of the hazardous secondary materials by a single entity in a foreign country.

D. Termination of the Exclusion

As with the generator-controlled exclusion, units managing hazardous secondary materials excluded under the transfer-based exclusion are not subject to the closure regulations in 40 CFR parts 264 and 265 subpart G. However, when the use of these units is ultimately discontinued, all owners and operators must manage any remaining hazardous secondary materials that are not reclaimed and remove or decontaminate all hazardous residues and contaminated containment system components, equipment structures, and soils. These hazardous secondary materials and residues, if no longer intended for reclamation, would also no longer be eligible for the exclusion (which only applies to hazardous secondary materials that will be reclaimed). Failure to remove these materials within a reasonable time frame after operations cease could cause the facility to become subject to the full Subtitle C requirements if the Agency determines that reclamation is no longer feasible. While this final rule does not set a specific time frame for these activities, the Agency believes that they typically should be completed within the time frames established for analogous activities. For example, the requirements for product tanks under 40 CFR 261.4(c) allow 90 days for removal of hazardous material after the unit ceases to be operated for manufacturing. This time frame should serve as a guideline for regulators in determining, on a case-by-case basis, whether owners and operators have completed these activities within in a reasonable time frame. In any event, these hazardous secondary materials remain subject to the speculative accumulation restrictions in 40 CFR 261.4(a)(8), which includes both a time limitation of recycling 75% of the hazardous secondary material within a year and a requirement that the facility be able to show there is a feasible means of recycling the hazardous secondary material.

In addition, as described in section VIII.C. above, in order to be released from the financial assurance condition, intermediate and reclamation facilities will need to submit for approval a plan for removing the hazardous secondary material and decontaminating the unit, and then, when the work is completed, submit a certification from a qualified Professional Engineer that all hazardous secondary materials have been removed from the unit and the unit has been decontaminated.

E. Enforcement

Hazardous secondary materials transferred to a third party for the purpose of reclamation are excluded from RCRA Subtitle C regulation under certain conditions and restrictions. If a hazardous secondary material generator fails to meet any of the above-described conditions that are applicable to the generator, then the hazardous secondary materials would be considered discarded by the generator and would be subject to the RCRA Subtitle C requirements from the point at which such material was generated. In addition, if a reclaimer or an intermediate facility failed to meet any of the above-described conditions, then the hazardous secondary materials would be considered discarded by the reclaimer or intermediate facility and would be subject to the RCRA Subtitle C requirements from the point at which the reclaimer or intermediate facility

failed to meet a condition or restriction, thereby discarding the material.

It should be noted that the failure of the reclaimer or intermediate facility to meet the conditions of the exclusion does not mean that the hazardous secondary material was considered waste when handled by the generator, as long as the generator can adequately demonstrate that it has met its obligations, including the obligation under 40 CFR 261.4(a)(24)(v)(B) to make reasonable efforts to ensure that the hazardous secondary material will be reclaimed legitimately and properly managed. A hazardous secondary material generator that met its reasonable efforts obligations could, in good faith, ship its excluded materials to a reclamation facility or intermediate facility where, due to circumstances beyond its control, they were released and caused environmental problems at that facility. In such situations, and where the generator's decision to ship to that reclaimer or intermediate facility is based on an objectively reasonable belief that the hazardous secondary materials would be reclaimed legitimately and otherwise managed in a manner consistent with this regulation, the generator would not have violated the terms of the exclusion.

In addition, the Agency affirms in this preamble that § 261.2(f) applies to all claims that hazardous secondary materials are not solid waste because they are being legitimately recycled, including those that are not specifically addressed in this final rule. Respondents in enforcement cases should be prepared to demonstrate that they meet the terms of the exclusion or exemption, which includes demonstrating that the recycling is legitimate. Appropriate documentation must be provided to the enforcing agency to demonstrate that the material is not a solid waste or is exempt from regulation. In addition, the recycler of the hazardous secondary material should be prepared to show it has the necessary equipment to perform the recycling operation. Furthermore, any release of the hazardous secondary materials to the environment that is not immediately cleaned up would be considered discarded and, thus, the hazardous secondary material that was released would be a solid waste and potentially subject to the RCRA hazardous waste regulations.

IX. Legitimacy

As part of this final rulemaking, EPA has decided to codify in 40 CFR 260.43 the requirement that materials be legitimately recycled as a requirement for the exclusion for hazardous secondary materials that are legitimately reclaimed under the control of the generator (40 CFR 261.2(a)(2)(ii) and 40 CFR 261.4(a)(23)) and as a condition of the exclusion for hazardous secondary materials that are transferred for the purpose of legitimate reclamation (40 CFR 261.4(a)(24) and 40 CFR 261.4(a)(25)). EPA is also requiring that hazardous secondary materials must be legitimately recycled under the final non-waste determinations (40 CFR 260.34) for hazardous secondary materials that are (a) reclaimed in a continuous industrial process and (b) indistinguishable in all relevant aspects from a product or intermediate.

In addition, in Section IX.B.3, EPA has included a discussion of how the current legitimacy policy continues to apply to existing exclusions and how the four factors being added to 40 CFR 260.43 are substantively the same as the current legitimacy policy.

A. Background of Legitimacy

Under the RCRA Subtitle C definition of solid waste, many existing hazardous secondary materials are not solid wastes and, thus, not subject to RCRA's ''cradle to grave'' management system if they are recycled. The basic idea behind this construct is that recycling of such materials often closely resembles normal industrial manufacturing rather than waste management. However, since there can be a significant economic incentive to manage hazardous secondary materials outside the RCRA regulatory system, there is a potential for some handlers to claim that they are recycling, when, in fact, they are conducting waste treatment and/or disposal in the guise of recycling.[7] To guard against this, EPA has long articulated the need to distinguish between ''legitimate'' (i.e., true) recycling and ''sham'' (i.e., fake) recycling, beginning with the preamble to the 1985 regulations that established the definition of solid waste (50 FR 638, January 4, 1985).

In the October 28, 2003, proposal at 68 FR 61581–61588, EPA discussed its position on the relevance of legitimacy to hazardous secondary materials recycling in general and to the redefinition of solid waste specifically. We proposed to codify in the RCRA hazardous waste regulations four general criteria to be used in determining whether recycling of hazardous secondary materials is legitimate. In the supplemental proposal of March 26, 2007, at 72 FR 14197–14201, we proposed two changes to the 2003 proposed legitimacy criteria and asked for public comment on those changes. The changes were (1) a restructuring of the proposed criteria, called ''factors'' in this proposal, to make two of them mandatory, while leaving the other two as factors to be considered, and (2) additional guidance on how the economics of the recycling activity should be considered in a legitimate recycling determination.

The concept of legitimacy being finalized in today's rule as a restriction or a condition for the final exclusions and the non-waste determinations is not substantively different from the Agency's longstanding policy that has been expressed in our earlier preamble discussions and policy statements. The October 28, 2003, definition of solid waste proposal discussed the history of the guidance EPA has provided to the regulated community on the question of what it means to legitimately recycle. To summarize that discussion, the January 4, 1985, preamble to the final rule that promulgated the original definition of solid waste regulations established EPA's concept of legitimacy and described several indicators of sham recycling. A similar discussion that addressed legitimacy as it pertains to burning hazardous secondary materials for energy recovery was presented in the preamble to the January 8, 1988, proposed amendments to the definition of solid waste (53 FR 522).

On April 26, 1989, the Office of Solid Waste (OSW) issued a memorandum that consolidated preamble statements concerning legitimate recycling that had been articulated previously into a list of criteria to be considered in evaluating legitimacy [OSWER directive 9441.1989(19)]. This memorandum, known to many as the ''Lowrance Memo,'' has been a primary source of guidance for the regulated community and for implementing agencies in distinguishing between legitimate and sham recycling for many years.

The legitimacy provision applicable to these exclusions and non-waste determinations is based on the October 2003 proposal and March 2007 supplemental proposal and all relevant information available to EPA as contained in the rulemaking record. The basis for how the legitimacy requirement in 40 CFR 260.43 works

[7] As an example of sham recycling, in a recent case the owner of a facility in Mississippi was found to be illegally burying hazardous waste on his property, where it was leaching into the surrounding soil and groundwater, while he was telling regulators and customers that he was recycling it into a salable product (Department of Justice, ''Mississippi Hazardous Waste Operator Sentenced to 41 Months in Prison for Environmental Crimes,'' news release, February 7, 2008, *http://www.epa.gov/compliance/resources/cases/criminal/highlights/2008/pridemore-02-07-08.pdf*).

includes the reasoning in the October 2003 and March 2007 preambles to the proposal and supplemental proposal, respectively, and consideration of all significant public comments as discussed in section XVIII of this preamble, as well as in the response to comment document.

Following the detailed discussion of the structure of the 40 CFR 260.43 legitimacy factors and each individual factor in this preamble, EPA has included a discussion of how the current legitimacy policy continues to apply to existing exclusions and how the four factors being added to 40 CFR 260.43 compare to the questions in the Lowrance Memo and the discussions in the preambles identified above.

B. How To Determine When Recycling Is Legitimate

1. What Is the Purpose of Legitimacy?

As discussed in the October 2003 proposal and the March 2007 supplemental proposal to this rulemaking, the Agency has a long-standing policy that all recycling of hazardous secondary materials must be legitimate, including both excluded recycling and the recycling of regulated hazardous wastes. The legitimacy provision in today's final exclusions and non-waste determinations is designed to distinguish between real recycling activities—legitimate recycling—and ''sham'' recycling, an activity undertaken by an entity to avoid the requirements of managing a hazardous secondary material as a hazardous waste. Because of the economic advantages in managing hazardous secondary materials as recycled materials rather than as wastes, there is an incentive for some handlers to claim they are recycling when, in fact, they are conducting waste treatment and/or disposal.

2. Legitimacy Requirements

In this action, EPA is finalizing requirements that reclamation being undertaken under the exclusions at § 261.2(a)(2)(ii), § 261.4(a)(23), (24), and (25) and the non-waste determinations at § 260.30(d) and (e) be legitimate. These requirements can be found in the final regulatory text at § 260.34(b), § 261.2(a)(2)(ii), § 261.4(a)(23)(v), and § 261.4(a)(24)(iv). Each of these provisions refers to § 260.43, where the full requirements for determining the legitimacy of the reclamation operation can be found.

The design of legitimacy in the final rule has two parts. The first is a requirement that hazardous secondary materials being recycled provide a useful contribution to the recycling process or to the product of the recycling process and a requirement that the product of the recycling process is valuable. These two legitimacy factors make up the core of legitimacy and, therefore, a process that does not conform to them cannot be a legitimate recycling process, but would be considered sham recycling.

The second part of legitimacy is two factors that must be considered when a recycler is making a legitimacy determination. EPA believes that these two factors are important in determining legitimacy, but has not made them factors that must be met because the Agency knows that there will be some situations in which a legitimate recycling process does not conform to one or both of these two factors, yet the reclamation activity would still be considered legitimate. EPA does not believe that this will be a common occurrence, but in recognition that legitimate recycling may occur in these situations, EPA has made management of the hazardous secondary materials and the presence of hazardous constituents in the product of the recycling process to be factors that must be considered in the overall legitimacy determination, but not factors that must always be met.

Structure of legitimacy provision. Under the first paragraph of 40 CFR 260.43, hazardous secondary materials that are not legitimately recycled are discarded materials and, therefore, are solid wastes. This paragraph also states that anyone claiming an exclusion at § 261.2(a)(2)(ii), § 261.4(a)(23), § 261.4(a)(24), or § 261.4(a)(25) or using a non-waste determination at § 260.30(d) or (e) must be able to demonstrate that its recycling activity is legitimate. The Agency has included the language ''In determining if their recycling is legitimate, persons must address the requirements of § 260.43(b) and must consider the requirements of § 260.43(c)'' to make it clear that the factors in paragraph (b) must be met, while the factors in paragraph (c) must be considered and evaluated in determining whether the recycling activity overall is legitimate.

Although there is no specific recordkeeping requirement that goes with the ability to demonstrate legitimacy, EPA would expect that in the event of an inspection or an enforcement action by an implementing agency, the recycler would be able to show how it made the overall legitimacy determination per § 261.2(f).[8] In the event that the process does not conform to one of the two factors under § 260.43(c), the facility should be able to show that it considered that factor and why the recycling activity overall remains legitimate. For example, under existing exclusions from the definition of solid waste, reuse of lead contaminated foundry sands may or may not be legitimate, depending on the use. The use and reuse of foundry sands for mold making in a facility's sand loop under normal industry practices has been found to be legitimate because the sand is part of an industrial process where there is little chance of the hazardous constituents being released into the environment or causing damage to human health and the environment when it is kept inside, because there is lead throughout the foundry's process, and because there is a clear value to reusing the sand.[9] However, in the case of lead contaminated foundry sand used as children's play sand, the same high levels of lead would disqualify this use from being considered legitimate recycling.[10] the same result would be reached when applying Factor 4.

Factor 1—Useful Contribution. ''Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process * * * The hazardous secondary material provides a useful contribution if it (i) contributes valuable ingredients to a product or intermediate; or (ii) replaces a catalyst or carrier in the recycling process; or (iii) is the source of a valuable constituent recovered in the recycling process; or (iv) is recovered or regenerated by the recycling process; or (v) is used as an effective substitute for a commercial product'' (40 CFR 260.43(b)(1)).

This factor, one of the two core legitimacy factors, expresses the principle that hazardous secondary materials should contribute value to the recycling process. This factor is an

[8] Under the transfer-based exclusion being finalized in today's rule, a reclaimer should also anticipate that a hazardous secondary material generator may inquire as to whether the reclamation process is legitimate (40 CFR 261.4(a)(24)(v)(B)(1)). Reasonable effort inquiries will vary by generator and may include a request for information or documentation of legitimacy.

[9] Letter. Elizabeth Cotsworth, Director Office of Solid Waste, to Amy Blankenbiller, American Foundry Society, March 28, 2001. *http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/4C9A2EEE6E5F859B85256AC5004FC1C2/$file/14534.pdf*

[10] One of the profiles in the docket shows that from 1997–1998, a horticultural nursery purchased approximately 375 tons of foundry sand that contained lead above the regulatory limits and that was then bagged and sold as play sand to approximately 40 different retailers. (U.S. EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials,* Appendix 2).

essential element to legitimate recycling because real recycling is not occurring if the hazardous secondary materials being added or recovered do not add anything to the process. This factor is intended to prevent the practice of adding to or recovering hazardous secondary materials from a manufacturing operation simply as a means of disposing of them, or recovering only small amounts of a constituent, which EPA would consider sham recycling.

In response to comments received on this factor asking for more clarification on what useful contribution means, the regulatory text includes an explanation of how useful contribution might be achieved in (i) through (v) of § 260.43(b)(1). EPA stresses that the ways in which hazardous secondary materials can add value and be useful in a recycling process are (i) contributing valuable ingredients to a product or intermediate; (ii) replacing a catalyst or carrier in the recycling process; (iii) providing a valuable constituent to be recovered; (iv) being regenerated; or (v) being used as an effective substitute for a commercial product. The preamble to the October 2003 proposed rule gave full descriptions of these five situations (68 FR 61585), but the Agency has also included them in the regulatory text to clarify this factor for the regulated community.

The Agency also wants to restate for clarification that for hazardous secondary materials to meet the useful contribution factor, not every constituent or component of the hazardous secondary material has to make a contribution to the recycling activity. For example, a legitimate recycling operation involving precious metals might not recover all of the components of the hazardous secondary material, but would recover precious metals with sufficient value to consider the recycling process legitimate. In addition, the recycling activity does not have to involve the hazardous component of the hazardous secondary materials if the value of the contribution of the non-hazardous component justifies the recycling activity. One example of this factor from an existing exemption is where hazardous secondary materials containing large amounts of zinc, a non-hazardous component, are recycled into zinc micronutrient fertilizers. In cases where the hazardous component is not being used or recycled, the Agency stresses that the recycler is responsible for the management of any hazardous residuals of the recycling process.

In a situation where more than one hazardous secondary material is used in a single recycling process and the hazardous secondary materials are mixed or blended as a part of the process, each hazardous secondary material would need to satisfy the useful contribution factor. This requirement prevents situations where a worthless hazardous secondary material could be mixed with valuable and useful hazardous secondary materials in an attempt to disguise and dispose of it. In addition, a situation in which hazardous secondary materials that can be useful to a process are added to that process in much greater amounts than are needed to make the end-product or to otherwise provide its useful contribution would also be sham recycling.

Another way the usefulness of the hazardous secondary material's contribution could be demonstrated is by looking at the efficiency of the material's use in the recycling process—that is, how much of the constituent in a hazardous secondary material is actually being used. As an example, if there is a constituent in the hazardous secondary material that could add value to the recycling process, but, due to process design, most of it is not being recovered but is being disposed of in the residuals, this would be a possible indicator of sham recycling. However, there are certainly recycling scenarios where a low recovery rate could still be legitimate. For example, under an existing exclusion, if the concentration in a metal-bearing hazardous secondary material is low (2%–4%) and a recycling process was able to recover a large percentage of the target metal, this factor could be met and the recycling may be legitimate (depending on the outcome of the analysis of the other legitimacy factors).

One way to use the efficiency of the recycling process to evaluate legitimacy is to compare the process to typical industry recovery rates from raw materials to determine if the recycling process is reasonably efficient. This method should involve an examination of the overall process, not just a single step of the process. For example, if one step in the process recovers a small percentage of the constituent, but the overall process recovers a much larger percentage, the Agency would consider the overall efficiency of the recycling process in determining whether hazardous secondary materials are providing a useful contribution.

There are various ways in which hazardous secondary materials can be useful to a recycling process and various ways are laid out in this discussion of how a facility might demonstrate conformity with this factor. In addition, we provided a number of different ways a material could contribute to the process in the regulatory text describing this factor. Any one of these would be sufficient to demonstrate that the hazardous secondary material provides a useful contribution. Overall, the Agency considers this factor to be a critical element in determining legitimacy and any recycling process that does not meet this factor cannot be considered legitimate recycling.

Factor 2—Valuable Product or Intermediate. ''The recycling process must produce a valuable product or intermediate * * * The product or intermediate is valuable if it is (i) sold to a third party or (ii) used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process'' (40 CFR 260.43(b)(2)).

This factor, one of the two core legitimacy factors, expresses the principle that the product or intermediate of the recycling process should be a material of value, either to a third party who buys it from the recycler, or to the generator or recycler itself, who can use it as a substitute for another material that it would otherwise have to buy or obtain for its industrial process. This factor is also an essential element of the concept of legitimate recycling because recycling cannot be occurring if the product or intermediate of the recycling process is not of use to anyone and, therefore, is not a real product. This factor is intended to prevent the practice of running a hazardous secondary material through an industrial process to make something just for the purpose of avoiding the costs of hazardous waste management, rather than for the purpose of using the product or intermediate of the recycling activity. Such a practice would be sham recycling.

Most commenters on the proposed rule for this factor stated that this is a useful way of gauging whether recycling is actually taking place, but requested that the Agency clarify the meaning of the term valuable, as it is used in the regulatory text. EPA is repeating and clarifying today that for the purpose of this factor, a recyclable product may be considered ''valuable'' if it can be shown to have either economic value or a more intrinsic value to the end user. Evaluations of ''valuable'' for the purpose of this factor should be done on a case-by-case basis, but one way to demonstrate that the recycling process yields a valuable product would be the documented sale of a product of the recycling process to a third party. Such documentation could be in the form of

receipts or contracts and agreements that establish the terms of the sale or transaction. This transaction could include money changing hands or, in other circumstances, may involve trade or barter. A recycler that has not yet arranged for the sale of its product to a third party could establish value by demonstrating that it can replace another product or intermediate that is available in the marketplace. A product of the recycling process may be sold at a loss in some circumstances, but the recycler would have to be prepared to show how the product is clearly valuable to the purchaser.

However, many recycling processes produce outputs that are not sold to another party, but are instead used by the generator or recycler. A product of the recycling process may be used as a feedstock in a manufacturing process, but have no established monetary value in the marketplace. Such recycled products or intermediates would be considered to have intrinsic value, though demonstrating intrinsic value may be less straightforward than demonstrating value for products that are sold in the marketplace. Demonstrations of intrinsic value could involve showing that the product of the recycling process or intermediate replaces an alternative product that would otherwise have to be purchased or could involve a showing that the product of the recycling process or intermediate meets specific product specifications or specific industry standards. Another approach could be to compare the product's or intermediate's physical and chemical properties or efficacy for certain uses with those of comparable products or intermediates made from raw materials.

Some recycling processes may consist of multiple steps that may occur at separate facilities. In some cases, each processing step will yield a valuable product or intermediate, such as when a metal-bearing hazardous secondary material is processed to reclaim a precious metal and is then put through another process to reclaim a different mineral. When each step in the process yields a valuable product or intermediate that is salable or usable in that form, the recycling activity would conform to this factor.

Like the other factors, this factor should be examined and evaluated on a case-by-case basis looking at the specific facts of a recycling activity. If, for instance, a recycling activity produces a product or intermediate that is used by the recycler itself, but does not serve any purpose and is just being used so that the product or intermediate appears valuable, that would be an indicator of sham recycling. An example of this would be a recycler that reclaims a hazardous secondary material and then uses that material to make blocks or building materials for which it has no market and then ''uses'' those building materials to make a warehouse in which it stores the remainder of the building materials that it is unable to sell.

Factor 3—Managed as a Valuable Commodity. ''The generator and the recycler should manage the hazardous secondary material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material. Where there is no analogous raw material, the hazardous secondary material should be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded'' (40 CFR 260.43(c)(1)).

The first of the additional factors that must be considered expresses the principle that hazardous secondary materials being recycled should be managed in the same manner as other valuable materials. This factor requires those making a legitimacy determination to look at how the hazardous secondary material is managed before it enters the recycling process. In EPA's view, a recycler will value hazardous secondary materials that provide an important contribution to its process or product and, therefore, will manage those hazardous secondary materials in a manner consistent with how it manages a valuable feedstock. If, on the other hand, the recycler does not manage the hazardous secondary materials as it would a valuable feedstock, that behavior may indicate that the hazardous secondary materials may not be recycled, but rather released into the environment and discarded.

This factor may be particularly appropriate in the case where a recycler has been paid by a generator to take its materials as a result of the economic incentives in the hazardous secondary materials market. By looking at the management of the hazardous secondary material before it enters the recycler's process, the entity making the legitimacy determination can tell that a material being managed like an analogous raw material is, in fact, valued by the recycler. If the hazardous secondary material is not being managed like a valuable raw material because it is uncontrolled or is being released, that indicates that the fee the recycler obtains for taking the hazardous secondary material may be its only value to that recycler. If the fee received were the only value to the recycler, it would mean that discard was taking place.

This factor addresses the management of hazardous secondary materials in two distinct situations. The first situation is when a hazardous secondary material is analogous to a raw material which it is replacing in the process. In this case, the hazardous secondary material should be managed prior to recycling similarly to the way the analogous raw materials are managed in the course of normal manufacturing. EPA expects that all parties handling hazardous secondary materials destined for recycling—generators, transporters, intermediate facilities and reclamation facilities—will handle them in generally the same manner in which they would handle the valuable raw materials they might otherwise be using in their process. ''Analogous raw material,'' as defined elsewhere in this preamble, is a raw material for which the hazardous secondary material substitutes and which serves the same function and has similar physical and chemical properties as the hazardous secondary material.

The second situation the factor addresses is the case where there is no analogous raw material that the hazardous secondary material is replacing. This could be either because the process is designed around a particular hazardous secondary material—that is, the hazardous secondary material is not replacing anything—or it could be because of physical or chemical differences between the hazardous secondary material and the raw material that are too significant for them to be considered ''analogous.''

Hazardous secondary materials that have significantly different physical or chemical properties when compared to the raw material would not be considered analogous even if they serve the same function because it may not be appropriate to manage them in the same way. In this situation, the hazardous secondary material would have to be contained for this factor to be met. A hazardous secondary material is ''contained'' if it is placed in a unit that controls the movement of that material out of the unit. This requirement is consistent with the idea that normal manufacturing processes are designed to use valuable material inputs efficiently rather to than allow them to be released into the environment.

For example, if a manufacturer has an ingredient that is a dry raw material managed in supersacks, the Agency would expect that a hazardous secondary material that is a similar dry

material also would be managed in supersacks or in a manner that would provide equivalent protection. If, on the other hand, the hazardous secondary material was instead managed in an outdoor pile without appropriate controls in place to address releases to the environment, it may indicate that it was not being handled as a valuable commodity. If, however, the manufacturer decided to replace the dry raw material in its process with a liquid having the same constituents, it would not be sufficient, nor would it make sense, for the liquid to be managed in supersacks. Instead, the liquid would have to be ''contained'' (for example in a tank or surface impoundment).

An important part of this factor is the statement in the regulatory text clarifying that hazardous secondary materials that are released to the environment and not recovered immediately are discarded. Valuable products should not be allowed to escape into the environment through poor management and this factor clarifies that those hazardous secondary materials that do escape (and are not immediately recovered) are clearly discarded. Either a large release or ongoing releases of smaller amounts could indicate that, in general, the hazardous secondary material is not being managed as a valuable product, which could potentially lead to the recycling process being found not to be legitimate. Hazardous secondary materials that are immediately recovered before they disperse into the environment—air, soil, or water—and are reintroduced in the recycling process are not discarded. This determination must be made on a case-by-case basis, however.

EPA has determined that it is appropriate that this factor is one of the two that must be considered rather than a factor that must be met because there are situations in which this factor is not met, but recycling appears to be legitimate. An example of this kind of situation is described in the March 2007 supplemental proposal (72 FR 14199). In the example, a hazardous secondary material that is a powder-like material is shipped in a woven super sack and stored in an indoor containment area, whereas the analogous raw material is shipped and stored in drums. A strict reading of this factor may determine that the hazardous secondary material is not being managed in a manner consistent with the raw material even if the differences in management are not actually impacting the likelihood of a release. By designing the legitimacy factors so that this one has to be considered, but not necessarily met, the individual facts of situations like the one described here can be evaluated on a case-by-case basis to determine if they affect the legitimacy of the recycling activity.

In summary, given the nature of the legitimacy factors and their need to apply to all the practices covered by the exclusions in this final rule, it is not appropriate or practicable for EPA to develop a specific management standard. In the absence of such a management standard, EPA is using this factor: materials must be managed as analogous raw materials or, if there are no analogous raw materials, the materials must be contained. EPA's intent with this factor is that hazardous secondary materials are managed in the same manner as materials that have been purchased or obtained at some cost, just as raw materials are. Just as it is good business practice to ensure that raw materials enter the manufacturing process rather than being spilled or released, we would expect hazardous secondary materials to be managed effectively and efficiently in order that their full value to the manufacturing process would be realized.

Factor 4—Comparison of Toxics in the Product. ''The product of the recycling process does not (i) contain significant concentrations of any hazardous constituents found in Appendix VIII of part 261 that are not found in analogous products; or (ii) contain concentrations of any hazardous constituents found in Appendix VIII of part 261 at levels that are significantly elevated from those found in analogous products; or (iii) exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit'' (40 CFR 260.43(c)(2)).

The second of the additional factors that must be considered requires those making a legitimacy determination to look at the concentrations of the hazardous constituents found in the product made from hazardous secondary materials and compare them to the concentrations of hazardous constituents in analogous products. Any of the following three situations could be an indicator of sham recycling: a product that contains significant levels of hazardous constituents that are not found in the analogous products; a product with hazardous constituents that were in the analogous products, but contains them at significantly higher concentrations; or a product that exhibits a hazardous characteristic that analogous products do not exhibit. Any of these situations could indicate that sham recycling is occurring because in lieu of proper hazardous waste disposal, the recycler could have incorporated hazardous constituents into the final product when they are not needed to make that product effective in its purpose. This factor, therefore, is designed to determine when toxics that are ''along for the ride'' are discarded in a final product and, therefore, the hazardous secondary material is not being legitimately recycled.

To evaluate this factor, a recycler will ordinarily compare the product of the recycling process to an analogous product made of raw materials. For example, if a recycling process produced paint, the levels of hazardous constituents in the paint will be compared with the levels of the same constituents found in similar paint made from virgin raw materials.

A recycler is also allowed to perform this evaluation by comparing the hazardous constituents in the hazardous secondary material feedstock with those in an analogous raw material feedstock. If the hazardous secondary material feedstock does not contain significantly higher concentrations of hazardous constituents than the raw material feedstock, then the end product of the recycling process would not contain excess hazardous constituents ''along for the ride'' either. EPA is clarifying here that this method of showing that the product does not have ''toxics along for the ride'' is acceptable. There may be cases in which it is easier to compare feedstocks than it is to compare products because the recycler knows that the hazardous secondary material is very similar in profile to the raw material. A comparison of feedstocks may also be easier in cases where the recycler creates an intermediate which is later processed again and may end up in two or more products, when there is no analogous product, or when production of the product of the recycling process has not yet begun.

This factor identifies three ways to evaluate whether or not unacceptable amounts of hazardous constituents are passed through to the products of the recycling process. (As explained above, these methods also could be used to compare the hazardous secondary material feedstock to a raw material feedstock, if the recycler prefers.) The first method specifies that when analogous products made from raw materials do not contain hazardous constituents, the product of the recycling process should not contain significant amounts of hazardous constituents. For example, if paint made from reclaimed solvent contains significant amounts of cadmium, but the same type of paint made from virgin raw materials does not contain cadmium, it could indicate that the cadmium serves

no useful purpose and is being passed though the recycling process and discarded in the product.

The second method addresses analogous products that do contain hazardous constituents and asks whether the concentrations of those hazardous constituents are significantly higher in the product of the recycling process than in the product made from raw materials. Concentrations of hazardous constituents in the product of the recycling process that are significantly higher than in the product made from virgin raw materials could again be an indicator of sham recycling. For example, if a lead-bearing hazardous secondary material was reclaimed and then that material was used as an ingredient in making ceramic tiles and the amount of lead in the tiles was significantly higher than the amount of lead found in similar tiles made from virgin raw materials, the recycler should look more closely at the factors to determine the overall legitimacy of the process.

The third method under this factor is whether the product of the recycling process exhibits a hazardous characteristic that analogous products do not exhibit. Requiring an evaluation of hazardous characteristics ensures that products of the recycling process do not exhibit the characteristics of toxicity, ignitability, corrosivity, or reactivity when the analogous products do not. The Agency believes that most issues associated with ''toxics along for the ride'' will involve the presence of toxic constituents, which are addressed under the first two parts of the factor. That is, we believe that it is likely that there are few instances where hazardous secondary materials are used in the process and hazardous constituents are not present at significantly higher levels, but the product made from the hazardous secondary material nevertheless exhibits the hazardous characteristic of toxicity when the analogous product does not. It is possible, though, that the use of hazardous secondary materials as an ingredient could cause a product to exhibit a hazardous characteristic, such as corrosivity, that is not exhibited by analogous products.

The Agency has determined that it is appropriate for this factor to be considered in legitimacy determinations under the final exclusions and in the non-waste determinations in this action, but thinks that there may be situations in which the factor is not met but the recycling would still be considered legitimate. An example of this kind of situation that has been addressed by the Agency under the current regulatory scheme would be in the use and reuse of foundry sands for mold making in a facility's sand loop. Because of repeated exposure to metals in a foundry's process, the sands used to make the molds may have significantly higher concentrations of hazardous constituents than virgin sand. However, because the sand is part of an industrial process where there is little chance of the hazardous constituents being released into the environment or causing damage to human health and the environment when it is kept inside, because there is lead throughout the foundry's process, and because there is a clear value to reusing the sand, this would be an example of a situation where this factor is not met, but it does not affect the legitimacy of the recycling process.

In fact, EPA has concluded as a general matter that foundries engaged in the reuse of lead-containing foundry sands are recycling those sands legitimately and these sands would not be regulated under RCRA Subtitle C (under the circumstances described in EPA's March 2001 memorandum on this subject).[11] Thus, while the used sands in the sand loop arguably have toxics-along-for-the ride, EPA did not raise questions about the legitimacy of the recycling, given the overall nature of the operations. If the used foundry sand were being recycled into a different product, such as a material used on the ground or in children's play sand, the legitimacy determination would be very different and significant levels of metals would likely render the recycling illegitimate. The same conclusions would be reached applying the factors codified in 260.43.

Another example of recycling that may be legitimate although this factor has not been met could be when the material has concentrations of toxics that could be considered ''significantly higher'' than the analogous product, but meets industry specifications for the product that include specific specifications for the hazardous constituent of concern. Meeting accepted industry standards would be a strong indication that this material is being legitimately recycled. A third example could be in the mining and mineral processing industry. In many mineral processing operations, the very nature of an operation results in hazardous constituents concentrating in the product as it proceeds through the various steps of the process. In many cases, there is not an analogous product to compare the products of these processes so this factor may not be relevant because of the nature of the operations. As with the above example, if a facility considers a factor and decides that it is not applicable to its process, the Agency suggests that the facility evaluate the presence of hazardous constituents in its product and be prepared to demonstrate both that it considered this factor and the reasons it believes the factor is not relevant.

As discussed in more detail in the comments section of this preamble (section XVIII) and in the response to comments document in the docket, commenters on this factor requested clarification concerning what EPA meant by the terms used in this factor. In response to some of these comments, EPA has made two clarifications in the regulatory text by (1) specifying that the hazardous constituents referred to in the regulation are those that are found in Appendix VIII to 40 CFR part 261 and (2) clarifying that the hazardous characteristics to which EPA is referring to are those in 40 CFR part 261 subpart C.

The Agency also received much comment on the term ''significant'' and what the Agency intended by this term. EPA has decided to keep the term in the final rule. The alternative to using ''significant'' or a similarly flexible term to determine when there may be hazardous constituents in the product made from recycled hazardous secondary materials that are not in the analogous products made from raw materials would be to set an absolute standard. In its discussion of legitimacy in the October 2003 proposed rule, EPA discussed possible ''bright line'' or risk-based approaches as a way to set absolute lines to define ''significant'' based on either a numerical limit or a risk level (68 FR 61587–61588). EPA recognizes that the ''bright line'' or the risk-based approach may provide greater clarity and predictability to the regulated community, but that in both cases the Agency would have to establish a line for what is acceptable and the line may either be somewhat arbitrary or it may exclude recycling practices that, if carefully considered, should be considered legitimate. Based on the comments received on those approaches, we are convinced that they would not be workable.

On the other hand, a case-by-case analysis of a recycling process can take into consideration the relevant principles and facts for that activity,

[11] Letter. Elizabeth Cotsworth, Director Office of Solid Waste, to Amy Blankenbiller, American Foundry Society, March 28, 2001. *http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/4C9A2EEE6E5F859B85256AC5004FC1C2/$file/14534.pdf*

leading to a determination of significance based on the facts of the activity. Because this factor must apply to various different recycling activities, we believe the case-by-case approach is most appropriate.

EPA, therefore, is finalizing its proposed option of using the term ''significant'' in 40 CFR 260.43(c)(2)(i) and (ii). Evaluating the significance of levels of hazardous constituents in products of the recycling process may involve taking into consideration several variables, such as the type of product, how it is used and by whom, whether or not the elevated levels of hazardous constituents compromise the efficacy of the product, the availability of the hazardous constituents to the environment, and others. For example, if a hazardous secondary material has been reclaimed and made into a product that will be used by children, and that product contains hazardous constituents that are not in analogous products, that product will likely need to be closely scrutinized. On the other hand, low levels of a hazardous constituent in a product from that same reclamation operation that is used as an ingredient in an industrial process or for another industrial application may not be significant and must be evaluated in the context of the product's use.

EPA provided several additional examples in implementing this factor in the October 2003 proposed rule which will be repeated here. If zinc galvanizing metal made from hazardous secondary materials that were reclaimed contains 500 parts per million (ppm) of lead, while the same zinc product made from raw materials typically contains 475 ppm, this difference in concentration would likely not be considered ''significant'' in the evaluation of this factor. If, on the other hand, the lead levels in the zinc product made from reclaimed hazardous secondary materials were 1,000 ppm, it may indicate that the product was being used to illegally dispose of lead and that the activity is sham recycling, unless other factors would demonstrate otherwise.

In another example, if a ''virgin'' solvent contains no detectable amounts of barium, while spent solvent that has been reclaimed contains a minimal amount of barium (e.g., 1 ppm), this difference might not be considered significant. If, however, the barium in the reclaimed solvent were at much higher levels (such as 50 ppm), it may indicate discard of the barium and sham recycling.

Unfortunately, because of the variety of possible recycling scenarios under the exclusions and in the non-waste determinations covered by this final rule, we cannot provide examples for how this factor might work for all possible recycling situations. The Agency stresses that the determination of legitimacy for this factor should consider both the use and the users of the product in addition to the concentration of the hazardous constituents or the presence of a hazardous characteristic, as well as other relevant information. In addition, in some cases, the implementing agency may accept a risk argument from a recycler to show that the recycling activity meets this factor. If the recycler can show that despite elevated concentrations of hazardous constituents, such constituents pose little or no risk to human health or the environment, the implementing agency may consider that as evidence that the elevated concentrations are not significant. *How consideration of economics applies to legitimacy*. Consideration of economics has long been a part of the Agency's concept of legitimacy, as is evident in the Lowrance Memo and earlier preamble text (50 FR 638, January 4, 1985 and 53 FR 522, January 8, 1988; *see also American Petroleum Institute* v. *EPA (''API II'')*, 216 F.3d 50, 57–58 (DC Cir. 2000)). This final rule does not codify specific regulatory language on economics as part of the legitimacy provision, but EPA offers further guidance and clarification on how economics may be considered in making legitimacy determinations, which is similar to the preamble discussion in the March 2007 supplemental proposal.

Specifically, EPA believes that consideration of the economics of a recycling activity can be used to inform and help determine whether the recycling operation is legitimate. Positive economic factors would be a strong indication of legitimate recycling, whereas negative economic factors would be an indication that further evaluation of the recycling operation may be warranted in assessing the legitimacy factors.

Considering the economics of a recycling activity can also inform whether the hazardous secondary material inputs provide a useful contribution and whether the product of recycling is of value. Economic information that may be useful could include (1) the amount paid or revenue generated by the recycler for recycling hazardous secondary materials; (2) the revenue generated from the sale of recycled products; (3) the future cost of processing existing inventories of hazardous secondary materials; and (4) other costs and revenues associated with the recycling operation. The economics of the recycling transaction may be more of an issue when hazardous secondary materials are sent to a third-party recycler, but even when the hazardous secondary materials are recycled under the control of the generator, the generator must still show that the hazardous secondary materials are, at a minimum, providing a useful contribution and producing a valuable product.

Useful Economic Information

(1) The amount paid or revenue generated by the recycler for recycling hazardous secondary materials is one example of how economic information can help support a legitimacy determination. We have three primary illustrations to exemplify this. First, the basic economic flows can suggest whether the recycling operation will process inputs, including hazardous secondary materials, and produce products over a reasonable period of time, recognizing that there will be lean and slow times. A general accounting of the major costs, revenues, and economic flows for a recycling operation over a reasonable period of time can provide information for considering whether recycling is likely to continue at a reasonable rate, compared to the rate at which inputs are received, or whether it is likely that significant amounts of hazardous secondary materials would be accumulated and then abandoned when the facility closes. Any bona fide sources of revenues would be included in this consideration, such as payments by generators to recyclers for accepting hazardous secondary materials and subsidies supporting recycling. However, in order to have some level of confidence that beneficial products are or will be produced over a reasonable timeframe, we believe that at least some portion of the revenues should be from product sales (or savings due to avoided purchases of products if the hazardous secondary materials are used directly by the recycler). This is consistent with the factor requiring that the hazardous secondary material must be recycled to make a valuable product or intermediate.

Two scenarios illustrate this first example: A recycling operation that generates revenues from the sale of recycled products that greatly exceed the costs of the operation is an indication of a process that turns the hazardous secondary materials into useful products, and is unlikely to over accumulate them. A very different example is an operation that has, relative to its revenues, large inventories of unsold product and large future liabilities in terms of stocks of

unprocessed hazardous secondary materials. This operation could potentially fail the ''useful contribution'' and ''produces a valuable product or intermediate'' legitimacy factors, and would draw closer attention to determine whether it is engaged in treatment and/or abandonment in the guise of recycling.

Second, when the economics of a recycling operation that uses hazardous secondary materials to produce and sell final products are similar to a manufacturing operation using raw materials to produce and sell final products, we believe that such an operation is likely to be legitimate. For instance, if the recycler pays for hazardous secondary materials as a manufacturer would pay for raw materials, the recycler sells products from the recycling process as a manufacturer would sell products from manufacturing, and the revenues generated equal or exceed costs, then the hazardous secondary materials appear to be valuable (i.e., the recycler is willing to pay for them) and appear to make a useful contribution to a valuable recycled product.

However, we also recognize that the economics of many legitimate recycling operations that utilize hazardous secondary materials differ from the economics of more traditional manufacturing operations. For example, many recyclers are paid by generators to accept hazardous secondary materials. Generators may be willing to pay recyclers because generators can save money if the recycling is less expensive than disposing of the hazardous secondary materials in landfills or incinerators. Also, some recyclers receive subsidies that may be designed to develop recycling infrastructure and markets or to achieve other benefits of recycling. For instance, the recycling of electronic materials can be legitimate even when the recycler is subsidized for processing the material.

Third, any analysis of the economics of a recycling operation should recognize that a recycler may be able to charge generators and still be a legitimate recycling operation. Because these hazardous secondary materials are hazardous wastes if disposed of, typically the generators' other alternative management option already carries a cost that is based on the existing market for hazardous waste transportation, treatment, and disposal. Hence, unless there is strong competition in recycling markets or the hazardous secondary materials are extremely valuable, a recycler may be able to charge generators simply because alternative disposal options cost more.

Recognizing that such a dynamic exists can assist those making legitimacy determinations in evaluating recycling operations. For example, if a recycler is charging generators fees (or receiving subsidies from elsewhere) for taking hazardous secondary materials and receives a far greater proportion of its revenue from acceptance of the fees than from the sale of its products, both the useful contribution and the valuable product factors may warrant further review, unless other information would indicate that such recycling is legitimate. Fees and subsidies may indicate that the economic situation allows the recycler to charge high fees, regardless of the contribution provided by the inputs, including hazardous secondary materials. In this situation, recyclers may also have an increased economic incentive to over-accumulate or overuse hazardous secondary materials or to manage them less carefully than one might manage more valuable inputs. Additionally, if there is little competition in the recycling market, and/or if acceptance fees seem to be set largely to compete with the relative costs of alternative disposal options rather than to reflect the quality or usefulness of the input to the recycling operation, this may also suggest a closer look at the useful contribution factor.

(2) A comparison of revenue from sales of recycled products to payments by generators is another example of how economic information can help support an evaluation of ''valuable product.'' It is possible that product sales revenues could be dwarfed by the acceptance of fees because markets for particular products are highly competitive or because high alternative disposal costs allow for high acceptance fees. However, relatively low sales revenues could also require a review of other factors, such as whether product sales prices are lower than other comparable products, products are being stockpiled rather than sold, or very little product is being produced relative to the amount of inputs to the recycling operation. These indicators may suggest that the product of the recycling process is not valuable and, thus, sham recycling may be occurring.

(3) A consideration of the future cost of processing or alternatively managing existing inventories of hazardous secondary material inputs is another example of how economic information can inform a legitimacy determination. When hazardous secondary materials make a significant useful contribution to the recycling process, a recycler will have an economic incentive to process the input materials relatively quickly and efficiently, rather than to maintain large inventories. While recyclers often need to acquire sufficient amounts of hazardous secondary materials to make it economically feasible to recycle them, there should be little economic incentive to over-accumulate such materials that make a useful contribution. Overly large accumulations of input materials may indicate that the hazardous secondary materials are not providing a useful contribution or that the recycler is increasing its future costs of either processing or disposing of the material, and may be faced with an unsound recycling operation in the future. However, it is important to keep in mind that possible explanations for this may exist. For example, the recycler may have acquired a large stock of hazardous secondary materials because the price was unusually low or perhaps the hazardous secondary materials are generated episodically and the recycler has few opportunities to acquire them.

(4) An analysis of costs and revenues specific to on-site recycling is an additional, albeit specific, example of economic information to consider. When recycling is conducted under the control of the generator, the recycler may not account formally for some of the costs and savings of the operation. Still, when deciding whether to undertake or continue the recycling operation or to utilize alternative outside recycling or disposal options, the on-site recycler (under the control of the generator) will evaluate the basic economic factors as a part of doing business. One such factor could be an accounting of the costs of virgin materials avoided by using hazardous secondary materials. Similarly, sales of recycled products under the control of the generator that are sold to an external market may support the valuable product criterion.

3. Legitimacy Policy for Other Exclusions and Exemptions

EPA is codifying a legitimacy provision in this final rule as part of the final exclusions and non-waste determinations, but stresses that EPA retains its long-standing policy that all recycling of hazardous secondary materials must be legitimate. If a facility is engaged in sham recycling, this, by definition, is not real recycling and that material is being discarded. The legitimacy policy continues to apply to all hazardous secondary materials that are excluded or exempted from Subtitle C regulation because they are recycled and to recyclable hazardous wastes that remain subject to the hazardous waste regulations. This policy is well-

understood throughout the regulated community and among the state implementing agencies.

EPA believes that the four legitimacy factors being codified in 40 CFR 260.43 are substantively the same as the existing legitimacy policy. These factors are a simplification and clarification of the policy statements in the 1989 Lowrance Memo and in various Definition of Solid Waste **Federal Register** notices.

Nonetheless, to avoid confusion among the regulated community and state and other implementing regulatory agencies about the status of recycling under the existing exclusions, the Agency has decided not to codify the legitimacy factors for existing exclusions and, thus, states and other implementing agencies will continue to apply the existing legitimacy policy to all recycling as they have in the past in order to ensure that recycling is real and not a sham. The legitimacy provisions of the final rule are codified only for the exclusions and non-waste determinations being promulgated today. In developing the codified legitimacy language, we did not intend to raise questions about the status of legitimacy determinations that underlie existing exclusions from the definition of solid waste, or about case-specific determinations that have been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports, remain in effect.

A number of commenters raised concerns with the application of the codified legitimacy factors to these existing waste-specific and industry-specific exclusions. In particular, as we noted in the October 2003 proposal, EPA has examined in depth a number of waste-specific and industry-specific recycling activities and has promulgated specific regulatory exclusions or provisions that address the legitimacy of these practices in much more specific terms than the general factors being finalized as part of the exclusions and non-waste determination process today. One example is the regulation for zinc fertilizers made from recycled hazardous secondary materials. In the zinc fertilizer regulation, among the requirements established by EPA are specific numerical limits on five heavy metal contaminants and dioxins in the zinc fertilizer product exclusion at 40 CFR 261.4(a)(21). Other examples are shredded circuit boards excluded under 40 CFR 261.4(a)(14), which must be free of mercury switches, mercury relays and nickel-cadmium and lithium batteries, and comparable fuels excluded under 40 CFR 261.4(a)(16), which must meet specific levels for hazardous constituents. The conditions developed for the recycling exclusions in § 261.4(a) were found to be necessary under material-specific rulemakings that determined when the particular hazardous secondary material in question is not a solid waste. When EPA originally made the decision that these materials are not solid waste, the Agency took into account the relevant factors about the hazardous secondary materials, including how the material was managed and what toxic chemicals were present. By limiting the codified legitimacy provision to the exclusions and non-waste determinations in today's final rule, EPA is avoiding any implication that we are revisiting these determinations.

However, at the same time, these material-specific exclusions from the definition of solid waste do not negate the basic requirement that the hazardous secondary material must be ''legitimately'' recycled. Recycling that is not legitimate is not recycling at all, but rather ''sham recycling''—discard in the guise of recycling.

For example, under EPA's historic guidance, particularly questions (1) and (3) in OSWER Directive 9441.1989(19), the ''Lowrance Memo,'' a facility could not plausibly claim the zinc fertilizer product exclusion at 40 CFR 261.4(a)(21) for a hazardous secondary material that contained absolutely no or minimal levels of zinc, even if all the conditions of the zinc fertilizer exclusion were met. The exclusion was developed to encourage legitimate recycling of zinc-containing hazardous secondary materials, not to allow any hazardous waste to be discarded to purported fertilizer in the name of recycling when the hazardous secondary material provided no recognizable benefit to the product.

Similarly, if a facility accepted zinc-containing hazardous waste, claiming to make zinc fertilizer, but failed to produce a product that was actually sold or was otherwise valuable, such a process would not be legitimate recycling (under question (4) of the Lowrance Memo in the historic legitimacy guidance), even if the management conditions or the constituent levels in the zinc fertilizer exclusion were met. The consequences of the latter example are illustrated in one of the damage cases in the environmental problems study. A facility whose primary business was mixing electric arc furnace dust (K061) with agricultural lime for sale as a micronutrient lost its customers and could not sell its product. However, the facility continued to accept EPA Hazardous Waste K061, and, in approximately seven months, the facility had accepted over 60,000 tons of this hazardous waste and stored it on the ground in piles up to 30 feet high, with no prospect of it being used to produce a product and, thus, legitimately recycled. While the initial recycling of the K061 hazardous waste was legitimate, when the facility failed to produce a product that was actually sold, the K061 could no longer be considered legitimately recycled.

In summary, all hazardous secondary materials recycling and hazardous waste recycling, whether such recycling remains under hazardous waste regulations or is excluded from the definition of solid waste, must be legitimate. This has been our long-standing policy and it is well understood throughout the regulated community and the implementing state regulatory agencies. In order to be clear that the legitimacy provision codified at 40 CFR 260.43 under today's final rule would not affect how the current legitimacy policy applies to recycling under existing exclusions, the legitimacy provision at 40 CFR 260.43 is explicitly designated as applying only to the exclusions and non-waste determinations being finalized in today's rule.

EPA also maintains that the legitimacy provision being finalized as part of the exclusions and non-waste determinations is substantively the same as existing policy because we developed the legitimacy factors in 40 CFR 260.43 by closely examining the questions and sub-questions in the Lowrance Memo and in the **Federal Register** preambles and converting them into four more direct questions. The following explanations show how each of the four factors is derived from the Lowrance Memo and other existing policy statements.

Factor 1—The Hazardous Secondary Material Provides a Useful Contribution

Relevant Lowrance Memo Questions

(1) Is the secondary material similar to an analogous raw material or product?

Is much more of the secondary material used as compared with the analogous raw material/product it replaces? Is only a nominal amount of it used?

Is the secondary material as effective as the raw material or product is replaces?

(3) What is the value of the secondary material?

Is it listed in industry news letters, trade journals, etc.?

Does the secondary material have economic value comparable to the raw material that normally enters the process?

Discussion

The factor addressing ''useful contribution'' has been distilled from and clarifies concepts in the Agency's existing policy for legitimate recycling. For example, the preamble to the January 4, 1985, recycling regulations noted that if a hazardous secondary material is ''ineffective or only marginally effective for the claimed use, the activity is not recycling but surrogate disposal.'' Similarly, the January 8, 1988, proposed rule discussed ''how much energy or material value each waste contributes to the recycling purpose.''

In the 1989 Lowrance Memo, the issue of effectiveness was addressed by the following questions: ''Is much more of the secondary material used as compared with the analogous raw material/product it replaces?''; ''Is only a nominal amount used?''; and ''Is the secondary material as effective as the raw material or product it replaces?'' The memo also addressed the value of the secondary material by asking, ''Is [the secondary material] listed in industry news letters, trade journals, etc.?'' and ''Does the secondary material have economic value comparable to the raw material that normally enters the process?''

Factor 1 takes these broad concepts of effectiveness and value and turns them into the requirement that the hazardous secondary material in the process must provide a ''useful contribution'' to the recycling process, that is, it must actually be adding something to the process into which they are being put. The factor provides more specifics than the Memo or preamble by providing a list of ways that a hazardous secondary material could provide that useful contribution to the process. EPA requested comment on other ways in which a hazardous secondary material might provide a useful contribution, but did not receive any from commenters.

Factor 2—The Recycling Process Produces a Valuable Product or Intermediate

Relevant Lowrance Memo Questions

(4) Is there a guaranteed market for the end product?

Is there a contract in place to purchase the ''product'' ostensibly produced from the hazardous secondary materials?

If the type of recycling is reclamation, is the product used by the reclaimer? The generator? Is there a batch tolling agreement? (Note that since reclaimers are normally TSDFs, assuming they store before reclaiming, reclamation facilities present fewer possibilities of systemic abuse).

Is the reclaimed product a recognized commodity?

Are there industry-recognized quality specifications for the product?

Discussion

Factor 2 distills several of the questions posed by the 1989 legitimacy memo. The memo addressed the value of recycled products sold to third parties by posing the questions, ''Is there a guaranteed market for the end product?'' and ''Is there a contract in place to purchase the ''product'' ostensibly produced from the hazardous secondary materials?'' The memo addressed the value of recycled products used by the recycler or the generator as process ingredients by posing the questions, ''Is the product used by the (recycler)? The generator? Is there a batch tolling agreement?'' The ''usefulness'' of a recycled material was addressed by posing the questions, ''Is the (recycled) product a recognized commodity?'' and ''Are there industry-recognized quality specifications for the product?''

The language of the factors in the legitimacy provision in the final rule reflects these concepts in a concrete manner by, for example, making it clear that the indicator of legitimacy is that a recycling process results in a valuable product or intermediate and that the product or intermediate is valuable if it is ''(i) sold to a third party or (ii) used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.''

The Lowrance Memo posed additional questions aimed at distinguishing recycling operations that involve direct use or reuse of secondary materials from recycling operations that involve reclamation. These concepts, however, are not particularly relevant to distinguishing legitimate from sham recycling and are not generally used by implementing agencies in legitimacy analyses, so we therefore did not attempt to capture them in the codified regulatory text.

Factor 3—Managed as a Valuable Commodity

Relevant Lowrance Memo Questions

(5) Is the secondary material handled in a manner consistent with the raw material/product it replaces?

Is the secondary material stored in a similar manner as the analogous raw material (*i.e.*, to prevent loss?)

Are adequate records regarding the recycling transactions kept?

Do the companies involved have a history of mismanagement of hazardous wastes?

Discussion

Although worded somewhat differently, this factor is essentially the same as the fifth question in the Lowrance Memo. Similarly, the 1985 preamble asked whether recyclable hazardous secondary materials were ''handled in a manner consistent with their use as raw materials or commercial product substitutes.''

In one respect, however, Factor 3 is less restrictive than the Lowrance Memo—the memo posed an additional question, ''Is the secondary material stored on the land?'' This could be read as implying that storage on the land is an indication of sham recycling. Of course, this question is just one of the more than two dozen questions from the Lowrance memo, that, when taken as a whole, help draw the distinction between legitimate recycling and sham recycling. Also, the Agency is aware of situations where storage of raw materials on the land is a normal part of the manufacturing process. Thus, Factor 3 does not identify land storage as a specific indicator of sham recycling.

Factor 4—The Product Does Not Contain Significant TARs

Relevant Lowrance Memo Questions

(1) Is the secondary material similar to an analogous raw material or product?

Does it contain Appendix VIII constituents not found in the analogous raw material/product (or at higher levels)?

Does it exhibit hazardous characteristics that the analogous raw material/product would not?

Does it contain levels of recoverable material similar to the analogous raw material/product?

(6) Other Relevant Factors

Are the toxic constituents actually necessary (or of sufficient use) to the product or are they just ''along for the ride''?

Discussion

The Lowrance Memo and the definition of solid waste preamble statements from which it was developed have addressed the question of ''toxics along for the ride'' in a slightly different way than the factor in the final rule. The Lowrance Memo, for example, allows for examination of toxic constituents in the hazardous secondary material destined for recycling and/or in the recycled product. As noted above, Factor 4 is intended to primarily address the question of ''toxics along for the ride'' in the products of recycling. We believe that the presence of toxic constituents in recyclable hazardous secondary materials is less relevant to assessing the legitimacy of recycling, primarily because much if not most recycling (as well as manufacturing) involves removing or destroying such harmful materials. As reflected in the factor, the central question is whether or not (and in what amount) hazardous constituents pass through the recycling process and become incorporated into the products of recycling. While some may argue that the approach of focusing on toxic constituents in recycled products may be somewhat less restrictive than the policy it would replace, we believe it is a better indicator of legitimate recycling. In cases where a recycler would prefer to compare the virgin feedstock to the hazardous secondary material going into the process, the rule makes it clear that this would be an adequate stand-in for the comparison described in the regulatory text.

Lowrance Memo Questions Not Covered in Factors

A few of the questions from the Lowrance Memo are not covered by the factors in the regulatory text for the legitimacy provision in § 260.43. The above discussions address why EPA believes this is appropriate. In the case of the role economics can play in a legitimacy determination, this preamble has discussed how it can inform an overall legitimacy determination, but there is no particular factor on economics.

Relevant Lowrance Memo Questions

(2) What degree of processing is required to produce a finished product?

Can the secondary material be fed directly into the process (*i.e.*, direct use) or is reclamation (or pretreatment) required?

How much value does final reclamation add?

Is the secondary material stored on the land? (a sub-question of (5) Is the secondary material handled in a manner consistent with the raw material/product it replaces?)

(6) Other Relevant Factors

What are the economics of the recycling process? Does most of the revenue come from charging generators for managing their wastes or from the sale of the product?

For the reasons outlined above, EPA believes that the legitimacy factors in 260.43 are equivalent to the existing legitimacy policy that applies to all recycling.

X. Non-Waste Determination Process

A. What Is the Purpose of This Provision?

The purpose of the non-waste determination process is to provide persons with an administrative procedure for receiving a formal determination that their hazardous secondary materials are not discarded and, therefore, are not solid wastes when recycled. This process is available in addition to the solid waste exclusions in today's rule. Once a non-waste determination has been granted, the hazardous secondary material is not subject to the limitations and conditions discussed elsewhere in today's rule (*e.g.*, prohibition on speculative accumulation, storage standard, or, for the transfer-based exclusion, recordkeeping, reasonable efforts, financial assurance, and export notice and consent); however, the regulatory authority may specify that a hazardous secondary material meet certain conditions and limitations as part of the non-waste determination.

The non-waste determination process is voluntary. Facilities may choose to continue to use the self-implementing portions of any applicable waste exclusions and, for the vast majority of cases, where the regulatory status of the hazardous secondary material is evident, self-implementation will still be the most appropriate approach. In addition, facilities may continue to contact EPA or the authorized state to ask for informal assistance in making these types of non-waste determinations. However, for cases where there is ambiguity about whether a hazardous secondary material is a solid waste, today's formal process can provide regulatory certainty for both the facility and the implementing agency.

EPA is finalizing two types of non-waste determinations: [12] (1) A determination for hazardous secondary materials reclaimed in a continuous industrial process; and (2) a determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate. The process for applying for a non-waste determination is found at 40 CFR 260.34.

The Agency confirms today's process for non-waste determinations is not intended to affect any existing exclusion under 40 CFR 261.4. The process is also not intended to affect any variance already granted under 40 CFR 260.30 or other EPA or authorized state determination. In other words, generators or reclaimers operating under an existing exclusion, variance, or other EPA, or authorized state, determination do not need to apply for a formal non-waste determination under today's rule. This process also does not affect the authority of EPA or an authorized state to revisit past determinations according to appropriate procedures, if they so choose.

B. Scope and Applicability

Hazardous secondary materials presented for a non-waste determination must be legitimately recycled and, therefore, must meet the legitimacy factors under 40 CFR 260.43 of today's rule. For further discussion of legitimacy and the factors to be considered, see section IX of today's preamble.

In addition, today's rule limits non-waste determinations to reclamation activities and does not apply to recycling of ''inherently waste-like'' materials (40 CFR 261.2(d)); recycling of materials that are ''used in a manner constituting disposal,'' or ''used to produce products that are applied to or placed on the land'' (40 CFR 261.2(c)(1)); or for ''burning of materials for energy recovery'' or materials ''used to produce a fuel or otherwise contained in fuels'' (40 CFR 261.2(c)(2)). Today's rule does not affect how these recycling practices are regulated.

C. Types of Non-Waste Determinations

1. Non-Waste Determination for Hazardous Secondary Materials Reclaimed in a Continuous Industrial Process

As discussed earlier in today's preamble, previous court decisions have indicated that hazardous secondary

[12] In the March 2007 supplemental proposal, EPA also proposed (but is not finalizing) a third type of non-waste determination for hazardous secondary materials reclaimed under the control of the generator via a tolling arrangement or similar contractual arrangement. EPA, however, did not identify any comments that described specific types of contractual arrangements that would meet the proposed criteria for this non-waste determination. See section XIX for more information.

materials that are reclaimed in a continuous industrial process are not discarded and, therefore, not a solid waste. EPA believes, in most instances, hazardous secondary materials reclaimed in a continuous process would be excluded under today's self-implementing exclusions. However, production processes can vary widely from industry to industry and it is possible that the regulatory status of certain materials may be unclear under a self-implementing exclusion (including those exclusions finalized today). Thus, to determine whether individual hazardous secondary materials are reclaimed in a continuous industrial process, and, therefore, not a solid waste, EPA has developed the non-waste determination process to evaluate case-specific fact patterns.

EPA is finalizing four criteria for making the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process. The first is the extent that the management of the hazardous secondary material is part of the continuous production process and is not waste treatment. At one end of the spectrum, if the hazardous secondary material is handled in a manner identical to virgin feedstock, then it would appear to be fully integrated into the production process. At the other end of the spectrum, hazardous secondary materials that are indisputably discarded prior to being reclaimed are not a part of the continuous primary production process, (''*AMC II*''), 907 F. 2d 1179 (DC Cir. 1990) (listed wastes managed in units that are part of wastewater treatment units are discarded materials (and solid wastes), especially where it is not clear that the industry actually reuses the materials). For cases that lie within the spectrum, persons applying for a non-waste determination need to provide sufficient information about the production process to demonstrate that the management of the hazardous secondary material is an integral part of the production process and is not waste treatment. It is important to note that this non-waste determination is not necessarily limited to cases under the control of the generator. For example, hazardous secondary materials that are hard piped from one facility to another facility that is under separate control would appear to be fully integrated into the production process and may therefore be eligible for this non-waste determination, provided the other criteria are met.

The second criterion examined under this non-waste determination is the capacity of the production process to use the hazardous secondary material in a reasonable time frame and ensure that it will not be abandoned. This criterion can be satisfied by a consideration of past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements. Abandonment of stockpiled hazardous secondary materials is one way that discard can occur at recycling operations and is one of the major causes of environmental problems. As indicated in the recycling studies, 69 of the 208 incidents of environmental damage involve abandonment of the hazardous secondary materials as the primary cause of damage. For today's self-implementing exclusions for hazardous secondary materials, EPA is using speculative accumulation (as defined in 40 CFR 261.1(c)(8)) as the method for determining when a hazardous secondary material is discarded by abandonment. For the non-waste determination, a person does not need to demonstrate that the hazardous secondary material meets the speculative accumulation limits per 40 CFR 261.1(c)(8), but he must provide sufficient information about the hazardous secondary material and the process to demonstrate that the hazardous secondary material will in fact be reclaimed in a reasonable time frame and will not be abandoned. EPA is not explicitly defining ''reasonable time frame'' because such time frames could vary according to the hazardous secondary material and industry involved and, therefore, determining this time frame should be made on a case-specific basis. However, a person may still choose to use the speculative accumulation time frame as a default.

The third criterion for this non-waste determination is whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, land, or water at significantly higher concentrations from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process. To the extent that the hazardous constituents are an extension of the original hazardous secondary material, their release to the environment is an indicator of discard. The Agency recognizes that normal production processes may also result in a certain level of releases and, in evaluating this criteria, would not deny a non-waste determination if the increase in releases is not significantly different from either a statistical or risk perspective. However, when unacceptably high levels of the hazardous constituents in the hazardous secondary material are released to the environment rather than reclaimed, then that material (or at least the portion of the material that is of most concern) is not in fact being ''reclaimed in a continuous industrial process.''

The fourth and final criterion for this non-waste determination includes any other relevant factors that demonstrate the hazardous secondary material is not discarded. This catch-all criterion is intended to allow the person to provide any case-specific information deemed important and relevant in making the case that the hazardous secondary material is not discarded and, therefore, not a solid waste.

2. Non-Waste Determination for Hazardous Secondary Materials Indistinguishable in All Relevant Aspects From a Product or Intermediate

Although the courts have indicated that hazardous secondary materials recycled within a continuous industrial process are not discarded and, therefore, are not solid wastes, they have also said that hazardous secondary materials destined for recycling in another industry are not automatically discarded. However, there may be some situations where the regulatory status of a certain material is unclear under a self-implementing exclusion and thus may benefit from a non-waste determination that evaluates case-specific fact patterns. EPA is finalizing five criteria for making a non-waste determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate.

The first criterion for this non-waste determination is consideration of likely markets for the hazardous secondary material (e.g., based on the current positive value of the hazardous secondary material, stability of demand, and any contractual arrangements). This evaluation of market participation is a key element for determining whether companies view these hazardous secondary materials like products rather than negatively-valued wastes. EPA's market forces study on how market incentives affect the management of hazardous secondary materials indicates that both high value and stable markets are strong incentives to refrain from over-accumulating hazardous secondary materials, thus maximizing the likelihood that the hazardous secondary materials will be reclaimed and not abandoned.

The second criterion for this non-waste determination is the chemical and physical identity of the hazardous secondary material and whether it is comparable to commercial products or

intermediates. This ''identity principle'' is a second key factor that the Court in Safe Foods found useful in determining whether a material is indistinguishable from a product. It is important to note that the identity of a material can be comparable to a product without being identical. However, to qualify for a non-waste determination, any differences between the hazardous secondary material in question and commercial products or intermediates should not be significant from either a statistical or from a health and environmental risk perspective.

The third criterion for making this non-waste determination is the capacity of the market to use the hazardous secondary material in a reasonable time frame and ensure that it will not be abandoned. Abandonment of stockpiled hazardous secondary materials is one way that discard can occur at recycling operations and is one of the major causes of environmental problems (a key finding from the recycling studies discussed earlier). For today's self-implementing exclusions for hazardous secondary materials, EPA is using speculative accumulation (as defined in 40 CFR 261.1(c)(8)) as the method for determining when a hazardous secondary material is discarded by abandonment. For the non-waste determination, a person does not need to demonstrate that the hazardous secondary material meets the speculative accumulation limits per 40 CFR 261.1(c)(8), but he must provide sufficient information about the hazardous secondary material and the market demand for it to demonstrate that the hazardous secondary material will in fact be reclaimed in a reasonable time frame and will not be abandoned. EPA is not explicitly defining ''reasonable time frame'' because such time frames could vary according to the hazardous secondary material and industry involved, and therefore determining this time frame should be made on a case-specific basis. However, a person may still choose to use the speculative accumulation time frame as a default.

The fourth criterion for this non-waste determination is whether the hazardous constituents in the hazardous secondary materials are reclaimed rather than released to the air, land, or water at significantly higher concentrations from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process. The Agency believes that to the extent that the hazardous constituents are an extension of the original hazardous secondary material, their release to the environment is a possible indicator of discard. The Agency recognizes that normal production processes also result in a certain level of releases and, in evaluating this criteria, would not deny a non-waste determination if the increase in releases is not significant from either a statistical or a health and environmental risk perspective. However, when unacceptably high levels of the hazardous constituents in the hazardous secondary material are released to the environment rather than reclaimed, then that material (or at least the portion of the hazardous secondary material that is of most concern) is not being handled as a commercial product or intermediate.

As with the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process, the fifth and final criterion for this non-waste determination includes any other relevant factors that demonstrate the hazardous secondary material is not discarded. This catch-all criterion is intended to allow the person to provide any case-specific information it deems important and relevant in making the case that its hazardous secondary material is not discarded.

D. Non-Waste Determination Process

The process for the non-waste determination is the same as that for the solid waste variances found in 40 CFR 260.30. In order to obtain a non-waste determination, a facility that manages hazardous secondary materials that would otherwise be regulated under 40 CFR part 261 as either a solid waste or an excluded waste must apply to the Administrator or the authorized state per the procedures described in 40 CFR 260.33, which EPA is amending today to apply to non-waste determinations. The application must address the relevant criteria discussed in detail above. The Administrator will evaluate the submission and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the facility is located. The Administrator will accept comment on the tentative decision for 30 days, and may also hold a public hearing. The Administrator will issue a final decision after receipt of comments and after the hearing (if held). If the application is denied, the facility may still pursue a solid waste variance or exclusion (for example, one of the solid waste variances under 40 CFR 260.30 or solid waste exclusions under 40 CFR 261.4).

After a formal non-waste determination has been granted, if a change occurs that affects how a hazardous secondary material meets the relevant criteria contained in 40 CFR 260.34, persons must re-apply to the Administrator for a formal determination that the hazardous secondary material continues to meet the relevant criteria and is not discarded and not a solid waste.

As discussed in more detail in section XX of today's preamble, under section 3006 of RCRA, EPA would authorize states to administer the non-waste determinations as part of their base RCRA program. Because states are not required to implement federal requirements that are less stringent or narrower in scope than the current requirements, authorized states are not required to adopt the non-waste determination process. Ordinarily this provision could not go into effect in an authorized state until the state chooses to adopt it. However, because the non-waste determination process is a formalization of determinations that states may already perform, states that have not formally adopted this non-waste determination process may participate if the following conditions are met: (1) The state determines that the hazardous secondary material meets the criteria in either paragraph (b) or (c) of 40 CFR 260.34; (2) the state requests EPA to review its determination; and (3) EPA approves the state determination. In addition, of course, states may continue to make regulatory determinations under their authorized state regulations, as they do now.

E. Enforcement

If a regulatory authority determines that a hazardous secondary material is not a solid waste through the non-waste determination process, the hazardous secondary material is not subject to the RCRA Subtitle C hazardous waste requirements. However, as part of this process, the applicant has an obligation to submit, to the best of his ability, complete and accurate information. If the information in the application is found to be incomplete or inaccurate and, as a result, the hazardous secondary material does not meet the criteria for a non-waste determination, then the material may be subject to the RCRA Subtitle C requirements and EPA or the authorized state could choose to bring an enforcement action under RCRA section 3008(a). Moreover, if the person submitting the non-waste determination is found to have knowingly submitted false information, then he also may be subject to criminal penalties under RCRA section 3008(d).

Once a non-waste determination has been granted, the applicant is obligated

to ensure the hazardous secondary material continues to meet the criteria of the non-waste determination, including any conditions specified therein by the regulatory authority. If a change occurs that affects how a hazardous secondary material meets the relevant criteria and (if applicable) any conditions as specified by the regulatory authority and the applicant fails to re-apply to the Administrator for a formal determination, the hazardous secondary material may be determined to be a solid and hazardous waste and subject to the RCRA Subtitle C hazardous waste requirements.

XI. Effect on Other Exclusions

The final rule will not supersede any of the current exclusions or other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports. If a hazardous secondary material has been determined not to be a solid waste, for whatever reason, such a determination will remain in effect, unless the regulatory agency decides to revisit the regulatory determination under their current authority. In addition, if a hazardous secondary material has been excluded from hazardous waste regulations—for example, under the Bevill exclusion in 40 CFR 261.4(b)(7)—the regulatory status of that material will not be affected by today's rule.

In the October 2003 proposal, EPA proposed a number of specific ''conforming changes'' to existing exclusions (68 FR 61578–61580). The purpose of these conforming changes was to simplify and clarify the regulations. EPA did not intend to make any substantive changes as to how currently excluded materials would need to be managed or regulated. However, comments to the proposed changes were overwhelming in favor of retaining the existing exclusions. These existing exclusions are familiar to both the states and the regulated community, and making wholesale adjustments, it appears, would have had unintended consequences in many cases.

Thus, in the March 2007 supplemental proposal, we proposed to retain the existing exclusions exactly as written (72 FR 14205). In addition, recycling of such hazardous secondary materials at new facilities, or at existing facilities that are not currently operating under the terms of an existing exclusion, would also be subject to the existing applicable regulatory exclusions, rather than the proposed exclusions.

We did request comment, however, on the option of allowing a regulated entity to choose which exclusion it is subject to in those cases where more than one exclusion could apply and, if so, whether that entity should be required to document the choice made. One state supported allowing a regulated entity to choose if that entity documents its choice and the few comments that were submitted by industry on this matter, generally, preferred to have the option to choose which exclusion they would be subject to. EPA has determined, however, that the conditions that were developed for the existing exclusions were found to be necessary under case-specific rulemakings that determined when the hazardous secondary material in question is not a solid waste. For example, broken cathode ray tubes must be transported in closed containers (40 CFR 261.4(a)(22)) and shredded circuit boards need to be free of mercury switches and relays (40 CFR 261.4(a)(14)).

Therefore, the final rule requires that hazardous secondary materials specifically subject to the existing exclusions must continue to meet the existing conditions or requirements in order to be excluded from the definition of solid waste. Moreover, industry and the states are familiar with these requirements and EPA believes that changing them would only lead to confusion in the regulated community. In addition, the current exclusions would apply to facilities not currently operating under terms of an existing exclusion. They would also be subject to the conditions for that exclusion if they decide to recycle the particular excluded wastes in the future.

In the March 2007 supplemental proposal, we also requested comment on whether any specific regulatory exclusion would need revision in order to avoid confusion or contradictions. With a few exceptions, public comments did not discuss this issue in depth. Only three states commented on this issue. One supported the requirement that currently-excluded facilities must stay under their specific exclusions and two requested clarifications on how such a requirement would be implemented. Industry, in a few cases, had specific comments on the provisions already in place.

One commenter asked that EPA clarify that wood preserving waste be allowed to be reclaimed off-site under the new exclusion. This would be an expansion of the existing exclusion, which is limited to on-site reuse. Another comment was in regards to whether hazardous secondary materials currently regulated under the closed-loop exclusion would be eligible for the new exclusions that do not require closed-loop operations. The third comment, from both reclaimers of spent lead-acid batteries and spent lead-acid battery manufacturers requested that EPA clarify that spent lead-acid battery recycling continue to be regulated under 40 CFR 266.80 or as a universal waste at 40 CFR part 273. The mining industry requested that EPA clarify that the proposed exclusions would have ''no impact'' on 40 CFR 266.70 (precious metals exclusion) and 40 CFR 266.100(d) and (g) (conditional exclusions from boiler and industrial furnace (BIF) regulations for ''smelting, melting, and refining furnaces'' and precious metals recovery furnaces).

A. Solid Waste Exclusions Found in 40 CFR 261.4(a)

Under today's final rule, if a hazardous secondary material is subject to material-specific management conditions under 40 CFR 261.4(a) when reclaimed, such a material is not eligible for the final rule exclusions. For most of the exclusions in 40 CFR 261.4(a), this provision will have no practical effect because the current exclusion either (1) has no conditions, (2) has conditions that overlap with those of the final rule exclusions (i.e., no speculative accumulation, or land disposal),[13] (3) does not involve reclamation, or (4) involves hazardous secondary materials burned for energy recovery or used in a manner constituting disposal. These include the exclusions in 40 CFR 261.4(a)(1)–(7), 40 CFR 261.4(a)(10)–(13), 40 CFR 261.4(a)(15)–(16), 40 CFR 261.4(a)(18), and 40 CFR 261.4(a)(20)–(21).

The exclusions in 40 CFR 261.4(a) that are for a specific material and include conditions that are more specific than those included for the exclusions being finalized today are those for (1) spent wood preserving solutions (40 CFR 261.4(a)(9)), (2) shredded circuit boards (40 CFR 261.4(a)(14)), (3) mineral processing spent materials (40 CFR 261.4(a)(17)), (4) spent caustic solutions from petroleum refining liquid treating processes (40 CFR 261.4(a)(19)), and (5) cathode ray tubes (40 CFR 261.4(a)(22)). For each of these cases, EPA has made a material-specific determination of

[13] ''Disposal'' is defined in 40 CFR 260.10 as ''the discharge, deposit, injection, dumping, spilling leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.'' Thus a hazardous secondary material that is land disposed would presumably not meet the ''contained'' standard.

when such a material is not discarded and therefore not a solid waste and such a determination is more appropriately applied to these materials than the general conditions of today's final rule. The conditions of the material-specific exclusion essentially help define when that material is legitimately recycled and not discarded.

However, in the case of the spent wood preserving exclusion (40 CFR 261.4(a)(9)), EPA agrees with the comments that this exclusion is limited to on-site recycling. Thus, if managed on-site, these materials would need to comply with the existing conditions to be eligible for an exclusion from the definition of solid waste. However, since the current exclusion does not apply to hazardous secondary materials sent off-site, and the substance of the exclusion (i.e., drip pad requirements) applies to a management method not applicable to off-site transfers, the new exclusion in today's rule would apply to hazardous secondary materials that are sent off-site for reclamation. Thus, if sent off-site for legitimate reclamation, these materials could be eligible for today's exclusion if the restrictions and/or the conditions are met.

Finally, the closed-loop exclusion 40 CFR 261.4(a)(8) is not specific to a material, but rather identifies a recycling process. EPA agrees with comments stating that hazardous secondary materials recycled via the closed-loop exclusion at 40 CFR 261.4(a)(8) could be recycled under a different process and still be eligible for today's exclusions. The closed-loop exclusion is based on the premise that hazardous secondary materials reclaimed in a continuous process within an industry are not discarded and, therefore, are not solid wastes subject to EPA's RCRA jurisdiction (See AMC I.) In fact, closed loop recycling is a subset of materials reclaimed in a continuous industrial process, since materials may be reclaimed in a continuous process outside of a closed loop system. EPA did not make a finding that any particular hazardous secondary material must be reclaimed in a continuous process. The Agency only determined that closed-loop recycling, in general, should be excluded. Today's exclusions, however, allow any hazardous secondary materials to be excluded if reclamation meets the restrictions and/or conditions set forth in the rules. Thus, a facility currently engaged in closed-loop recycling could change their processes and still be excluded, as long as all applicable restrictions and/or conditions are met.

In addition to the solid waste exclusions currently in 40 CFR 261.4(a), EPA is planning to propose—in a separate rulemaking from today's final rule—to amend its hazardous waste regulations to conditionally exclude from the definition of solid waste spent hydrotreating and hydrorefining catalysts generated in the petroleum refining industry when these hazardous secondary materials are reclaimed (*see* entry in the *Introduction to the Fall 2007 Regulatory Plan*, 72 FR 69940, December 10, 2007). Spent hydrotreating and hydrorefining catalysts generated in the petroleum refining industry are routinely recycled by regenerating the catalyst so that it may be used again as a catalyst. When regeneration is no longer possible, these spent catalysts are either treated and disposed of as listed hazardous wastes or sent to RCRA-permitted reclamation facilities, where metals, such as vanadium, molybdenum, cobalt, and nickel are reclaimed from the spent catalysts.

EPA originally added spent hydrotreating and hydrorefining catalysts (waste codes K171 and K172) to the list of RCRA hazardous wastes found in 40 CFR 261.31 on the basis of toxicity (i.e., these materials were shown to pose unacceptable risk to human health and the environment when mismanaged) (63 FR 42110, August 6, 1998). In addition, EPA based its decision to list these materials as hazardous due to the fact that these spent catalysts can at times exhibit pyrophoric or self-heating properties.

It is largely because of these pyrophoric properties that EPA is considering a separate proposal to conditionally exempt these catalysts from hazardous waste regulation. This future proposal will allow the agency to consider and seek comment on specific conditions to address the pyrophoric properties of these hazardous secondary materials, particularly during transportation and storage prior to reclamation, in order for the Agency to determine that they are not being discarded. As a result of this separate effort, these spent catalysts will not be eligible for today's exclusions. Once EPA has proposed a conditional exclusion specifically for these spent catalysts, and after consideration of public comments, EPA will either finalize a conditional exclusion specific to these spent catalysts or may decide that the conditions being promulgated in today's final rule are fully adequate for the management of these spent catalysts when recycled, and therefore would remove the restriction preventing these spent catalysts from being eligible for today's exclusions.

B. Spent Lead-Acid Battery Recycling and Precious Metals Reclamation

EPA also agrees that spent lead-acid battery recycling should continue to be regulated under 40 CFR 266.80 or 40 CFR part 273. This is because these regulations are actually hazardous waste regulations and are not solid waste exclusions. Continuing the regulation of spent lead-acid battery (SLAB) recycling as hazardous waste is necessary due to the unique nature of these batteries. Also, as noted by the commenters, the current battery recycling regulations are working well. More than 95% of SLABs are currently recycled and generators of SLABs are exempt from Superfund liability under the Superfund Recycling Equity Act (SREA), provided that they meet the requirements of the exemption, including the requirement to take ''reasonable care'' to determine that the accepting facility is in compliance with the substantive environmental regulations.

Because SREA was based on the current SLAB hazardous waste regulations under RCRA, changing the regulation of SLABs could have unintended consequences. For example, the current regulations prohibit battery-breaking without a permit because such battery-breaking operations have been high-risk activities. In addition, as noted in the environmental problems study, 12% of our damage cases were from battery-breaking operations. Moreover, the high value of the lead plates and low entry cost for a battery-breaking facility provides a strong market incentive for facilities to recycle without investing in adequate management systems for the discarded battery acid and casings.

In addition, because the RCRA-regulated ''generator'' of a SLAB is often the garage or junkyard that removed the battery from the automobile (rather than the original owner who discarded the battery), the generator-controlled exclusion could be read to apply to these operations. Therefore, the reasonable efforts and financial assurance conditions that are a part of the transfer-based exclusion would not apply, despite the fact that their activities would resemble waste management rather than production. Because, in these cases, the SLABs have effectively already been discarded by the original owners before they enter the RCRA hazardous waste regulatory system, EPA will continue to regulate SLABs as solid and hazardous waste under 40 CFR 266.80 or 40 CFR part 273.

EPA also agrees with comments that the exclusions should have no impact on 40 CFR 266.70 (precious metals

exclusion) and 40 CFR 266.100(d) and (g) (conditional exclusions from the boiler and industrial furnace (BIF) regulations for ''smelting, melting, and refining furnaces'' and precious metals recovery furnaces). Because these exclusions are exclusions from certain hazardous waste regulations, not solid waste exclusions, as a general matter, EPA believes that facilities should have a choice of whether they manage their materials as hazardous waste under these exclusions or seek an exclusion from the definition of solid waste through today's final rule.

However, part of what 40 CFR 266.100(d) accomplishes is to define when an operation involving burning is solely a metals recovery operation rather than a burning for energy recovery or destruction operation, neither of which is eligible for today's exclusions. This distinction is an important one to make, and EPA did not intend to revise how such material recovery operations were identified, nor did EPA ask for comment on such a revision.

Thus, for the purpose of defining the type of burning for metals recovery to be allowed under these exclusions, EPA will reference the requirements in 40 CFR part 266 subpart H that defines when a ''smelting, melting, and refining'' furnace is solely engaged in metals recovery, but will not require the other conditions that are not related to distinguishing legitimate materials recovery from burning. Therefore, under today's final rule, hazardous secondary materials burned for metals recovery would still be required to meet the minimum metals and maximum toxic organic metals content specified in 40 CFR part 266 (as part of the definition of this activity), and would continue to be exempt from BIF permits, but they would not be subject to hazardous waste manifests and storage permits, as long as the conditions of the exclusions promulgated in today's rule are met.

C. Other Recycling Exclusions

For other hazardous secondary materials currently eligible for management under other exclusions or alternative regulatory structures that do not include an exclusion from the definition of solid waste (such as the universal waste regulations in 40 CFR part 273), the facility would have the choice of either continuing to manage the hazardous secondary material as a hazardous waste under the existing regulations or under today's exclusions from the definition of solid waste.

In addition, it should be noted that, for the purposes of § 261.2(a)(2)(ii) and § 261.4(a)(2)(23), when a facility collects hazardous secondary materials from other persons (for example, when mercury-containing equipment is collected through a special collection program), it is not the hazardous secondary material generator. Therefore, a universal waste handler who collects hazardous secondary materials from other persons would not be eligible for the generator-controlled exclusion, even if it would be considered a ''generator'' for purposes of the Universal Waste regulations.

XII. Effect on Permitted and Interim Status Facilities

A. Permitted Facilities

Facilities that currently have RCRA permits or interim status and manage hazardous wastes that are excluded under today's final rule will be affected in a number of ways, depending on the situation at the facility. At some facilities, some of the hazardous waste management units will be converted solely to manage excluded hazardous secondary materials, and other units may continue to manage hazardous wastes. At other facilities, all of the hazardous waste management units will be converted to manage wastes excluded under today's final rule. In still other cases, individual units may manage both excluded materials and hazardous wastes. In all cases, the owner or operator of the facility must comply with the applicable conditions and limitations of the exclusion (including the containment of the hazardous secondary material in units operating under the exclusion, recycling legitimately, and the prohibition against speculative accumulation of excluded hazardous secondary materials) to maintain the exclusion.

Permitted facilities that continue to manage hazardous wastes in addition to managing hazardous secondary materials excluded under this final rule must continue to maintain their Part B permits. Individual units may be converted solely to manage excluded hazardous secondary materials; however, the permit requirements applicable to the newly excluded units will remain in effect until they are removed from the permit. Owners and operators that seek to remove permit conditions applicable to units that are no longer hazardous waste management units must submit a permit modification request to the implementing agency. In the March 26, 2007, supplemental proposed rule, the Agency requested comment on requiring owners and operators seeking to modify their permits to remove units that are no longer regulated to follow the procedures of 40 CFR 270.42(a) for Class 1 permit modifications, with prior Agency approval. The Agency received few comments on this issue, and is proceeding in this final rule with the proposed approach. Thus, this final rule modifies 40 CFR 270.42 by adding an entry to Appendix 1 that classifies permit modifications to remove units that are no longer regulated as a result of this rule as Class 1 with prior Agency approval.

As was discussed in the preamble of the March 26, 2007, supplemental proposal, under the Class 1 with prior Agency approval approach, the owner or operator must submit notification of the permit modification to the implementing agency, along with documentation demonstrating that the operations at the unit meet the conditions of the exclusion and that the unit is used solely to manage excluded hazardous secondary materials. In addition, the owner or operator must comply with the requirements of 40 CFR 270.42(a)(ii) for public notification. Under § 270.42(a)(ii), the permit modification will not become effective until the owner or operator receives written approval by the implementing agency. The implementing agency will approve the permit modification so long as the owner or operator has complied with the procedural requirements of § 270.42(a) and has demonstrated that the operations meet the conditions of the exclusion, and that the unit does not manage non-excluded hazardous wastes.

One commenter disagreed with the Agency's approach, and believed that the Class 2 permit modification procedures were necessary to provide the public an opportunity to comment on the removal of the unit from the permit. The Agency disagrees with this commenter. The regulations that govern permit modification classify modifications to the permit term, to allow for earlier permit termination, as Class 1 with prior Agency approval. The Agency believes that removing permit conditions for units that are no longer regulated is, in effect, allowing earlier permit termination at those units. Thus, the Agency believes that Class 1 with prior Agency approval is the appropriate designation for these permit modifications.

In the preamble of the March 26, 2007, supplemental proposal, the Agency discussed the issue of whether closure requirements at formerly regulated units would be triggered when this rule becomes effective and the hazardous secondary materials they are receiving is no longer hazardous waste. This issue was also discussed in the October 2003 proposal, in which EPA

expressed the view that requiring closure of units in these situations would serve little environmental purpose, since after closure the unit would be immediately reopened and used to store the same (now excluded) hazardous secondary material (68 FR 61580–61581).

In today's final rule, a permitted unit that is converted solely to manage excluded hazardous secondary materials will not be subject to the 40 CFR part 264 closure requirements, since, typically, it will be managing the same material, with the only difference being that the material is now excluded from regulation as a hazardous waste. However, we expect that any funds in the closure or post-closure financial assurance mechanisms will be converted to provide financial assurance under today's exclusion, assuming the facility is operating under the transfer-based exclusion. In addition, as described in sections VII.D. and VIII.D of this preamble, at the end of the operating life of these units, all owners and operators (i.e., of units operating under either exclusion promulgated in this final rule) must manage any hazardous secondary materials that are not recycled, and remove or decontaminate all hazardous residues and contaminated containment system components, equipment structures, and soils.

A permitted facility that converts to manage only hazardous secondary materials excluded under this final rule, and is, therefore, no longer a hazardous waste management facility, will no longer be required to maintain a hazardous waste operating permit (although, as discussed below, may still be subject to corrective action).[14] However, permits issued to these facilities remain in effect until they are terminated.

In the March 2007 supplemental proposal, the Agency also requested comment on requiring owners and operators seeking to terminate their operating permits (as opposed to just removing units from their permit) by modifying the permit term to follow the procedures of 40 CFR 270.42(a) for Class 1 permit modifications, with prior Agency approval. The Agency received few comments on this issue, and is proceeding in this final rule with the proposed approach. Thus, this final rule modifies § 270.42 by adding an entry to Appendix 1 that classifies permit modifications to terminate operating permits by modifying the permit term, at facilities at which all units are excluded as a result of this final rule, as Class 1 with prior Agency approval. Under this approach, owners and operators seeking to terminate their operating permits must submit a permit modification request to the overseeing agency following the procedures of § 270.42(a) for Class 1 modifications with prior Agency approval, as described above.[15]

To support a request for permit termination by modifying the permit term, the owner or operator must demonstrate that the operations meet the conditions of the exclusion, and that the facility does not manage non-excluded hazardous wastes.

In addition, as was explained in the October 28, 2003, proposal (*see* 68 FR 61580) and again in the March 26, 2007, supplemental proposal (72 FR 14206), the obligation of 40 CFR 264.101 to address facility-wide corrective action at permitted facilities, is not affected by this final rule, and remains in effect.[16] Therefore, an owner or operator of a facility that manages only hazardous secondary materials excluded under this final rule, who seeks to terminate the facility's permit by modifying the permit term, must demonstrate as part of the permit modification request that the corrective action obligations at the facility have been addressed or where corrective action obligations remain, that continuation of the permit is not necessary to assure that they will be addressed. The Agency's corrective action authority at such facilities is not affected by this rulemaking and the Agency thus retains its authority to address corrective action at such facilities using all authorities applicable prior to this rulemaking.

At some facilities, corrective action obligations will likely continue to be addressed through the corrective action provisions of the permit. In these cases, maintenance of the permit would ensure that facility-wide corrective action will be addressed. Thus, in these cases, the permit would not be terminated by modifying the permit term, but would be modified to remove the provisions that applied to the now-excluded hazardous secondary material. The facility's permit would, thereafter, only address corrective action.

In other cases, however, EPA or an authorized state may have available an alternative federal or state enforcement mechanism or other federal or state cleanup authority, through which it could choose to address the facility's cleanup obligations, rather than continue to pursue corrective action under a permit. In these cases, where the alternate authority would ensure that facility-wide corrective action will be addressed, maintenance of the permit would not be necessary.

B. Interim Status Facilities

A facility that is operating under interim status will be affected by this final rule in much the same way as is a permitted facility and the issue of corrective action will be addressed in a similar manner. At an interim status facility that converts to managing only hazardous secondary materials that become excluded under this final rule, the part 265 interim status standards that applied to the hazardous waste management units at the facility, as well as the general facility standards in part 265, will no longer apply. At the same time, the Agency's authority to address corrective action at the facility is not affected by this final rule, and the owner or operator retains responsibility for unaddressed corrective action obligations at the facility.

C. Releases From Excluded Units at Interim Status or Permitted Facilities

Commenters on the October 28, 2003, proposal stated that one of the main purposes of the RCRA Subtitle C closure requirements is to identify and remediate any releases originating from the units. In response, the Agency noted in the March 26, 2007, supplemental proposal that releases from these units are discarded solid wastes and, therefore, potentially hazardous wastes, and agreed with the commenter's concern that such releases should be addressed. The Agency suggested in that preamble that the specific Subtitle C closure requirements may not be the most appropriate means of addressing cleanup of releases from these units, if any have occurred. Rather, the Agency suggested that a better approach to address historical releases from these

[14] Again, the owner/operator of the facility must comply with the applicable conditions and limitations of the exclusion (including the containment of the hazardous secondary material in the unit, legitimate recycling, and the prohibition against speculative accumulation) to maintain the exclusion.

[15] The commenter discussed above who disagreed with the Agency's approach for permit modifications to remove units that are no longer regulated, also believed that Class 2 permit modification procedures were necessary to provide the public an opportunity to comment on the owner or operator's request to terminate a permit by modifying the permit term. The Agency disagrees with this commenter. As was discussed above, the regulations governing permit modifications classify changes to the expiration date to allow earlier permit termination as Class 1 with prior Agency approval.

[16] Owners and operators of permitted and interim status facilities with corrective action obligations should refer to the Agency's February 25, 2003, guidance entitled ''Final Guidance on Completion of Corrective Action Activities at RCRA Facilities,'' (*see* 68 FR 8757) for a detailed discussion of corrective action completion.

units, as well as any future releases, would be as part of corrective action for all releases at the facility—an approach that the Agency believed would achieve the same environmental results and would provide the owner or operator the option of integrating the cleanup more closely into the broader facility response.

Some commenters on the March 26, 2007, supplemental proposal objected to this approach of addressing releases from units that previously managed hazardous wastes and, as a result of today's rule, would subsequently only receive hazardous secondary materials excluded from Subtitle C control. These commenters requested that EPA expressly recognize that units storing or managing hazardous secondary materials excluded as a result of this rule would no longer be regulated as solid waste management units and are not subject to RCRA's corrective action requirements. EPA disagrees with this approach, as we have discussed previously in this section and as discussed below, and continues to believe that the best approach to addressing releases from conditionally excluded units is, generally, to address them as part of corrective action for all releases at the facility.

The Agency discussed the issue of its corrective action authority to address non-SWMU-related releases at RCRA treatment, storage, or disposal facilities in the May 1, 1996, Advance Notice of Proposed rulemaking (*see* 61 FR 19442–3). There, the Agency stated, ''[g]iven the legislative history of RCRA section 3004(u), which emphasizes that RCRA facilities should be adequately cleaned up, in part, to prevent the creation of new Superfund sites, EPA believes that corrective action authorities can be used to address all unacceptable risks to human health and the environment from RCRA facilities. In the permitting context, remediation of non-SWMU related releases may be required under the ''omnibus'' authority * * * In other contexts, orders under RCRA sections 3008(h) or 7003 may require remedial action to address releases regardless of whether a SWMU is present.''

The Agency envisions three scenarios that might apply to units from which releases have occurred. The first will arise in situations where an owner or operator fails to comply with the applicable conditions and limitations of the exclusion, and the unit consequently loses its exemption. In these situations, the unit itself will once again become a hazardous waste management unit, and the unit, as well as materials in the unit, will become subject to all requirements that were applicable prior to this final rule. Not only will corrective action authority be available at such a unit, but the closure requirements of 40 CFR part 264 or 265 will once again apply at the unit as well, and releases from that unit may be addressed through either the corrective action or the closure process.

The second scenario will arise in situations where releases occur at an excluded unit but, based on the site-specific factors, the Agency does not consider the release to be significant and, therefore, the release does not cause the unit to lose its exclusion. Failure on the part of the owner or operator to respond to such releases could be considered an act of illegal disposal. The Agency generally would address these situations by issuing an enforcement action under RCRA section 3008(a), or other applicable authorities, to compel cleanup actions and/or impose penalties. It should be noted that this approach is consistent with the approach taken by the Agency in a July 2002 final rule, in which the Agency excluded hazardous secondary materials used to make zinc fertilizers from the definition of solid waste (*see* ''Zinc Fertilizers Made from Recycled Hazardous Secondary Materials,'' 67 FR 48400, July 24, 2002).

The third scenario will arise in situations where releases from the unit, of either the now excluded hazardous secondary material and/or other hazardous or solid wastes previously managed in the unit, were not addressed prior to the unit obtaining its exclusion. At permitted and interim status facilities, the status of those releases is unaffected by this rulemaking, and the Agency retains its authority to address them under all authorities applicable to them prior to this final rule, including sections 3004(u) and (v), and section 3008(h).

D. Financial Assurance Obtained for Closure at Newly-Excluded Units

The requirements in 40 CFR parts 264 and 265 subpart H, which applied at these units prior to their exclusion under this final rule, provide for the release of financial assurance upon certification by the facility owner or operator that closure has been completed in accordance with the approved closure plan, and after the Agency has verified that certification (*see* 40 CFR 264.143(i) and 265.143(h)).[17]

Under the approach discussed in section VII.D. and VIII.D. of this preamble, hazardous waste management units that convert to managing only hazardous secondary materials that are excluded under this final rule will no longer be subject to the 40 CFR part 264 or part 265 closure requirements. Further, while reclaimers who receive hazardous secondary materials that have been excluded under the new 40 CFR 261.4(a)(24) are required to meet financial assurance requirements,[18] persons who recycle hazardous secondary materials under the exclusions for materials recycled under the control of the generator (§ 261.2(a)(2)(ii) and § 261.4(a)(23)) are not required to meet the financial assurance requirements.

Under the requirements of 40 CFR parts 264 and 265 subpart G, owners and operators of units now eligible for the exclusion of § 261.2(a)(2)(ii) and § 261.4(a)(23) would have been required to remove and decontaminate all contaminated structures, equipment, and soils (*see* § 264.114 and § 265.114). The financial assurance provided under 40 CFR parts 264 and part 265 subpart H was designed to assure that funds would be available for these activities. In the case of generator controlled units, where financial assurance is no longer required, previous releases from the unit, which would have been addressed during closure and for which financial assurance was obtained will, as a result of this rule, now be addressed through corrective action authority. The question raised by the Agency in the March 26, 2007, supplemental proposal was whether funds obtained for closure should, therefore, be directed to corrective action activities at the unit.

Commenters on the March 26, 2007, supplemental proposal generally agreed that funds obtained for closure at units excluded under § 261.2(a)(2)(ii) and § 261.4(a)(23) (under the control of the generator) should be directed to address releases from the unit. The Agency agrees with these commenters, and encourages regulators to work with owners and operators that seek to modify their permits to remove conditions applicable to these units that will operate under the exclusion of § 261.2(a)(2)(ii) and § 261.4(a)(23), to verify that there are no unaddressed releases from the unit. In situations where corrective action is necessary at the unit, the Agency encourages regulators to work with owners and operators to assure that the releases from the unit are addressed promptly.

[17] Similar provisions at 40 CFR 264.145(i) and 265.145(h) provide for release of financial assurance for post-closure care.

[18] See section VIII.C.4 of this preamble for a complete discussion of financial assurance as a condition of the exclusion for this group of facilities.

XIII. Effect on CERCLA

A primary purpose of today's final rule is to encourage the safe, beneficial reclamation of hazardous secondary materials. In 1999, Congress enacted the Superfund Recycling Equity Act (SREA), explicitly defining those hazardous substance recycling activities that may be exempted from liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (CERCLA section 127). Today's final rule does not change the universe of recycling activities that could be exempted from CERCLA liability pursuant to CERCLA section 127. Today's final rule only changes the definition of solid waste for purposes of the RCRA Subtitle C requirements. The final rule also does not limit or otherwise affect EPA's ability to pursue potentially responsible persons under section 107 of CERCLA for releases or threatened releases of hazardous substances.

XIV. Effect on Imports and Exports

The exclusion for hazardous secondary materials generated and reclaimed under the control of the generator is limited to recycling performed in the United States or its territories. However, the exclusion for hazardous secondary materials exported for reclamation and the non-waste determinations included in today's final rule do not place any geographic restrictions on movements of such hazardous secondary materials, provided they meet the conditions of the exclusion or, if stipulated, conditions of the non-waste determination. It is therefore possible that in some cases excluded hazardous secondary materials could be generated in the United States or its territories and subsequently exported for reclamation to a facility in a foreign country. It is also possible that hazardous secondary materials could be generated in a foreign country and imported for reclamation in the United States. Under today's exclusion for hazardous secondary materials exported for reclamation, hazardous secondary materials are only excluded from the definition of solid waste in the U.S. and, thus, may be considered solid and hazardous wastes in the foreign country under that country's laws and regulations. If this is the case, the U.S. facility that exports or imports hazardous secondary materials will also need to comply with any applicable laws and regulatory requirements of the foreign country. For further discussion, see section VIII.C.5. of today's preamble regarding specific export and import conditions for hazardous secondary materials excluded under today's rule.

XV. General Comments on the Proposed Revisions to the Definition of Solid Waste

EPA received hundreds of comments on the October 2003 proposal and the March 2007 supplemental proposal, most of which were quite detailed and raised multiple issues. Below is an overview of some of the major comments on general aspects of the proposals and a summary of EPA's responses to those comments. For a complete discussion of all the comments and EPA's responses to those comments, please see *Revisions to the Definition of Solid Waste Final Rule Response to Comment Document* found in the docket for today's rulemaking.

A. EPA's Legal Authority To Determine Whether a Material Is a Solid Waste

Comments: Legal Authority

EPA received many comments from environmental groups and the waste treatment and recycling industry regarding EPA's authority to define when recyclable hazardous secondary materials are solid wastes and how EPA used this authority in the proposed rulemaking. Some commenters argued that EPA has no authority under the RCRA statute to broadly exclude hazardous secondary materials from the definition of solid waste. These commenters asserted that Congress intended for hazardous secondary materials to be classified as solid wastes even when they are recycled. The commenters argued that the proposed exclusions are contrary to the plain statutory language of RCRA and that EPA may not lawfully exclude pollution control sludges and materials resulting from industrial, commercial, mining, and agricultural operations, according to accepted principles of statutory interpretation. Although the commenters acknowledged that EPA has promulgated such exclusions in the past, and that one such exclusion was recently upheld in court in *Safe Food and Fertilizer* v. *EPA*, they stated that they believed that the DC Circuit erred in *Safe Food*. The commenters argue that, in the fertilizer rule upheld in *Safe Food*, EPA considered impermissible factors (e.g., market participation, management practices, and chemical identity) in defining which materials are not discarded under RCRA, and that the Agency has done so again in the current rulemaking effort.

EPA's Response: Legal Authority

EPA disagrees with comments that state that we have exceeded our authority by the exclusions being finalized today. While EPA clearly has the authority to regulate hazardous secondary materials that are reclaimed under Subtitle C of RCRA when discard is involved, the Agency also believes (and the courts have generally confirmed) that when hazardous secondary materials are reclaimed and such recycling operations do not involve discard, the hazardous secondary materials involved are not solid wastes under RCRA. EPA also has the authority to determine which types of recycling do not involve discard and, therefore, which types of hazardous secondary materials are not solid wastes. As EPA noted in the March 2007 supplemental proposal, ''[u]nder the RCRA Subtitle C definition of solid waste, many existing hazardous secondary materials are not solid wastes and, thus, not subject to RCRA's 'cradle-to-grave' management system if they are recycled. The basic idea behind this construct is that recycling of such materials often closely resembles normal industrial manufacturing, rather than waste management'' (72 FR 14197). Existing exclusions, found in 40 CFR 261.4(a), provide a long historical precedent for EPA's authority to exclude reclaimed materials from the definition of solid waste. EPA refers these commenters to the discussion of case law, above, and asserts that this rule follows valid precedent in the DC Circuit, including the court's opinion in Safe Food.

B. Adequacy of Conditions and Restrictions Used To Determine Whether a Material Is a Solid Waste

Comments: Adequacy of Conditions

Other commenters did not dispute EPA's authority to exclude hazardous secondary materials from the definition of solid waste, but instead argued that before EPA can lawfully claim that excluded materials are not discarded, the Agency would need to strengthen the conditions to protect human health and the environment. For example, one commenter believed that all legitimacy criteria should be mandatory, that performance standards, such as secondary containment are needed for materials stored in tanks and containers, and that EPA should require engineered liner systems and monitoring for materials stored in land-based units.

EPA's Response: Adequacy of Conditions

EPA disagrees that the restrictions we are requiring for the under the control of the generator exclusions or the conditions and restrictions we are requiring for the transfer-based exclusion are inadequate. Each of the restrictions and/or conditions is specifically linked to defining when the hazardous secondary materials are not discarded and to ensuring that the regulatory authority has the information needed to oversee the exclusion. Specifically, for hazardous secondary materials reclaimed under the control of the generator, the fact that the generator maintains control and liability for the hazardous secondary materials, either by managing them on-site, within the same company, or under a specific tolling contract, is itself an indication that the materials are not discarded. The prohibition on speculative accumulation (as defined in 261.1(c)(8)), addresses both the situation in which a large percentage of the hazardous secondary material is accumulated over the year without being recycled and the situation where there is no feasible means of recycling the hazardous secondary material, regardless of volume. Finally, the requirement that the hazardous secondary materials must be contained in the unit recognizes the reality that hazardous secondary materials that are released to the environment are discarded.

For hazardous secondary materials transferred to another party for reclamation, the fact that the generator is required to make reasonable efforts to ensure that its hazardous secondary materials are properly and legitimately reclaimed demonstrates that the generator is not simply disposing of the material, but instead is taking responsibility that the hazardous secondary materials will be recycled. In addition, by maintaining a record of each shipment and a confirmation of receipt, the generator demonstrates that it continues to take responsibility for knowing the ultimate disposition of its hazardous secondary materials. Furthermore, by obtaining financial assurance, the reclamation facility demonstrates that it has also taken on the responsibility to ensure that the hazardous secondary materials will not be abandoned in the event that circumstances make it impossible for the facility to reclaim the hazardous secondary materials. For further discussion of how these and other restrictions and/or conditions of the exclusions are linked to defining when hazardous secondary materials are not discarded, see section V of this preamble, as well as sections VII–IX and sections XVI–XVIII. Support for the Agency's determination regarding which materials are not discarded is also found throughout the rulemaking record in this proceeding.

EPA also disagrees that specifying further engineering conditions, such as secondary containment, liners, and leak detection systems, is needed to determine which hazardous secondary materials are not being discarded. The restrictions EPA has established and the conditions that EPA is finalizing today address a variety of hazardous secondary materials and reclamation operations that are linked to defining the act of discard, rather than specifying a particular technology that may not be appropriate in some cases.

Furthermore, hazardous secondary materials excluded under today's rule may remain subject (or become subject) to requirements under other statutory programs. For example, hazardous secondary material generators, transporters, intermediate facilities and reclaimers may be subject to regulations developed under:

- The Occupational Safety and Health Act of 1970, which requires hazard communication programs, labeling, material safety data sheets (MSDS) and employee information and training (29 CFR part 1910). The Occupational Safety and Health Administration (OSHA) regulations also require emergency response planning and training under their Emergency Response Program to Hazardous Substance Releases (29 CFR 1910.120);
- The Hazardous Materials Transportation Act of 1975 and the subsequent Hazardous Materials Transportation Uniform Safety Act of 1990, which requires hazardous secondary materials meeting DOT's defining criteria for hazard classes and divisions to comply with hazard identification, shipping papers, labeling and placarding, incident reporting and security plans (49 CFR part 107 and parts 171–180);
- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Emergency Planning and Community Right-to-Know Act (EPCRA) and the Superfund Amendments and Reauthorization Act (SARA) of 1986 which, combined, require notification of hazardous substance releases above a reportable quantity, emergency planning and, if applicable, MSDS and inventory reporting (40 CFR 302.6, 40 CFR parts 355 and 370). Hazardous secondary material generators and reclaimers meeting defined criteria are also subject to toxic chemical release reporting (i.e., Toxics Release Inventory (TRI) under EPCRA (40 CFR part 372)).

While not exhaustive, this list provides examples of regulatory programs designed to protect human health and the environment developed under other statutory authorities alongside of RCRA. For more information on these regulatory programs, please see ''Memorandum: Requirements that other Regulatory Programs would place on Generators, Reclaimers and Transporters of Hazardous Secondary Materials'' located in the docket for this rulemaking.

C. EPA's Authority To Regulate Recycling

Comments: EPA's Authority

EPA also received comments from the hazardous waste generating industry disputing EPA's authority to promulgate today's rule. Unlike the environmental groups' and waste treatment and recycling industry's comments, which argued that EPA has no authority to deregulate hazardous secondary materials recycling, many of the generator industry comments asserted that EPA has no authority to regulate such recycling, even to prohibit speculative accumulation or require that the hazardous secondary materials be contained.

While most such commenters applauded EPA's decision in the March 2007 supplemental proposal to explicitly link the proposed exclusions to the concept of defining when hazardous secondary materials are not discarded, many of these comments argued that EPA has over-reached its statutory authority by imposing restrictions or conditions that the commenters argued have no relationship to discard.

Some commenters asserted that limiting the exclusions for hazardous secondary materials reclaimed under the control of the generator and imposing conditions on the exclusion for hazardous secondary materials transferred to a third party for reclamation, EPA has misread the intent of Congress. These comments cite previous court cases, noting the ''analysis of the statute reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned'' (*AMC I,* 824 F2d. at 1190). They go on to argue that materials being recycled do not fall into one of these enumerated activities.

Specifically, many of the comments cite the *ABR* decision (which in turn cites earlier court decisions), where the

court noted that EPA's authority is ''limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away'' and that ''[s]econdary materials destined for recycling are obviously not of that sort. Rather than throwing them away, the producer saves them, rather than abandoning them, the producer reuses them'' (*ABR* 208 F.3d at 1051). ''To say that when something is saved it is thrown away is an extraordinary distortion of the English language'' (*Id.* at 1053). The commenters assert that, by limiting the exclusion to hazardous secondary materials intended for recycling that are ''contained'' in the unit, EPA is illegally imposing conditions on a material that has not been discarded.

Other comments take issue with EPA's decision to impose conditions for the transfer-based exclusion. These comments criticize EPA's rationale that, in part, bases the conditions on the fact that ''subsequent activities are more likely to involve discard, given that the generator has relinquished control of the hazardous secondary material'' (72 FR 14178). One commenter specifically challenged the proposed financial assurance requirement, claiming that the condition does not define the absence of discard and would effectively impose a waste management requirement upon a non-waste.

EPA's Response: EPA's Authority

EPA disagrees with the comments that Congress did not intend to give EPA the authority to regulate hazardous waste recycling. As EPA noted in both the October 2003 proposal and the March 2007 supplemental proposal, the RCRA statute and the legislative history suggest that Congress expected EPA to regulate as solid and hazardous wastes certain materials that are destined for recycling (*see* 45 FR 33091, citing numerous sections of the statute and *U.S. Brewers' Association* v. *EPA,* 600 F. 2d 974 (DC Cir. 1979); 48 FR 14502–04, April 3, 1983; and 50 FR 616–618). Moreover, the case law discussed above clearly shows instances where EPA properly regulated the recycling of solid and hazardous wastes.

EPA also disagrees that requiring the hazardous secondary materials to be ''contained'' contradicts the court's finding in *ABR* that EPA does not have the authority to define when hazardous secondary materials are not discarded. By limiting the exclusion to hazardous secondary materials that are contained, EPA is defining ''discard'' for this material. While it is true that the court has said that materials recycled in a continuous process by the generating industry are not solid wastes, commenters have failed to demonstrate how hazardous secondary materials that are *not* contained meet that description. By ''contained,'' EPA means not released to the environment. It is a self-evident fact that hazardous secondary materials released to the environment (e.g., causing soil and groundwater contamination) are not ''destined for recycling'' or ''recycled in a continuous process''; thus, they are part of the waste management problem. Moreover, as discussed above in section VII.C, to the extent that significant releases to the environment from a storage unit have occurred and remain unaddressed, it is reasonable to conclude that the material remaining in the unit is also actively being discarded. It is important to note that the hazardous secondary materials that remain in the unit are not solid wastes, unless the releases from the storage unit indicate that these materials are not being managed as valuable commodities and are, in fact, discarded. For examples of releases from a hazardous secondary materials storage unit that indicate that the hazardous secondary material in the unit is discarded and examples of releases that do not indicate discard, see section VII.C. of this preamble.

EPA also disagrees with comments that, under the transfer-based exclusion, EPA cannot consider the fact that the generator has relinquished control of the hazardous secondary material (along with other factors that indicate discard) in determining what conditions are needed for this exclusion. EPA's authority to regulate such transfers is clear: as the Court noted in *Safe Food,* ''materials destined for future recycling by another industry *may* be considered 'discarded'; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem'' (350 F.3d at 1268).

EPA's record for today's rulemaking demonstrates that third-party recycling of hazardous secondary materials has been and continues to be part of the waste disposal problem, and, without the conditions being finalized today, these hazardous secondary materials would be solid wastes. Of the 208 damage cases in EPA's study of environmental problems associated with post-RCRA, post CERCLA hazardous secondary materials recycling, 94% appeared to take place at commercial off-site facilities. Moreover, EPA's study of how market forces impact recycling demonstrates that these damages are consistent with our understanding of how the business model for commercial recycling can lead to sub-optimal results. As opposed to manufacturing, where the cost of inputs, either raw materials or intermediates, is greater than zero and revenue is from the sale of the output, recycling conducted by commercial hazardous secondary materials recyclers involves generating revenue from receipt of the hazardous secondary materials, as well as from the sale of the output. Recyclers of hazardous secondary materials in this situation can have a short-term incentive to accept more hazardous secondary materials than they can economically or safely recycle, resulting in the hazardous secondary materials eventually being discarded.

The financial assurance condition for the transfer-based exclusion being finalized today is directly linked to this situation. By obtaining financial assurance, the owner or operator of the reclamation facility is making a direct demonstration that it will not abandon the hazardous secondary material. Of the 208 damage cases, 69 (or 33%) were primarily caused by abandonment of the hazardous secondary material by the recycler. None of 69 facilities whose damages were primarily caused by abandonment had financial assurance.

Under the transfer-based exclusion, financial assurance is the means by which the recycler demonstrates an investment in the future of the recycled materials; even if the market changes in such a way that the recycler can no longer process the hazardous secondary materials, by obtaining financial assurance, it has made certain that the hazardous secondary materials will not be abandoned and therefore not discarded. EPA therefore disagrees with the comment that the financial assurance condition is not related to discard of the material.

Moreover, financial assurance also addresses the correlation of the financial health of a reclamation facility with the absence of discard of hazardous secondary materials. According to the successful recycling study, an examination of a company's finances is an important part of many of the environmental audits generators currently use to determine that their hazardous secondary materials will not be discarded. In addition, the environmental problems study showed that bankruptcies or other types of business failures were associated with 138 (66%) of the damage cases, and the market forces study identified a low net worth of a firm as a strong indication of a sub-optimal outcome of recycling (i.e., over-accumulation of hazardous secondary materials, resulting in releases to the environment and

abandonment of hazardous secondary materials).

In the March 2007 supplemental proposal, EPA proposed to require that reclamation facilities obtain financial assurance to ensure that the reclamation facility owner/operators who would operate under the terms of this exclusion are financially sound (72 FR 14191), and many commenters supported this condition and EPA's rationale. EPA continues to believe that the findings in the recycling studies indicate a correlation between financial health of a reclaimer and the likelihood he will not discard the hazardous secondary materials.

D. Comments on Recycling Studies

1. Environmental Problems Study

EPA completed *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* in order to identify and characterize environmental problems attributed to hazardous secondary materials recycling activities and to provide the stakeholders with a clearer picture of the recycling industry in the United States.

The environmental problems study (or study) was conducted in response to public comments received on the October 2003 proposal and to guide EPA's deliberations on how to proceed with the March 2007 supplemental proposal. In the public comments to the October 2003 proposal, a number of commenters expressed concern that deregulating hazardous secondary materials that are reclaimed in the manner described in that proposal could result in mismanagement of the hazardous secondary materials, and thus could create new cases of environmental damage requiring remedial action under federal or state authorities. Some of these commenters illustrated their concern by citing specific examples of environmental damage related to hazardous secondary materials recycling. A number of other commenters expressed the view that the great majority of the damage cases cited by commenters had occurred before RCRA, CERCLA, or other environmental regulatory programs were established in the early 1980s and, therefore, that the cases represent ''historical'' recycling-related environmental damage and are not particularly relevant or instructive for revising the RCRA Subtitle C definition of solid waste. These commenters further argued that the environmental programs—most notably RCRA's hazardous waste regulations and the liability provisions of CERCLA—have created strong incentives for the proper management of recyclable hazardous secondary materials and recycling residuals.

In response to the March 2007 supplemental proposal and to the study, made public in the rulemaking docket in conjunction with that proposal, EPA received comments on the study from a variety of commenters. In general, the comments pertain to the scope and methodology of the study and how the study reflects on today's exclusions and restrictions and/or conditions of the exclusions.

Comments: Scope and Methodology

With respect to the scope and methodology of the study, a few commenters agreed with excluding historical damage cases from the study and stated that recycling operations have in fact improved since RCRA was enacted. A few commenters provided several types of recycling-related environmental problems familiar to state agencies and a few commenters suggested the review of several additional damage cases. A few commenters argued that inclusion of their facility in the study, or the inclusion of their industry representatives' facilities, was unfounded due to one or more of the following reasons: Hazardous secondary materials were exempt from RCRA when environmental problems occurred; environmental problems stem from historical or pre-RCRA activities; numerous facilities in the study shut down during the 1980s in response to the creation of regulatory disincentives; environmental problems were addressed pursuant to CERCLA; and problematic activities were clearly a result of non-compliance. Also, a commenter suggested that one damage case profiled in the study ''is not a good example of a contaminated site caused by recycling.'' In support of their comment, the commenter cited a Record of Decision (ROD) which stated that the site's former foundry operations, which existed pre-RCRA, caused soil and groundwater contamination.

One commenter suggested EPA overlooked potential sources of information for the study, including television commentary, media reports, books, and other reports (specifically one state report), and one commenter suggested that EPA ''may have missed reviewing relevant files'' by not analyzing state and regional paper files. Another commenter expressed concern that the study was not peer reviewed.

EPA's Response: Scope and Methodology

EPA acknowledged in the preamble to the March 2007 supplemental proposal that we did not search every possible information source for damage cases for the environmental problems study. For example, we did not systematically survey all state environmental agencies for relevant cases, nor did we search paper files in EPA Regional offices. We did solicit damage cases from regional representatives and we solicited additional cases through the public comment process. We recognize that there are likely to be additional cases that we did not identify. However, we have no reason to believe that additional cases would substantially change the overall picture. In fact, information submitted to EPA does not indicate that EPA has failed to find a representative sample of environmental damage caused by recycling activities.

EPA maintains that historical recycling-related damage cases are much less relevant and instructive than cases which have occurred within the current regulatory and liability landscape, and several commenters shared our belief. We value state commenters' general discussion of environmental problems encountered at recycling operations and note that any facility taking advantage of today's exclusion will need to comply with all applicable protective restrictions and conditions.

We also appreciate the suggestion of additional damage cases to review for the study. Based on our analysis of these cases, we have added one new damage case site to the study and updated two existing damage case profiles with more information about environmental problems (*see Addendum: An Assessment of Environmental Problems Associated With Recycling of Hazardous Secondary Materials*). We also determined that three damage cases identified in the public comments already are included in the 2007 study and additional information was not revealed to supplement the profiles; determined that one damage case identified in the public comments was previously reviewed and the damage was deemed unrelated to recycling and that no additional information was provided to change this conclusion; and determined that two sites identified in the public comments had damage unrelated to recycling. We concluded that the new damage cases and the supplemental information added to existing cases are consistent with the damage cases previously cited in the study; therefore, the additional facts do

not substantially change our understanding of the hazardous secondary materials recycling damage cases.

EPA maintains that the damage cases captured in the environmental problems study fall within the study's scope and, as such, are relevant for guiding the development of today's rulemaking. As we discussed in the study, we are interested in whether damage may be more or less prevalent for hazardous secondary materials that are explicitly exempted or excluded from RCRA regulatory controls and we are less interested in historical or pre-RCRA cases (defined in the study as before 1982). We also indicated in the study that we are interested in ''whether or not the recycler * * * went out of business'' and which ''government program is responsible for overseeing the cleanup of the site,'' and clearly we are interested in acts of non-compliance that resulted in environmental damage. These points of interest, among others cited on pages 4–5 of the study, are informative for the purpose of this rulemaking and are within the scope of the study. Consequently, we disagree with industry and association commenters who argued that certain damage cases did not warrant inclusion in the Environmental Problems Study.

We acknowledge that the particular damage case referenced by a commenter as ''not a good example'' for the study does in fact exhibit environmental damage which can be partially attributed to foundry operations pre-1982. However, as indicated in the damage case profile in Appendix II of the study, the damage case was included in the study due to the following factors, which do not include damage associated with pre-1982 operations: Abandonment of drums of spent catalyst, bankruptcy, and business closure. As a result, we maintain that this damage case is within the scope of the study.

While we acknowledge that we did not review all possible sources of information for our study and generally relied on readily available material, we did in fact rely on media reports for information and we collaborated with regional representatives who are very knowledgeable about the damage cases and who assisted us in fact checking and suggesting damage cases. With respect to a commenter's suggestion that we review the ''Final Report of the Waste and Hazardous Materials Division, Fire & Explosions Task Force,'' produced by Michigan DEQ, we regret that the state has not yet made the report publicly available. However, we note that the scope of the draft Michigan study was not limited to hazardous secondary materials recycling operations, and shows that accidents can and do occur in all types of manufacturing facilities.

Despite the fact that we did not conduct an exhaustive review of all possible sources of damage case information, we believe that the restrictions and conditions of today's exclusions are sufficient to ensure safe recycling activities. For facilities operating under the transfer-based exclusion, sudden accidental liability coverage for bodily injury and property damage to third parties is required for all units, and non-sudden accidental liability coverage is required for land-based units (see section VIII.C.4. for a more detailed discussion of liability coverage). We also note that facilities may be subject to other regulations that ensure facility safety, such as the OSHA requirements and state and local requirements (*see* ''Memorandum: Requirements that other Regulatory Programs Would Place on Generators, Reclaimers and Transporters of Hazardous Secondary Materials'' made available in the docket for today's final rulemaking). While EPA has not done a definitive study of other regulatory requirements, we are reasonably comfortable with the fact that the available information indicates oversight by other regulatory agencies would significantly mitigate potential damage from the non-discarded materials.

With respect to the comment regarding peer review, we believe that while the study was not peer reviewed, the scope and methodology are sound, as evidenced by the small number of comments received on this issue. Additionally, peer review was not warranted by EPA peer-review standards because the study is not a scientific and/or technical work product. Rather, the study is an analysis of existing and publicly available information compiled to provide a representative view of hazardous secondary materials recycling.

Comments: Study's Relation to Today's Actions

EPA received a number of comments alleging that the study does not support today's exclusions. Several commenters strongly believe that the study reflected that recycling hazardous secondary materials is a high risk activity and thus should remain fully regulated. A few commenters wrote that the study does not support the transfer-based exclusion and these commenters collectively predicted that the exclusion will create future damage cases. To bolster their feedback, one commenter stressed that the majority of all damage cases cited in the study are located off-site from the facilities that generated the hazardous secondary materials. Commenters also used the study's findings (namely damage type, damage cause, cost of cleanup) to support their opposition to the transfer-based exclusion. In particular, commenters stressed the financial impact to states and communities if additional environmental clean-ups were to result from facilities taking advantage of the exclusions.

On the other hand, EPA also received responses from several commenters stating that the environmental problems study supports the proposed conditions of the transfer-based exclusion for reclaimers and generators. While several of these commenters opposed codification of the transfer-based exclusion, other commenters supported it as long as there were requirements to ensure protection of public health and the environment. For example, commenters responded that mismanagement of hazardous secondary materials, residuals, and recycled products or intermediates in the damage cases clearly represented a need to have requirements for protective management and storage, as well as a requirement for safe residuals management. Additionally, commenters believed in the importance of a financial assurance requirement to protect against the damage noted in the study related to bankruptcy and the abandonment of hazardous secondary materials and residuals. A commenter also responded that generators should assess whether the above protections exist at reclamation facilities in order to minimize their future liability. Additionally, in response to the study, EPA received one comment suggesting that each of the following safeguards be added to the exclusions: Tracking materials, restriction on land-based storage, and 90-day storage provisions in 40 CFR part 262 for all generators, including those who recycle on-site.

EPA's Response: Study's Relation to Today's Actions

While EPA agrees that the study reflects the risk and problems involved with recycling hazardous secondary materials, we disagree with those commenters who stated that the study does not support today's exclusions because of the perceived risk posed by the exclusions. Instead, we agree that the environmental problems highlighted in the study demonstrate the need to promulgate restrictions and conditions for the exclusions (e.g., requirements for

financial assurance, reasonable efforts, shipping documentation, hazardous secondary materials management, legitimate recycling, and speculative accumulation). EPA maintains that the restrictions and conditions finalized with today's exclusions, and discussed more in depth in sections VII.C. and VIII.C., will address the problems identified in the study and will limit the exclusions to materials that EPA has determined are not discarded. We also agree with those commenters who suggest that generators should assess whether reclamation facilities adequately manage hazardous secondary materials in order to mitigate the risk of future environmental problems. Consequently, we are finalizing the reasonable efforts condition for the transfer-based exclusion.

Comments: Restrictions on Mining and Mineral Processing

A few commenters responded that the study does not support controls on land-based storage of hazardous secondary materials at mining and mineral processing facilities. They cited that only 1 of the 208 damage cases is associated with a primary mineral processing facility. Thus, the commenters argued that the small number of environmental problems stemming from recycling at mining and mineral processing facilities does not warrant the proposed regulatory oversight of the industry.

EPA's Response: Restrictions on Mining and Mineral Processing

EPA acknowledges that the environmental problems study included one damage case from primary mineral processing and two damage cases from secondary mineral processing. We note that whether an industry has a single damage case represented in the study or numerous damage cases, all industries are treated equally within the final rulemaking for hazardous secondary materials generated, reclaimed, and managed in land-based units (40 CFR 261.4(a)(23)).

Moreover, further review of publicly available data revealed four additional damage case profiles from primary and secondary mineral processing facilities, which corroborates EPA's view that the findings from the environmental problems study apply across industries, including the mining and mineral processing industries (*see Addendum: An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* to review new damage case profiles). Of the four additional damage cases, three are primary mineral processing facilities and one is a secondary mineral processing facility. Improper disposal of residuals and improper management of recyclables are the most frequently observed primary damage cause at such facilities. The primary environmental damage type resulting from the above activities are soil contamination, wildlife exposure, and groundwater and surface water contamination.

We have concluded that the additional damage cases do not substantially change the overall picture of environmental problems caused by hazardous secondary materials recycling activities at facilities, including mining and mineral processing facilities. We also disagree with the commenters' assertion that restrictions on land-based storage units are not supported by the environmental problems study. Cumulative damage causes from the study support the restrictions imposed by 40 CFR 261.4(a)(23) and the identification of additional mining and mineral processing damage cases corroborates EPA's finding that no industry should be exempt from the restrictions and/or conditions due to the limited number of damage case profiles exhibited in the environmental problems study.

2. Good Recycling Practices Study

EPA completed *An Assessment of Good Current Practices for Recycling of Hazardous Secondary Materials* to provide a more complete picture of the hazardous secondary materials recycling industry in the United States. The study examines what practices responsible generators and recyclers currently use to ensure that their hazardous secondary materials are recycled responsibly.

One purpose of the study was to provide the Agency with another angle from which to view the hazardous secondary materials recycling industry. EPA has long heard from representatives of that industry that management of hazardous secondary materials has changed and improved since RCRA was implemented in the early 1980s. In addition, by indicating what controls responsible recyclers are using, the study was intended to help EPA determine which kinds of regulatory requirements would be most appropriate and effective as conditions of the exclusions.

Some of the comments on the successful recycling study supported the conclusions in the study. Particularly, these commenters stated that audits are typical, that they usually cover the subjects described in the study, and that RCRA and CERCLA liability are drivers of responsible recycling behavior. Several other commenters suggested that other incentives affecting the behavior of recyclers include economic concerns, the RCRA hazardous waste regulations, and environmental and safety regulations under other statutes.

Comments: Scope of the Successful Recycling Study

EPA received several critical comments in response to the study on responsible recycling behaviors. One comment that appeared more than once was that EPA's study focused too much on large companies and that many of the practices a large company undertakes with a full environmental staff would not be possible for a smaller company and, therefore, that the practices are not widespread among smaller companies.

EPA's Response: Scope of the Successful Recycling Study

EPA agrees with the focus on larger companies in the study and discusses it in the methodology section of the report's introduction. Because many of the contacts for interviews for the report came out of the public comments on the October 2003 proposed rule, much of the information in the report came from companies large enough to have staff responsible for submitting public comments to federal proposed rulemakings. However, where possible and appropriate, the study does examine the options for small businesses, as well as what small businesses are doing that approximates the audit programs and other practices of larger companies. The Agency did find that many small companies are concerned with questions of liability in their hazardous secondary materials recycling and often either belong to auditing consortiums or already do smaller audits by mail and telephone if they cannot afford to set up visits to the recycling facilities to examine them in person.

Comments: Purpose of the Successful Recycling Study

Another comment made by several commenters expressed a concern that circular logic was in place in the March 2007 supplemental proposal. The commenters stated that it was regulation under RCRA that led to the growth of the good practices being described and stated that EPA was using these practices as justification for taking away the very regulations that led to them.

EPA's Response: Purpose of the Successful Recycling Study

The Agency believes that those making this comment misunderstood

the relationship between the successful recycling study and the March 2007 supplemental proposal. The proposal did not state that this background material was a justification for why the Agency proposed the conditional exclusion for hazardous secondary materials not under the control of the generator. Rather, the Agency looked to the study to determine what the current responsible practices are and to use that information to inform decisions on what restrictions and/or conditions would be appropriate for the transfer-based exclusion. By promulgating restrictions and/or conditions that will lead to responsible management of hazardous secondary materials, the Agency intends to encourage hazardous secondary materials recycling, while protecting human health and the environment.

3. Market Forces Study

EPA received very few comments on *Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling*. The purpose of this study is to use economic theory to describe how various market incentives can influence a firm's decision making process when the recycling of hazardous secondary materials is involved. Different economic incentives between the recycling of hazardous secondary materials and manufacturing can arise due to differences in these two business models. As opposed to manufacturing, where the cost of inputs of either raw materials or intermediates is greater than zero and revenue is generated primarily from the sale of the output, some models of hazardous secondary materials recycling involve generating revenue primarily from the receipt of the hazardous secondary materials. Recyclers of hazardous secondary materials in this situation may thus respond differently to economic forces and incentives from traditional manufacturers.

Comments and EPA's Response: Market Forces Study

Most of the commenters agreed with the underlying premise of the study that market forces affect commercial recycling differently from how they affect manufacturing from virgin materials, thus creating a potential incentive for the over-accumulation of hazardous secondary materials in some circumstances. Thus, the study supports both the proposed conditions for the transfer-based exclusion and the ''useful contribution'' factor for the legitimacy criteria. EPA agrees with these comments.

One commenter stated that as a result of the market forces study, EPA should also include a requirement that the generator evaluate the financial health of the recycler before shipping a hazardous secondary material to the recycler. While EPA agrees that evaluating the financial health of a company can be useful and informative, and encourages companies to do so, it is not an activity that lends itself to an objective standard that would be appropriate for regulation. Instead, EPA is requiring recyclers under the transfer-based exclusion to have financial assurance in order to determine that negative economic factors will not result in the hazardous secondary materials being abandoned.

One commenter disagreed with the study's conclusion that intra- and inter-company recyclers have more flexibility in their waste management decisions than commercial recyclers do. The commenter noted that company politics and internal goals can make it difficult to switch from recycling to disposal, even if the market forces make it more economical, and that it may take two or more months to find a disposal contractor.

While EPA generally agrees that there are more factors at work than those described in the study, we continue to believe that intra- and inter-company recycling have more flexibility in waste management decisions than a commercial recycler does. When a commercial recycler's entire income is from accepting hazardous secondary materials for recycling and selling recycled products, there is no economic alternative for it to stop recycling and continue to stay in business unless it can afford the cost of a hazardous waste management permit and the cost of becoming a hazardous waste disposal facility. This finding is supported by the results of the damage cases, the overwhelming majority of which were at commercial recycling facilities.

E. Use Constituting Disposal (UCD) and Burning for Energy (BFE)

Comments: UCD and BFE

EPA received extensive comments on both the October 2003 proposal and the March 2007 supplemental proposal requesting that the scope of the proposed rules be expanded to include hazardous secondary materials used in a manner constituting disposal and hazardous secondary materials burned for energy recovery. Commenters argued that these operations do not involve discard, and that they can have many environmental benefits, including resource conservation and reduction in greenhouse gas emissions. In particular, commenters argued that hazardous waste that is indistinguishable from a commercial fuel should be not a solid waste. Other commenters supported keeping the exclusion focused on reclamation and not including use constituting disposal and burning for energy recovery. Commenters noted that these types of activities, in some cases, are akin to discard, that precedents exist for regulation of these hazardous secondary materials, and that recycling and reclamation are higher on the waste management hierarchy and more likely to conserve resources than burning for energy recovery.

EPA's Response: BFE and UCD

EPA continues to maintain that comments on UCD and BFE are outside the scope of the solid waste exclusions in today's final rule, which are focused on reclamation. EPA agrees that hazardous secondary materials that are comparable to commercial fuels should not be solid wastes, and the Agency has already promulgated an exclusion for certain of these materials (40 CFR 261.4(a)(16)). However, as stated earlier, such materials are outside the scope of today's final exclusions and are best addressed under separate rulemaking efforts.

XVI. Major Comments on the Exclusion for Hazardous Secondary Materials Legitimately Reclaimed Under the Control of the Generator

A. Scope of the Exclusion

1. Exclusion for Materials Recycled On-Site

Comments: On-Site Exclusion

In our March 2007 supplemental proposal, EPA proposed to exclude from the definition of solid waste hazardous secondary materials that are generated and legitimately reclaimed at the generating facility. EPA proposed to define ''generating facility'' in 40 CFR 260.10 as ''all contiguous property owned by the generator'' (72 FR 14214). We noted that our proposed definition would include situations where a generator contracted with another company to reclaim hazardous secondary materials at the generator's facility, either temporarily or permanently. The Agency solicited comment on whether facilities under separate ownership, but located at the same site (*e.g.*, industrial parks), should be included within this proposed exclusion. We also solicited comment on other definitions which might be compatible with the concept of generator control.

Commenters who addressed this issue generally supported the proposed on-site exclusion. They agreed with EPA that hazardous secondary materials reclaimed by a generator at its facility are unlikely to be discarded because the materials will be managed and monitored by a single entity who is familiar with both the generation and recycling of the hazardous secondary materials. Several commenters also agreed with EPA that environmental risks were lessened if the hazardous secondary materials were not transported off-site, and that fewer liability questions would arise in the case of accidents or mismanagement.

With respect to companies under separate ownership, but located at the same site, commenter reaction was more mixed. Some commenters said that this situation is not compatible with generator control. They argued that unrelated companies would not be as likely to have knowledge of each other's operations and hazardous secondary materials, and that additional controls were necessary, such as financial assurance for the reclaimer and reasonable efforts on the part of the generator (conditions that EPA had proposed for the transfer-based exclusion).

Other commenters supported an exclusion for facilities under separate ownership, but located at the same site, (*i.e.*, co-located facilities). These commenters said that such an exclusion would encourage recycling. These commenters mentioned a variety of scenarios which they argued should be eligible for the exclusion. Some commenters described integrated chemical manufacturing operations with co-located facilities that are owned by different entities because of corporate mergers and acquisitions. Another commenter noted that at some steel plants, spent pickle liquor is reclaimed on-site by a company that is different from the company operating the steel plant. Other commenters noted that coke and tar plants at iron and steel facilities are sometimes owned by electric utilities. A few commenters argued that facilities at airports should be eligible for the exclusion, and other commenters mentioned various cooperative recycling ventures within the automotive industry. Some operations mentioned by commenters appeared to be prospective rather than actual.

EPA's Response: On-Site Exclusion

After evaluating these comments, EPA has decided to finalize this provision as proposed and to limit the exclusion to hazardous secondary materials that are generated and legitimately reclaimed by the hazardous secondary material generator at that generator's facility. We agree with the commenters that at least some of the situations they described are not necessarily incompatible with generator control. One of the situations—spent pickle liquor recycled on-site at a steel mill—is eligible for the generator-controlled exclusion if the generator has contracted with the company to reclaim the material at the generator's facility. However, the Agency does not have sufficient legal or factual information about other situations mentioned by the commenters to determine if there is a single entity who remains in control of the hazardous secondary material throughout the reclamation process.

For this reason, EPA believes that such situations may be more appropriately addressed under the exclusion for hazardous secondary materials transferred for reclamation (40 CFR 261.4(a)(24)) or under the case-by-case non-waste determination procedures finalized today in § 260.30.

For the sake of clarity and in response to comments, we are also adding a definition of ''hazardous secondary material'' and ''hazardous secondary material generator'' to § 260.10. ''Hazardous secondary material'' means a secondary material that, when discarded, would be identified as hazardous waste under part 261 of 40 CFR. ''Hazardous secondary material generator'' means any person whose act or process produces hazardous secondary material at the generating facility. A facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator. These definitions would apply to all of the exclusions promulgated today. We note that generators sometimes contract with a second company to collect hazardous secondary materials at the generating facility, after which the hazardous secondary materials are subsequently reclaimed at the facility of the second company. In that situation, the hazardous secondary materials would no longer be considered ''under the control of the generator'' because the materials are not reclaimed at the generating facility. The materials should instead be managed under the exclusion for materials transferred for reclamation.

EPA agrees with certain comments that a facility that generates hazardous secondary materials may lease the property where it conducts operations, rather than own the property and that our proposed definition of ''generating facility'' would not cover such arrangements. EPA has therefore changed the definition of ''generating facility'' in 40 CFR 260.10 to read ''all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator.'' We have also amended the existing definition of ''facility'' in § 260.10 to include a reference to management of hazardous secondary materials. Therefore, any references to ''facilities'' or ''units'' of a facility in today's rule also refers to facilities or units managing hazardous secondary materials excluded under this rule.

2. Exclusion for Materials Recycled by the ''Same Company''

In its March 2007 supplemental proposal, EPA proposed to exclude from the definition of solid waste hazardous secondary materials that were generated and reclaimed by the same ''person'' as defined in 40 CFR 260.10, if the generator certified the following: ''on behalf of [insert company name], I certify that the indicated hazardous recyclable material will be sent to [insert company name], that the two companies are under the same ownership, and that the owner corporation [insert company name] has acknowledged full responsibility for the safe management of the hazardous secondary material'' (72 FR 14214). ''Person,'' as defined in § 260.10, means an individual, trust, firm, joint stock company, Federal Agency, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body. EPA proposed the certification requirement because of existing complexities in corporate ownership and liability. The certification would clarify the responsibilities of the generator and reclaimer and would help regulatory authorities determine whether a facility was eligible for this exclusion. The Agency solicited comment on any other certification language that might accomplish the same end, and on other definitions of ''same-company'' (72 FR 14186).

Comments: Same-Company Exclusion

Many commenters supported this exclusion and stated that hazardous secondary materials sent from one company's facility to another remained essentially under the control of the generating company. According to these commenters, if a generator sends materials to a reclaimer that is part of the same corporate structure, the generator is likely to be familiar with the recycling and materials management processes employed by the reclaimer. In addition, questions regarding liability

and responsibility for such hazardous secondary materials are likely to be clearer than is the case with facilities from unrelated companies.

Other commenters stated that when hazardous secondary materials are generated and transported off-site for reclamation, additional controls were needed to avoid discard and protect human health and the environment even in the case of intra-company recycling. Some of these commenters preferred such reclamation to be regulated under the proposed conditional exclusion for hazardous secondary materials transferred for the purpose of reclamation. This measure would ensure that generators would have to perform reasonable efforts and that reclaimers would have to obtain financial assurance. Other commenters suggested additional notification and recordkeeping requirements for any hazardous secondary materials transported off-site.

EPA's Response: Same-Company Exclusion

After evaluating these comments, the Agency has decided to retain ''same-company'' recycling under the exclusion for hazardous secondary materials legitimately reclaimed under the control of the generator. We do not believe that facilities exchanging hazardous secondary materials within the same corporate structure should be subject to the requirements for our exclusion at § 261.4(a)(24), as long as appropriate control of the recycling process is maintained. In particular, it is unnecessary for the generator to perform reasonable efforts on the reclaimer, because the generator is likely to be knowledgeable about the reclaimer's ability to recycle the hazardous secondary materials properly and legitimately. Similarly, if the generator and reclaimer are part of the same corporate structure and if common control is maintained over the policies of both facilities, there are strong incentives to ensure that the hazardous secondary materials are properly and legitimately reclaimed, thus making a financial assurance requirement for the reclaimer unnecessary.

In response to commenters who suggested additional notification and recordkeeping requirements, we note that the Agency is revising our proposed requirements for notification and recordkeeping for all exclusions promulgated today. These revisions are discussed in sections VII.C. and VIII.C. of this preamble.

Comments: Certification of Same Company

Some commenters argued that no certification should be necessary when hazardous secondary materials are sent between the same or related companies because generator knowledge of the materials and the potential CERCLA liability should suffice to ensure safe and legitimate recycling. Other commenters supported a certification provision, but suggested alternative language that they stated would be more compatible with generator control. Still other commenters disagreed with our proposed requirement for certifying that the generator and reclaimer of hazardous secondary materials were under the same ownership and that the owner corporation must acknowledge responsibility for the safe management of the hazardous secondary materials.

According to these commenters, under existing corporate law, parent companies do not (and sometimes cannot) assume legal liability for their subsidiaries. EPA's proposed certification requirement regarding the owner company would therefore have little legal effect and could actually discourage same-company recycling. Some of these commenters suggested that either the generator or the reclaimer should acknowledge responsibility for properly managing the hazardous secondary material, not a third-party owner corporation.

Other commenters said that the proposed requirement that the hazardous secondary materials be generated and reclaimed by the same ''person'' under 40 CFR 260.10 was not appropriate because a corporation and its affiliates or subsidiaries are legally distinct and not the same ''person.'' Therefore, one commenter suggested that we refer to related ''facilities'' rather than ''companies.'' Some other commenters suggested that we focus on the concept of ''control'' rather than ''ownership.''

EPA's Response: Certification of Same Company

After evaluating these comments, EPA does not agree with the commenters who argued that a certification requirement is not needed. We note that the purpose of the certification is not to directly ensure proper and legitimate recycling, but to clarify responsibility for the hazardous secondary materials and to demonstrate to regulatory officials that the hazardous secondary materials are not discarded and are within the terms of the generator-controlled exclusion. We are therefore retaining a certification requirement for this exclusion.

However, the Agency has also decided that its proposed certification language should be revised to avoid confusion and to ensure more effective generator control. We have therefore revised our proposed regulatory definition for this exclusion to refer to ''facilities'' rather than companies. Under the definition finalized today at 40 CFR 260.10, the reclaiming facility must be ''controlled'' by the generating facility or by a person (under § 260.10) who controls both the generating facility and the reclaiming facility. ''Control,'' for purposes of this exclusion, means ''the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person shall not be deemed to ''control'' such facilities'' (see § 260.10). Our final certification language requires the generating facility to certify that it controls the reclaiming facility, or that the generating facility and the reclaiming facility are under common control. In addition, the generator must certify that either the generating facility or the reclaiming facility acknowledges full responsibility for the proper management of the hazardous secondary materials. To avoid confusion, we have also amended the definition of ''facility'' at 40 CFR 260.10 to include facilities which manage hazardous secondary materials. Therefore, any reference to ''facilities'' in this rule also includes facilities which manage materials excluded under the regulations promulgated today.

EPA believes that this revised language more appropriately reflects the concept of ''generator control'' that underlies the exclusions at 40 CFR 261.2(a)(2)(ii) and 261.4(a)(23). Requiring that a generating facility control the reclaiming facility, or that both be under common control, ensures that there is an ongoing relationship between the generator and reclaimer and that the two facilities are more likely to be familiar with each others' waste management practices, thereby minimizing the possibility of discard. If there is no such relationship, the two facilities should not be eligible for this exclusion and the use of the transfer-based exclusion would be more appropriate. In addition, requiring the hazardous secondary material generator to certify that either the generating facility or the reclaiming facility acknowledges responsibility for the safe management of hazardous secondary materials ensures that the responsibility rests with the party most capable of assuming such responsibility. This

certification should be made by an official familiar with the corporate structure of both the generating and the reclaiming facilities and should be retained at the site of the generating facility.

Comments and EPA's Response: Application to Government Agencies and Universities

Some commenters requested that EPA clarify whether two government agencies (such as the Department of Defense and the Department of Energy) would be considered the same ''person'' under 40 CFR 260.10 if hazardous secondary materials are generated by one agency and reclaimed by another. In response, we note that for purposes of RCRA, the federal government is not a single ''person''; rather, each agency or department would be considered a separate ''person.'' We also note that under today's final rule, a federal agency that is a generating facility does not normally have the power to direct the policies of a different federal agency that is a reclaiming facility, nor is there a ''person'' under § 260.10 who directs the routine policies of both facilities. In certain situations, the two different federal agencies involved may wish to apply for a case-by-case non-waste determination under 40 CFR 260.30, as appropriate, or use the transfer-based exclusion.

Other commenters requested that EPA clarify whether the same-company exclusion extends to hazardous secondary materials that are generated and reclaimed at different facilities, when both facilities are owned by the same government agency or university, but operated by a contractor. In some of these situations, the same contractor operates both the generating facility and the recycling facility, but, in other situations, the generating facility and the reclaiming facility are operated by different contractors. In those situations where the generating facility and the reclaiming facility are both owned by the same government agency or university, the two facilities would be under common control because the agency or university in question has the power to direct the policies of both the generating facility and the reclaiming facility. Under this scenario, both facilities would therefore be eligible for the same-company exclusion, even if operated by different contractors. However, if the generating facility and the reclaiming facility were each owned by a separate government agency or university, they would not be eligible for this exclusion even if both facilities were operated by the same contractor, because the element of common control would be lacking. We have revised the certification language of 40 CFR 260.10 to reflect this approach. The parties involved may apply for a case-by-case non-waste determination under 40 CFR 260.30, as appropriate, or use the transfer-based exclusion.

3. Types of Tolling Arrangements Eligible

In its March 2007 supplemental proposal, the Agency proposed to exclude from the definition of solid waste certain hazardous secondary materials that are generated pursuant to a written contract between a tolling contractor and a toll manufacturer. Through the contract, the tolling contractor would arrange for the manufacture by the toll manufacturer of a product made from unused materials specified by the tolling contractor. To be eligible for the exclusion, the tolling contractor would have to retain ownership of and responsibility for the hazardous secondary materials that were generated during the course of the production of the product. EPA solicited comment on other types of contractual arrangements under which discard is unlikely to happen and which could appropriately be covered by the exclusion for generator-controlled hazardous secondary materials. For example, one company could enter into a contractual arrangement for a second company to reclaim and reuse (or return for reuse) the first company's hazardous secondary materials. The first company could create a contractual instrument that exhibits the same degree of control over how the second company manages the hazardous secondary materials as is found in a tolling arrangement (72 FR 14186).

Comments: Tolling Arrangements

Some commenters stated that tolling arrangements are incompatible with ''generator control'' and are best regulated under the proposed exclusion for materials that were transferred for legitimate reclamation. They argued that requirements such as reasonable efforts (by generators) and financial assurance (for reclaimers) were necessary to avoid discard in the case of off-site reclamation. Some of the commenters argued that the physical generator of the hazardous secondary material (in this case, the toll manufacturer) retains legal liability for the material. They stated that contracts which reallocated resources to address financial responsibility for mismanagement or mishap could contain loopholes that would allow tolling contractors to dispose of hazardous secondary materials or send them to a third party for reclamation.

Other commenters, on the other hand, urged EPA to expand the tolling exclusion to other types of contractual arrangements. A few commenters said that the exclusion should be allowed for any contract between a generator and a reclaimer where the generator was willing to retain ownership of and/or responsibility for the hazardous secondary materials. Other commenters mentioned specific contractual situations in which they argued the hazardous secondary materials in question were clearly handled as a commodity and discard was therefore highly unlikely. One example given was a facility that reclaims metals from electric arc furnace dust and then sends the metals back to steel mills to be reused. Another example was a facility that takes spent copper etchant from manufacturers of printed wiring boards and uses the material to make new copper compounds. Still another example was a facility that collects used paint purge solvent from auto body paint operations, reclaims it, and sells regenerated solvent back to the auto body facility.

EPA's Response: Tolling Arrangements

After considering these comments, the Agency has decided to retain the tolling exclusion, but not to broaden its scope. The exclusion will therefore be limited to situations where a tolling contractor contracts with a toll manufacturer to make a product from specified unused materials. We do not agree with those commenters who said that tolling contracts are not compatible with ''generator control.'' The typical tolling contract contains detailed specifications about the product to be manufactured, including the management of any hazardous secondary materials that are generated and returned to the tolling contractor for reclamation. In addition, the tolling contractor will enter into a tolling contract with such requirements only if it has decided that the economic benefit from such recycling is justified. For these reasons, we do not believe that tolling arrangements should be subject to the conditions applicable to the transfer-based exclusion.

On the other hand, the Agency also does not agree with those commenters who urged that we should allow the generator-controlled exclusion for any hazardous secondary materials generated under a contract between a generator and a reclaimer. We believe that the exclusion should be limited to the types of tolling arrangements specified in 40 CFR 260.10. When hazardous secondary materials are

transferred off-site for reclamation, there is, in general, less likelihood of generator control, and, hence, more likelihood of discard, in the absence of conditions that ensure the hazardous secondary materials will be handled as valuable products. In these situations, additional requirements are needed for the Agency to determine that no discard has occurred. Conversely, in the specific situations included in the generator-controlled exclusion (on-site, same-company, and tolling reclamation), we believe that the generator is much more likely to be familiar with the reclaimer and to have powerful incentives to see that the hazardous secondary materials are reclaimed properly and legitimately. In these cases, the requirements that we have finalized today (notification, legitimate recycling, compliance with speculative accumulation limits, and containment) are sufficient for the Agency to determine that such hazardous secondary materials are not discarded. These requirements may not be sufficient in the case of unrelated generators and reclaimers who have a non-tolling type of contract.

To clarify the requirements for tolling contracts under today's rule, and to assist regulatory authorities in determining whether a facility is eligible for an exclusion under a tolling contract, EPA has also added a certification requirement to the definition of hazardous secondary material generated and reclaimed under the control of the generator in § 260.10 of the final rule. This provision would require the tolling contractor to certify that it has a written contract with the toll manufacturer to manufacture a product or intermediate which is made from unused materials specified by the tolling contractor, and that the tolling contractor will reclaim the hazardous secondary materials generated during the course of this manufacture. The tolling contractor must also certify that it retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process. This certification should be made by an official familiar with the terms of the written contract and should be retained at the site of the tolling contractor.

In response to those commenters who described specific types of contractual arrangements that should be eligible for the generator-controlled exclusion, we note that facilities operating under such arrangements may apply for a non-waste determination under § 260.30, as appropriate. In some cases, commenters did not include enough detail about the contracts to enable the Agency to draft appropriate regulatory language. In other cases, the arrangement suggested was industry-specific and the conditions or requirements suggested by the commenters were not appropriate for an exclusion covering many different types of facilities. We believe that such arrangements are best evaluated on a case-by-case basis by the regulatory authority, possibly under 40 CFR 260.30, to determine their eligibility for exclusion.

Comments: Terms Used in Tolling Exclusion

One commenter suggested that we replace the term ''batch manufacturer'' with ''toll manufacturer.'' This commenter stated that ''batch manufacturer'' was too broad and generally referred to a facility which engages in a distinct, short production campaign, not necessarily tied to a two-party contractual agreement. ''Toll manufacturer,'' this commenter stated, is a subset of batch manufacturers and generally refers to a party which undertakes manufacturing pursuant to a contract with a tolling contractor, such as the arrangement we proposed. This commenter also requested that EPA clarify that the ''product'' required to be produced under a tolling contract can include intermediates, as well as final products, and that materials used in toll manufacturing were sometimes specialty chemicals or intermediates that could not be described as ''raw materials,'' as would be required under our proposal. They suggested that we use the term ''specified materials'' instead.

EPA's Response: Terms Used in Tolling Exclusion

The Agency agrees that the suggested term ''toll manufacturer'' is more accurate and has revised the definition in § 260.10 accordingly. EPA also agrees that a product produced under a tolling contract can be an intermediate or a final product and has revised the definition in § 260.10 to refer to ''production of a product or intermediate.'' Finally, the Agency agrees that the term ''raw materials'' may not be accurate, but prefers to use the term ''unused materials'' instead of ''specified materials,'' because we believe that term encompasses specialty chemicals and intermediates without also including spent or secondary materials, which are not included in our definition of toll manufacturing.

B. Restrictions on Exclusions for Hazardous Secondary Materials Managed Under the Control of the Generator in Land-Based Units and Non-Land-Based Units

In its March 2007 supplemental proposal, the Agency proposed in 40 CFR 261.4(a)(23)(i) that hazardous secondary materials generated and legitimately reclaimed under the control of the generator must be contained if they were stored in land-based units (72 FR 14216). EPA proposed to use the existing definition of land-based units and defined a land-based unit in 40 CFR 260.10 as a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave. EPA did not propose a containment limitation for such materials if they were stored in non-land-based units.

EPA did not propose a regulatory definition of ''contained,'' nor did we propose specific performance or storage standards. We stated that whether hazardous secondary materials are contained would be decided on a case-by-case basis, and that such materials are generally contained if they are placed in a unit that controls the movement of the hazardous secondary materials out of the unit. We solicited comment on whether additional requirements might be necessary to demonstrate absence of discard when hazardous secondary materials were recycled under the control of the generator. In particular, we asked whether additional requirements for storage would be appropriate, such as performance-based standards designed to address releases to the environment. We also indicated that if commenters believed such requirements were appropriate, they should specify the technical rationale for each requirement suggested and why the requirement is necessary if the hazardous secondary material remains under the control of the generator.

Comments and EPA's Response: Definition of ''Land-Based Unit''

EPA received several comments expressing confusion over our proposed definition of ''land-based unit.'' We proposed land-based unit to mean ''a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.'' Commenters noted that including ''landfills'' and ''injection wells'' was not necessary for the proposed exclusion, since these management units are clearly inappropriate for

hazardous secondary materials intended for recycling. Furthermore, commenters also noted that Subtitle C defines these terms waste-centrically (i.e., as a unit that handles ''waste'' in one way or another). This could create confusion because a hazardous secondary material would not, by definition, be ''managed'' (or ''stored'') in one of these ''waste'' units. EPA agrees with these comments, and in the final rule has defined ''land-based unit'' as an area where hazardous secondary materials are placed in or on the land before recycling. However, as discussed below, the Agency has clarified that land-based units that are production units are not included in the definition.

Comments and EPA's Response: Mineral Processing Industry

Some commenters asserted that the Agency has no jurisdiction over land-based production units in the mineral processing industry. As previously stated, EPA agrees that the Agency does not regulate the production process. (*See* 63 FR 28580). Accordingly, EPA has clarified the definition of ''land-based unit'' to clarify that production units are not included in that definition. However, these commenters also asserted that EPA cannot legally require containment for these units. To the extent that these comments are intended to mean that EPA cannot regulate material that has been released into the environment, these comments are addressed in section XV.C. of this preamble, and also in the response to comments document in the record for this rulemaking.

Comments: Standards for Units (Both Land-Based and Non-Land-Based)

Other commenters, however, were opposed to allowing any land-based storage, at least without a RCRA Part B permit or strict requirements, such as secondary containment, leak detection measures, regular inspections, monitoring, or financial assurance. Most of these commenters did not appear to distinguish between land-based units under the generator-controlled exclusion and those under the exclusion for hazardous secondary materials transferred for reclamation; presumably, they wanted the same conditions for both.

Regarding non-land-based units such as tanks, containers, or containment buildings, some commenters agreed with EPA's approach, but other commenters preferred minimum storage standards for these units. Some commenters wanted Subtitle C standards to apply. Other commenters believed that the RCRA hazardous waste requirements were not necessary, but suggested other standards, such as requiring tanks to be in good condition, to be compatible with the stored material, to have secondary containment, or to be subject to routine inspections.

EPA's Response: Standards for Units (Land-Based and Non-Land-Based)

After evaluating these comments, the Agency has decided not to add performance standards or other requirements for managing hazardous secondary materials excluded under any of the exclusions promulgated today (§§ 261.2(a)(2)(ii), 261.4(a)(23), or 261.4(a)(24)). Such detailed measures are unnecessary for hazardous secondary materials that are handled as valuable products that are destined for recycling. Under today's rule, regulatory authorities can determine whether such materials in a unit are contained by considering all such site-specific circumstances. For example, local conditions can greatly affect whether hazardous secondary materials managed in a surface impoundment are likely to leak and cause damage, and, therefore, whether the unit could be considered contained. Similarly, facilities may employ such measures as liners, leak detection measures, inventory control and tracking, control of releases, or monitoring and inspections. Any or all of these practices may be used to determine whether the hazardous secondary materials are contained in the unit.

EPA also believes that detailed standards are not necessary to determine that valuable materials destined for recycling are not discarded when managed in non-land-based units. As with land-based units, the regulatory authorities can identify hazardous secondary materials that have been released from the unit and determine that the released material is discarded. To clarify this approach and to facilitate its implementation, however, EPA has revised its regulatory language to require that hazardous secondary materials that are generated and reclaimed under the control of the generator and managed in non-land-based units must also be contained (§ 261.4(a)(23)(i)).

Comments and EPA's Response: State Regulatory Program-Compliant Units

A few commenters indicated that hazardous secondary materials managed in units complying with state regulatory programs to address releases should be considered contained. Because of the variety of such programs, and because the Agency has not conducted an in-depth evaluation of such state requirements, we are not adding a definition of ''contained'' that would incorporate this suggested element. However, regulatory authorities may consider compliance with such requirements as one of the factors in determining whether the hazardous secondary materials are contained in the units.

Comments: Releases

In the March 2007 supplemental proposal, the Agency stated that hazardous secondary materials that remain contained in these units would still meet the terms of the exclusion even if a release occurred, unless the hazardous secondary materials are not managed as a valuable product, and, as a result, a significant release from the unit takes place. If such a significant release occurred, the hazardous secondary material remaining in the unit may be considered a solid and hazardous waste. Some commenters noted that a series of small releases from a unit could occur over time, causing cumulative environmental harm even though no single release was significant in terms of volume. These commenters said that such a series of releases should generally lead to the conclusion that the hazardous secondary material remaining in the unit was a waste.

EPA's Response: Releases

EPA agrees with the comment concerning small releases from a unit over time. Thus, a ''significant'' release is not necessarily large in volume, but would include an unaddressed small release from a unit that, if allowed to continue over time, could cause significant damage. Any one release may not be significant in terms of volume. However, if the cause of such a release remains unaddressed over time and hazardous secondary materials are managed in such a way that the release is likely to continue, the hazardous secondary materials in the unit would not be contained. For example, a rusting tank or containers that are deteriorating may have a slow leak that, if unaddressed, could, over time, cause a significant environmental impact. Similarly, a surface impoundment with a slow, unaddressed leak to groundwater could, over time, result in significant damage. Another example would be a large pile of lead-contaminated finely ground material without any provisions to prevent wind dispersal of the particles. Such releases, if unaddressed over time and likely to continue, would mean that the hazardous secondary materials remaining in the unit were not being

managed as a valuable raw material, intermediate, or product and that the materials had been discarded. As a result, the hazardous secondary materials in the unit would be hazardous wastes and these units would be subject to the RCRA hazardous waste regulations.

XVII. Major Comments on the Exclusion for Hazardous Secondary Materials Transferred for the Purpose of Legitimate Reclamation

A. Status of Facilities Other Than the Generator or Reclaimer (''Intermediate Facilities'')

Comments: Intermediate Facilities

In its March 2007 supplemental proposal, EPA requested comment on its proposal that under the proposed exclusion for hazardous secondary materials transferred for reclamation, such materials would have to be transferred directly from the generator to the reclaimer and not be handled by anyone other than a transporter.

EPA received many comments on this provision. Some commenters supported the provision as proposed because they were concerned that if hazardous secondary materials were transferred to a ''middleman,'' the generator would not have a reasonable understanding of who would reclaim the hazardous secondary materials and how they would be managed and reclaimed. If the generator was unable to ascertain whether the hazardous secondary materials in question could be properly and legitimately recycled, the materials should be considered discarded.

Other commenters objected to this proposed limitation. They argued that many persons who generate smaller quantities of hazardous secondary materials need help in consolidating shipments to make reclamation economically feasible. Some of these commenters also argued that intermediate facilities provided valuable assistance to generators by helping them properly transport, package, and store material, and by helping them find responsible reclaimers. These commenters believed that EPA's proposed limitation could discourage reclamation by persons who generate smaller quantities of such hazardous secondary materials.

Most of the commenters who suggested that intermediate facilities be eligible for the exclusion also suggested conditions for these facilities. These conditions included requiring the generator to select the reclaimer, requiring the generator to perform reasonable efforts on the intermediate facility, as well as the reclaimer, and requirements for notification and recordkeeping. A few commenters argued that intermediate facilities should be required to have a RCRA Part B permit or interim status.

EPA's Response: Intermediate Facilities

After evaluating these comments, the Agency has decided that intermediate facilities storing hazardous secondary materials should be eligible for the exclusion at 40 CFR 261.4(a)(24) under certain conditions. We believe that such facilities make it easier for generators that generate smaller quantities of hazardous secondary materials to send these materials for reclamation and that storage at such facilities under the conditions designed to address discard is completely consistent with handling the hazardous secondary materials as valuable commodities. To this end, we have added a new definition of ''intermediate facility'' to 40 CFR 260.10. We note that this rule does not address ''brokers'' because that term is commonly understood to mean a person who helps arrange for the transfer of hazardous waste or hazardous secondary material, but does not take possession of the material or manage it in any way. Brokers that never take possession of hazardous secondary materials would not have been affected under the supplemental proposal, nor are they affected by today's rule.

Under today's rule, an intermediate facility is a facility that stores hazardous secondary materials for more than 10 days, other than a generator or reclaimer of such materials. If an intermediate facility treats the hazardous secondary materials or commingles it with other hazardous secondary materials or with hazardous waste, it would not be eligible as an ''intermediate facility'' as defined in § 260.10 under today's regulation. Under 40 CFR 260.42, intermediate facilities must submit the same notification required of generators and reclaimers of hazardous secondary materials transferred for reclamation. In addition, under § 261.4(a)(24)(v) of today's rule, generators must also perform appropriate reasonable efforts on the intermediate facility, as well as the reclamation facility, and generators are responsible for the ultimate selection of the reclamation facility. These requirements will ensure that the intermediate facility is handling the hazardous secondary materials as a commodity.

Today's rule also requires intermediate facilities to comply with the applicable requirements for reclaimers of hazardous secondary materials under 40 CFR 261.4(a)(24)(vi), including recordkeeping, storage of excluded materials, financial assurance, and speculative accumulation. The Agency believes that these conditions are fully sufficient to ensure that hazardous secondary materials stored at intermediate facilities are handled as valuable products and not discarded. Therefore, we do not agree with those commenters who suggested that intermediate facilities should be required to operate under Part B permits or interim status.

The Agency notes that in some cases, the intermediate facility performs the physical measures associated with generator reasonable efforts to ensure that the reclaimer will properly and legitimately recycle the hazardous secondary materials. These measures may include facility inspections and preparation of audits. In those cases, the generator must carefully review such measures to ensure that any information provided is credible.

Under today's rule (*see* 40 CFR 261.4(a)(24)(ii)), if hazardous secondary materials are stored for 10 days or less at a transfer facility, the transit is not subject to the requirements applicable to intermediate facilities under the transfer-based exclusion. Instead, it must only be packaged in accordance with applicable DOT requirements. The Agency considers hazardous secondary materials stored by transfer facilities for short periods of time to be in transit, similar to hazardous waste stored by similar facilities for the same time period. They are therefore not discarded. We have revised the existing definition of ''transfer facility'' at 40 CFR 260.10 to clarify that such facilities may store hazardous secondary materials, as well as hazardous waste. The generator need not perform reasonable efforts on such facilities, nor must such facilities comply with the requirements applicable to reclaimers of hazardous secondary materials under 40 CFR 261.4(a)(24)(vi). In addition, hazardous secondary materials at transfer facilities may be repackaged from one container to another (e.g., the materials may be consolidated from smaller to larger containers) or transferred to different vehicles for shipment (*see* 45 FR 86966, December 31, 1980). However, different hazardous secondary materials may not be mixed together. In addition, if there is a release of the hazardous secondary materials at the transfer facility that is not cleaned up immediately, such materials become solid waste, and, if they exhibit a hazardous characteristic or are specifically listed by EPA, a hazardous waste as well. Depending on the nature of the release, the hazardous secondary materials remaining in the unit could

also become a solid and hazardous waste subject to Subtitle C regulation (for a discussion of when such units are considered ''contained,'' see section XVI of this preamble).

B. Reasonable Efforts Condition

EPA received many comments on the condition proposed in the March 2007 supplemental proposal that generators ''make reasonable efforts to ensure that the reclaimer intends to legitimately recycle the material and not discard it * * * and that the reclaimer will manage the material in a manner that is protective of human health and the environment.'' This condition was proposed to be fulfilled by hazardous secondary material generators sending hazardous secondary materials to any reclamation facility not operating under a RCRA Part B permit or interim status standards, and the condition would have to be satisfied prior to transferring the hazardous secondary materials to the reclamation facility (72 FR 14190–14194). Below is a summary of six major issues raised in the comments and EPA's responses. For more detailed comment responses, please see *Revisions to the Definition of Solid Waste Response to Comments Document.*

Comments: An Objective Standard for Reasonable Efforts

As proposed, the codified reasonable efforts provision for generators was a general standard, rather than a more specific standard with clearly stated requirements. EPA requested comment on establishing a more objective standard for making reasonable efforts, such as requiring generators to answer the questions discussed in the preamble. EPA acknowledged that creating an objective standard could provide generators and overseeing agencies with more regulatory certainty and requested comment on codifying the six questions outlined in the preamble.

EPA received many comments in support of an objective standard for satisfying the reasonable efforts condition. Commenters suggested that a minimum standard was needed to determine whether a generator fulfilled the condition and as a way of determining what is ''reasonable.'' Many of these commenters also believed that a standard that generators must meet was necessary to delineate liability for hazardous secondary materials that are transferred from a generator to a reclamation facility. In contrast, several commenters suggested that formalizing a minimum standard which all generators must meet is inappropriate since recycling is inherently case-specific.

On the issue of whether to codify a reasonable efforts standard, which several commenters addressed separately from the development of a standard, EPA received many comments both in support of and against codification. A large number of commenters addressed this issue by commenting on the six questions EPA discussed in the preamble. Those in favor of codification believed that establishing a minimum, objective standard was important in order to provide regulatory certainty for generators regarding what is ''reasonable'' and for overseeing agencies needing to make consistent determinations that the condition is satisfied. Industry commenters responding in support of codification believed the six questions resemble existing audit questions, and would therefore be straightforward to answer and satisfy. Recyclers and waste management commenters believed that small quantity generators would benefit from having a clear standard and also that the standard would make additional clarifying guidance unnecessary in the future. Some commenters conditionally supported codification contingent upon severance of RCRA liability for generators that meet the minimum condition. These commenters supported EPA's proposal to create what they termed as a ''safe harbor'' for generators that, having met the reasonable efforts condition, would be shielded from any future RCRA liability caused by environmental damage at a reclamation facility.

On the other hand, several commenters (mostly from the generating industry) opposed codifying a standard. They believed a standard would be unnecessary since generators that already audit recyclers have existing criteria for making reasonable efforts. Some of these commenters also stressed a need to maintain flexibility in their activities and to avoid additional burdensome requirements. One state commenter requested that EPA allow generators to establish their own standard for reasonable efforts so that generators will weigh their own level of risk and ultimately be responsible for their decisions. This commenter also believed that one standard is impractical for both ''a large industrial generator of a highly toxic hazardous secondary material'' and ''a small generator of a barely ignitable hazardous secondary material.''

Of the commenters that responded to the March 2007 supplemental proposal to codify a standard for reasonable efforts, many also provided comments on the six questions in the preamble. In general, commenters were divided between supporting and opposing codification of all six questions, but responses were generally favorable when commenters discussed the value of individual questions within a reasonable efforts inquiry. One exception to this is with respect to proposed question (B) (''Does the reclamation facility have the equipment and trained personnel to properly recycle the hazardous secondary material?''), which several commenters believed to be difficult for a hazardous secondary material generator to answer with existing knowledge. A few commenters also noted that questions (D) and (E), the two proposed questions pertaining to legitimacy within the preamble discussion of reasonable efforts, did not represent the legitimacy ''factors to be considered'' that were proposed in the March 2007 supplemental proposal at 40 CFR 261.2(g). These commenters suggested that a reasonable efforts inquiry should include all criteria and factors in the proposed legitimate recycling requirement. A few commenters also suggested including an additional question about the financial health of a reclaimer.

EPA's Response: An Objective Standard for Reasonable Efforts

After evaluating these comments, EPA agrees that an objective minimum standard is appropriate and necessary for hazardous secondary material generators to determine that they have fulfilled the reasonable efforts condition. We believe that without such a standard, both generators and the regulatory agencies would experience difficulty in determining whether the condition is met. However, in defining the standard, it would in no way limit a generator's ability to tailor and enhance its reasonable efforts inquiry to evaluate a particular industry or recycler.

We also agree with the commenters who stated that the six questions from the preamble to the March 2007 supplemental proposal, with two modifications noted below, serve as a minimum objective standard. Therefore, we are codifying them, with certain modifications. We strongly believe that any generator who takes advantage of today's transfer-based exclusion must be able to answer all reasonable efforts questions affirmatively for each reclamation facility (and intermediate facility, if such hazardous secondary materials are sent to such a facility) in order to demonstrate that its hazardous

secondary materials will be properly and legitimately recycled and not discarded. In EPA's view, a generator who is unable to satisfy the reasonable efforts condition has not demonstrated that its hazardous secondary materials are not discarded when recycled. The hazardous secondary materials would thus be ineligible for today's transfer-based exclusion.

With respect to question (4) (''Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material?''), we believe that its inclusion within reasonable efforts is appropriate and necessary since the question informs a generator's inquiry as to whether its hazardous secondary materials will be properly and legitimately recycled. If a reclamation facility were found to have inadequate equipment or untrained personnel, it would raise serious questions as to whether the facility would be engaged in proper recycling or discard. Without exploring this question, we believe that a generator cannot ascertain that a reclamation facility will properly and legitimately recycle its hazardous secondary materials. However, we also agree that, as drafted in the proposed rule, answering this question may require specialized knowledge and expertise. Accordingly, EPA is changing this question to allow the generator to rely on the reclamation facility to explain why its equipment and personnel are appropriate. Of course, the generator must have an objectively reasonable belief that the reclamation facility's equipment and trained personnel are adequate for safe recycling. Accordingly, if the equipment and personnel described by the reclamation facility would be, to an objective reasonable person, clearly inadequate for safe recycling of the generator's hazardous secondary material, then the generator would not have met this condition. However, EPA does not require nor expect the generator to have specialized knowledge or expertise of the recycling process. We also discuss in more detail how a generator can answer this question in section VIII.C.2. of this preamble.

As noted previously, we are codifying the questions with two modifications. The first modification to the questions is language that accommodates the inclusion of intermediate facilities within the transfer-based exclusion. As discussed in section VIII.C. of this preamble, if a generator sends hazardous secondary materials to an intermediate facility where they are stored for longer than 10 days prior to being transferred to a reclamation facility, the generator will need to perform reasonable efforts for both the intermediate facility and reclamation facility.

The second modification is to the questions pertaining to legitimate recycling activities. EPA acknowledges that one source of confusion for commenters regarding the relationship between the reasonable efforts condition and the legitimate recycling requirement may have been the two questions pertaining to legitimacy (proposed questions (D) and (E)) within the reasonable efforts preamble discussion and the proposed legitimacy requirement at 40 CFR 261.2(g). Questions (D) and (E) and the proposed regulatory language for legitimacy did not share the exact same wording, although both concepts were intended to be consistent. Furthermore, we understand the concern commenters raised that questions (D) and (E) did not represent the legitimacy ''factors to be considered'' that were proposed within 40 CFR 261.2(g). As a result, we have restructured the reasonable efforts questions pertaining to legitimacy to read as a single question that ensures that a reclamation facility receiving hazardous secondary materials intends to legitimately recycle the hazardous secondary materials. Because of changes to the legitimacy provision in this final rule as compared to the March 2007 supplemental proposal, this question now refers to the legitimacy requirement in § 260.43 of today's final rule.

Comments: Liability Related to Reasonable Efforts

EPA proposed the reasonable efforts condition as a way for hazardous secondary material generators to demonstrate that they met their regulatory obligation to ensure that their hazardous secondary materials, when transferred to a reclamation facility, would not be discarded. Based on our assessment of good recycling practices and the comments received, we believe that the reasonable efforts condition reflects current industry best practices of auditing or assessing reclamation facilities prior to entering into business relations; this is done to minimize potential regulatory and liability exposures and to demonstrate a commitment to environmental stewardship.

We received many comments related to liability and the reasonable efforts condition. Many commenters stated that making reasonable efforts to evaluate a reclaimer is a good method for limiting future liability and that many generators already employ some form of the practice. These commenters largely supported the provision. Other commenters expressed concern that the reasonable efforts condition is an unnecessary requirement since existing incentives, such as economic motivations and CERCLA liability, would cause a generator to perform evaluations of reclaimers without being mandated as a condition of the exclusion.

Additionally, EPA received comments about whether satisfying the reasonable efforts condition would sever a generator's regulatory liability if, after being sent to a reclamation facility, its hazardous secondary materials were discarded or involved in environmental damage. Several commenters (namely from industry) asked that EPA clarify that upon conducting a reasonable efforts evaluation of a reclamation facility, a generator would not be liable for a reclaimer's subsequent environmental violations or if a reclaimer's actions caused or contributed to some environmental harm or damage. Many of these commenters supported the codification of a reasonable efforts standard, provided that liability would be severed upon meeting the condition. Conversely, several commenters stated that generator liability should be maintained into the future regardless of satisfying the condition. In general, these commenters were concerned that hazardous secondary material generators could subvert RCRA liability by conducting incomplete and superficial evaluations of reclaimers, and that future environmental damage would result at reclamation facilities. A few of these commenters suggested that EPA clarify that a hazardous secondary material generator would be held liable for violating the condition of the exclusion into the future if it was shown that the generator did not conduct a thorough assessment of the reclaimer.

EPA's Response: Liability Related to Reasonable Efforts

EPA disagrees that the reasonable efforts condition is unnecessary in light of economic forces or CERCLA liability, which may motivate some generators to evaluate recyclers. We proposed the reasonable efforts condition as a way for hazardous secondary material generators to demonstrate that they are not discarding the hazardous secondary materials when sending them to a third party for reclamation. The language of the condition is intended to capture within the regulatory text how

responsible generators currently inquire and make decisions about recycling of hazardous secondary materials and how generators manage potential liability and regulatory non-compliance risks. Several commenters suggested that not all generators currently audit or evaluate reclamation facilities despite having economic interests and existing liability concerns. Analysis of the environmental problems study also suggests that CERCLA liability alone is not enough to prevent damage and that increased generator inquiry of reclamation facilities may help avoid future cases of abandonment or discard, residuals mismanagement, sham recycling, and improper management of hazardous secondary materials and recycled products.

By proposing the reasonable efforts condition, EPA intended to maintain RCRA liability for any hazardous secondary materials that are discarded. The condition clearly holds a generator accountable for determining that its hazardous secondary materials will not be discarded at a reclamation facility or any intermediate facility prior to transferring such materials to the facility. If a generator does not meet the condition, then the generator's hazardous secondary materials would not be eligible for the transfer-based exclusion and would be considered by EPA to be hazardous waste subject to the RCRA Subtitle C controls from the point of generation.

EPA did intend, however, that if the hazardous secondary materials generator had satisfied the reasonable efforts condition and discard subsequently occurred while hazardous secondary materials were under the control of the reclamation or intermediate facility, then the reclamation or intermediate facility, not the generator, would be liable under RCRA. EPA acknowledges that meeting this condition will not affect CERCLA liability. (*See* section XIII for more information on CERCLA liability.) We recognize commenters' concern that in order to satisfy the reasonable efforts condition and be released from RCRA liability, hazardous secondary material generators could be tempted into making incomplete evaluations of reclamation and intermediate facilities. EPA believes that codifying an objective reasonable efforts standard that all generators must meet in order to satisfy the condition will alleviate this concern (*see* section VIII.C. of today's rulemaking for more discussion). We also believe that specifying a standard that hazardous secondary material generators must satisfy will assist both regulatory agencies and the regulated community in determining whether the condition of the exclusion has been met or violated.

Comments: Relationship Between the Reasonable Efforts Condition and the Legitimate Recycling Requirement

EPA received a variety of comments on the relationship between the condition that hazardous secondary material generators must make a reasonable efforts inquiry of reclamation facilities and the requirement that hazardous secondary materials must be legitimately recycled. Several commenters stated that evaluating whether a reclaimer meets the legitimacy criteria should be part of a reasonable efforts inquiry to ensure that a generator's hazardous secondary materials are legitimately recycled. One commenter stated that while a hazardous secondary material generator would need to ensure that a recycling activity being considered is legitimate in order to protect its own liability interests, a legitimacy determination should be entirely separate from the reasonable efforts condition. Another commenter also stressed that, as a matter of good practice, many responsible generators already ensure that they send hazardous secondary materials to facilities engaged in legitimate recycling; therefore, a legitimacy evaluation within reasonable efforts is unnecessary. Furthermore, several commenters (mostly from industry) stated that a reasonable efforts condition is redundant since the proposed legitimate recycling requirement in 40 CFR 261.2(g) ensures that hazardous secondary materials transferred off-site are safely recycled.

EPA's Response: Relationship Between the Reasonable Efforts Condition and the Legitimate Recycling Requirement

EPA agrees with the commenters who stated that determining whether a recycling activity is legitimate is a sound practice and, based on comments we received, that many responsible generators already use existing legitimacy guidance as a way to manage their potential liability. The reasonable efforts condition is intended to assist generators in determining that their chosen reclamation facilities will properly and legitimately recycle the generators' hazardous secondary materials. Consequently, EPA strongly believes that the reasonable efforts condition must contain a provision that explicitly refers generators to their obligation to ensure that their hazardous secondary materials are legitimately reclaimed. Including legitimacy as part of the reasonable efforts condition means that if the generator made reasonable efforts to ensure that its hazardous secondary materials are legitimately recycled in a way that satisfies this condition and, subsequently, the reclamation facility fails to recycle the materials legitimately, the reclamation facility, not the generator, becomes liable for violating RCRA (*see* section VIII.E. for more information).

Comments: Periodic Updates to Reasonable Efforts

EPA requested comment on a requirement for making periodic updates to reasonable efforts, but did not propose an explicit time period. Some commenters favored requiring a specific time limit for updating the reasonable efforts provision, while others (a slightly smaller number) favored a flexible time frame for updating reasonable efforts, to be determined by the hazardous secondary material generator. The commenters who supported a specific time frame for updating the reasonable efforts condition included states, several representatives of the recycling industry, one industry generator, and one environmental organization. Several of these commenters stated that the hazardous secondary material generator needed to evaluate changes over time to the recycling facility (e.g., compliance status, financial assurance, permit renewals, impact of changes in recycling markets) to ensure that their hazardous secondary materials continue to be recycled properly and legitimately. Commenters also suggested that generators re-evaluate recyclers whenever the generator becomes aware of new, ''material'' information about or changes to a reclamation facility. These commenters asked EPA to set a minimum schedule for updating reasonable efforts. The suggested schedules ranged from annually to every five years.

Several industry generators and associations, as well as one waste management association, submitted comments in opposition to requiring specific periodic updates of the reasonable efforts provision. Commenters expressed concern that an arbitrary time frame would unnecessarily change generators' current schedules for auditing or making inquiries of recycling facilities. Several commenters suggested that schedules for evaluating reclaimers should vary from facility to facility and by industry and that a generator should be allowed to decide when to update reasonable efforts given a facility's history and the generator's familiarity

with the facility. One commenting organization cited its use of an internal risk-based audit schedule to determine when to review a reclamation facility. The stated criteria for judging the level of risk included facilities with lower financial health and the addition of ''new processing capabilities and when ownership changes.'' Another generator requested EPA to ''suggest, and not require, the frequency of periodic updates.''

EPA's Response: Periodic Updates to Reasonable Efforts

EPA agrees with the comments stating that requiring generators to conduct specific periodic updates of the reasonable efforts provision is critical for ensuring that reclamation facilities continue to properly and legitimately recycle the hazardous secondary materials into the future. We believe that if a hazardous secondary material generator evaluated a reclamation facility (or an intermediate facility if hazardous secondary material is sent to such a facility) only once before the initial transfer of hazardous secondary materials for recycling, it would not provide adequate assurance to regulators that hazardous secondary material generators have met the reasonable efforts condition to ensure discard will not occur 5, 10, or 20 years into the future. We understand that generators often evaluate recyclers or intermediate facilities on a recurring schedule determined by the generator's particular interests, concerns, and experience. However, EPA believes that hazardous secondary material generators are also interested in having regulatory certainty regarding the time frame for which reasonable efforts must be conducted, rather than a completely discretionary ''generator decides'' approach, which will present many disagreements and challenges as to what a ''reasonable'' schedule is. We are also aware that many generators do not currently conduct reasonable efforts, let alone re-evaluate such facilities over time. For these reasons, we are requiring that hazardous secondary material generators update their reasonable efforts evaluation at least every three years, at a minimum. Based on public comments, this appears to represent general industry practice and to be within the average time frame for those generators who currently conduct environmental audits of facilities to which they send their hazardous secondary materials.

By specifying a time frame for periodic updates, EPA in no way intends to limit a generator to conducting evaluations only every three years. In fact, we acknowledge that shorter time frames could be appropriate for certain industries. Additionally, we would expect that any hazardous secondary material generator who has concerns about a reclamation or intermediate facility, or who gains new knowledge of significant changes or extraordinary situations at such facilities, would conduct reasonable efforts regardless of the minimum required update schedule.

Comments: Requiring Generators to Certify Reasonable Efforts

EPA solicited comment on requiring hazardous secondary material generators to certify that they made reasonable efforts prior to arranging for transport of hazardous secondary materials to be recycled. As discussed in the preamble to the March 2007 supplemental proposal, the certification statement would be a form of documentation necessary for each reclamation facility and would be signed and dated by an authorized representative of the generator company. We also provided certification language as an example.

Several commenters including recyclers, all responding states but one, and a few industry generators and associations, commented in favor of requiring hazardous secondary material generators to certify that they had met the reasonable efforts condition. All commenters that responded regarding the example certification statement supported the language. A few commenters reiterated that generators must certify reasonable efforts for each reclamation facility and that certification should not be necessary for RCRA Part B permitted facilities. One commenter requested that the certification must be made ''prior to implementing exempt operations.'' Another commenter believed that a certification statement would improve the enforceability of the reasonable efforts condition. A generator that currently audits its waste facilities stated that ''a letter signed and dated by the department manager is mailed to the audited facility stating the results of the audit,'' and that the letter should act as a certification. Another commenter suggested that given the large number of facilities for which reasonable efforts are required, having a company representative, as opposed to an ''authorized representative,'' sign and date a certification should be sufficient and would be less burdensome. One recycler requested that the generator certification and signature be built into the one-time notification that EPA is requiring for the exclusion.

A smaller number of comments from generators opposed the certification requirement. A few generators found the certification statement to be overly burdensome and stated that it would stifle the use of third-party reclaimers. One generator, who currently audits reclamation facilities, stated it could not certify the accuracy of information prepared by third parties, nor could it certify responses by reclamation facilities to questions (B) through (E), which EPA discussed in the preamble. Another generator responded that without further clarification as to the minimum requirements for satisfying reasonable efforts, the generator could not certify that the condition was met. A commenter also suggested that requiring certification of reasonable efforts for reclamation facilities that recycle hazardous secondary materials was unnecessary if certification is not required for the storage, treatment, and disposal of hazardous waste.

EPA's Response: Requiring Generators To Certify Reasonable Efforts

After evaluating the comments, EPA has concluded that certifying the reasonable efforts provision is a necessary and minimally burdensome requirement for ensuring that the reasonable efforts condition is met prior to transferring the hazardous secondary materials to a reclamation facility. We also strongly believe that requiring the signature of an authorized representative of the generator company, who can be any appointed company representative, is critical for ensuring accountability for satisfying the condition. In the event of an enforcement action, we believe that the certification will lend support to hazardous secondary material generators needing to prove that the reasonable efforts condition was met. Therefore, in today's final rulemaking, we are finalizing a requirement that hazardous secondary material generators must certify that reasonable efforts were made for each reclamation and intermediate facility prior to transferring hazardous secondary materials to such facilities.

With respect to those commenters who opposed certification and specifically argued that requiring such certification would stifle the use of third-party auditors, it is our understanding that third-party auditors do not generally draw any conclusions based on their audits, but simply report the results. In addition, the reasonable efforts condition requires that the hazardous secondary material generator decide whether a reclaimer is acceptable. Therefore, we disagree with

those commenters who stated that requiring a certification would constitute a significant new burden. Rather, EPA believes that requiring a hazardous secondary material generator to certify the reasonable efforts condition would provide them the flexibility to use audits or other information necessary in certifying that the condition of the exclusion was met. We find that the commenter example of an existing practice of sending a letter with audit results to an audited facility would need to include the certification language in 40 CFR 261.4(a)(24)(v)(C)(2) in order to meet the reasonable efforts condition.

Comments: Documenting of Reasonable Efforts

While EPA proposed that generators conduct reasonable efforts before sending hazardous secondary materials to the reclamation facility, we did not propose that documentation records must be kept of such demonstrations. However, EPA requested comment on whether to require hazardous secondary material generators to maintain documentation at the generating facility demonstrating that the reasonable efforts condition was satisfied prior to transferring the hazardous secondary materials to a reclamation facility. No form of documentation or format was specified, although EPA did cite audits as one type of documentation that could be relevant. Additionally, EPA requested comment on whether hazardous secondary material generators should be required to maintain certification statements that reasonable efforts were conducted for each reclamation facility to which the generator transferred the hazardous secondary materials to be reclaimed.

A majority of commenters supported a requirement that generators maintain documentation of reasonable efforts. A few commenters asked that documentation be kept on-site, while a few commenters asked that the documentation could be kept at a headquarters or other off-site location. Other commenters specifically requested that EPA not specify a location for the documentation. Commenters in favor of this requirement stated that documentation would be necessary for showing the basis for the reasonable efforts determination, as well as for improving the enforceability of the condition. A few commenters suggested that documentation be maintained for three years and one industry commenter asked that EPA set a time requirement specifying how long such documentation must be kept.

On the other hand, a few commenters were opposed to a documentation requirement. These commenters cited the confidential and proprietary nature of the audits and reports used by generators for making reasonable efforts and stated they did not believe they should share this information with regulators. A few commenters, including one state, also argued that a certification statement of having made reasonable efforts, signed by an authorized representative of the generator company, would provide adequate documentation that reasonable efforts were made. One state commenter also suggested that it would be difficult for states to enforce the requirement of documentation, presumably because EPA proposed that ''any credible evidence available'' could be used to demonstrate that the condition is met.

EPA's Response: Documenting Reasonable Efforts

After evaluating the comments, EPA has concluded that it is important for hazardous secondary material generators to produce documentation to demonstrate that the reasonable efforts condition has been met prior to transferring hazardous secondary materials to a reclamation and/or intermediate facility. We do not believe it is necessary to mandate that, for example, audits are specifically required for documentation and we prefer to maintain some flexibility in terms of the format for documenting the condition based on commenter input and the knowledge that each reasonable efforts inquiry will be unique. This flexibility for documentation is also in response to commenter concern about the confidentiality of audits. We do not believe that this flexibility will in any way impact the ability of regulatory authorities to determine whether the condition is satisfied. We believe that the certification statement is critical for ensuring accountability for satisfying the condition and that the act of making reasonable efforts is in fact genuine. We believe this requirement helps generators support their position that hazardous secondary materials have not been discarded and helps regulators determine whether a generator has satisfied this condition. Since updates of reasonable efforts are required at a minimum of every three years, EPA believes that such generators should maintain documentation for a minimum of three years to show that the requirement to update reasonable efforts has been satisfied.

We understand that audits and evaluations of reclamation facilities are not always kept on-site and may be maintained at a generator's headquarters or at another off-site location. For this reason, EPA is requiring that documentation must be made available, upon request by a regulatory authority, within 72 hours, or within a longer period of time as specified by the regulatory authority. We understand that in the age of near-instantaneous communication, a hazardous secondary material generator that performed reasonable efforts prior to transferring hazardous secondary materials should be able to retrieve documentation with relative ease. We also note that time frames for producing documentation are generally determined by regulatory authorities on a case-by-case basis and time frames are clearly outlined by authorities within RCRA Section 3007 information request letters.

C. Financial Assurance Requirement

In EPA's March 2007 supplemental proposal, EPA proposed that reclamation facilities receiving and recycling hazardous secondary materials under the transfer-based exclusion be required to demonstrate financial assurance in accordance with the requirements of subpart H of 40 CFR part 265. As part of this proposal, EPA sought comment on whether the existing subpart H requirements should be modified in some way specifically for reclamation facilities affected by the proposed exclusion. EPA also requested comment on whether EPA should tailor the costing requirements associated with the subpart H financial assurance requirements. Because of these comments, EPA has made several revisions to the financial assurance condition, as explained below.

Comments: Financial Assurance

Many commenters supported EPA's proposal that reclamation facilities receiving and recycling hazardous secondary materials under the transfer-based approach be required to demonstrate financial assurance in accordance with the current requirements of subpart H of 40 CFR part 265 in order to demonstrate that the hazardous secondary materials are not being discarded. Commenters argued that without a codified financial assurance requirement, recyclers that mismanage hazardous secondary materials could simply close their doors (as has happened previously) and abandon their hazardous secondary materials, leaving an environmental problem for the public to address and imposing the financial burden of cleaning up recycling facilities on states and local authorities, which may not have the resources to do so.

Commenters also noted that EPA's environmental problems study shows that the primary cause of damage incidents has been the business failure of recycling facilities. Without financial assurance, the commenters argue that states and taxpayers have been left with the bill for cleaning up these abandoned sites. Finally, these commenters stated that a recycling facility that does not meet the financial test, cannot obtain an insurance policy or other financial instrument, and does not have the resources to establish a trust fund or other mechanism, should not be handling hazardous secondary materials under the conditional exclusion.

Other commenters supported EPA's proposal on financial assurance, but also made suggestions for modifications. One commenter recommended that a financial assurance program be developed specifically for reclaimers. A few commenters recommended that reclamation facilities taking advantage of the exclusion maintain a closure plan that would be available for review, upon request, that substantiates and verifies the amount of financial assurance required.

Still other commenters stated that reclamation facilities that receive hazardous secondary materials from off-site generators under the transfer-based approach should not be held to the same financial assurance standards as facilities with permits to manage hazardous waste. Instead, the financial assurance requirements for recycling facilities should reflect the relatively lower risks associated with the manufacturing/recycling activities. Commenters claimed that reclamation facilities are essentially processing raw materials for beneficial use as opposed to RCRA-permitted facilities that are treating, storing, and disposing hazardous waste.

Finally, some commenters disagreed completely with EPA's approach to financial assurance. Commenters stated that EPA lacks the authority to subject facilities to the requirements or conditions when using hazardous secondary materials in production operations in which these materials are never discarded. Commenters stated that proposed conditions for the exclusion do not define the absence of discard and would effectively impose a waste management requirement upon a non-waste.

EPA's Response: Financial Assurance

EPA finds those comments that support the financial assurance condition persuasive and agrees with their conclusions. Requiring financial assurance for reclamation facilities (and intermediate facilities, which are included in the final rule) operating under the transfer-based exclusion is appropriate and reasonable for the Agency to determine that the hazardous secondary materials managed at these facilities are not discarded and is supported by the findings of the recycling studies conducted as part of this rulemaking effort. Financial assurance as a condition will ensure that the reclamation and intermediate facilities either have the financial wherewithal themselves, as demonstrated by qualifying for self insurance under the financial test, or that funds from a third party will be available to ensure that the hazardous secondary materials will not be abandoned. An owner or operator who must fully fund a trust to cover the retirement cost estimate will be careful not to discard the hazardous secondary materials so that he may recover the funds from the trust. Sureties, banks providing letters of credit and insurers will screen applicants to ensure that they are only providing assurance for good risks who are unlikely to abandon or discard such materials, thus demonstrating that the hazardous secondary material is not being discarded. As noted by the commenters, at least 138 of the 208 damage cases were firms that had gone out of business and abandoned the ''hazardous secondary material,'' a material that they presumably believed could be reclaimed.

In addition, the market forces study indicates that recyclers of hazardous secondary materials can behave differently from traditional manufacturers due to differences in the economic forces and incentives involved in recycling. Unlike manufacturing, where the cost of raw materials or intermediates (or inputs) is greater than zero and revenue is generated primarily from the sale of the output, some models of hazardous secondary materials recycling involve generating revenue primarily from receipt of the hazardous secondary materials. This situation can lead to over-accumulation and abandonment of hazardous secondary materials, particularly in cases where the product of the recycling process has low value, the prices are unstable, and/or the firm has a low net worth.

By requiring financial assurance, the public and federal, state and local governments can have confidence that the recycler's business model takes these market factors into consideration and that it will therefore not abandon the hazardous secondary materials, even if unforeseen market changes occur. The successful recycling study indicated that one of the main reasons that generators audit recyclers is to evaluate their financial health and resources to respond to accidents or other problems that could cause adverse environmental or human health consequences. This is primarily because of the joint-and-several liability provisions of CERCLA, under which a generator becomes a ''responsible party'' obligated to pay (in part or in whole) for remediation expenses if (in this example) a recycler to whom he sent recyclable hazardous secondary materials were to create contamination problems, but lacked the resources to pay for the cleanup.

Because American manufacturers have considerable experience with these types of CERCLA liability issues, evaluating the financial health of the reclamation facility before shipping recyclable hazardous secondary materials to them has become a standard business precaution for responsible generators. The condition for financial assurance thus can be seen as a way of addressing the same concern, thus ensuring that the reclamation and intermediate facility owner/operators who operate under the terms of this exclusion are financially sound and will not abandon or otherwise discard their hazardous secondary materials.

Thus, EPA disagrees with the commenters who argued that recycling hazardous secondary materials is, as a general matter, the same as processing raw materials for beneficial use. Because of the nature of these materials (i.e., hazardous spent materials and listed by-products and listed sludges), they are frequently more difficult to process than most raw materials, and the nature of the economics of the transfer of these materials can create an incentive for discard. Requiring financial assurance is essential for helping to define those situations where the hazardous secondary material is not being discarded.

However, EPA agrees that some adjustments to the existing 40 CFR part 265 financial assurance requirements would help better tailor them to hazardous secondary material reclamation and intermediate facilities. The current hazardous waste financial assurance regulations include provisions (such as post-closure) not appropriate to hazardous secondary material units, and the terminology is directed towards permitted TSDFs. EPA also agrees that the regulations need to be more explicit as to the documentation requirements for the financial assurance cost estimate. The financial assurance requirements in 40 CFR part 265 subpart H in turn

reference and rely on certain requirements in the 40 CFR part 265 subpart G closure regulations. Although the hazardous secondary material units are not required to undergo Subtitle C closure, some of the provisions of 40 CFR part 265 subpart G are important to implementing 40 CFR part 265 subpart H and need to be clarified. As a convenience to the regulated community, EPA has placed the financial assurance requirements applicable to hazardous secondary materials in a stand-alone regulation (see 40 CFR part 261 subpart H). Substantively, these regulations generally mirror and include the same requirements as the 40 CFR part 265 financial assurance regulations, but they have been condensed and reframed to refer to reclamation and intermediate facilities rather than TSDFs and to directly incorporate (rather than just referencing) those aspects of 40 CFR part 265, subpart G that are necessary for implementing the financial assurance condition.

For further discussion of how the financial assurance condition operates and how the provisions map to the requirements in 40 CFR part 265, see section VIII.C of today's preamble.

D. Ability of Excluded Reclamation Facility To Accept Manifested Hazardous Waste

In the March 2007 supplemental proposal, EPA proposed that reclaimers receiving hazardous secondary materials from generators that continue to manage such materials under the current hazardous waste regulatory system would still be able to claim the exclusion for those hazardous secondary materials. In essence, this would allow manifested hazardous waste to be sent to an unpermitted facility, as long as that facility met the conditions of the exclusion.

Comments and EPA's Response: Excluded Reclamation Facilities Accepting Manifested Waste

Most of the commenters on this issue raised serious concerns about this provision, among other things arguing the fact that it would be unworkable. Commenters also raised concerns about the generator's liability under such a situation, particularly if the reclaimer failed to inform the generator that its hazardous waste would be managed under the exclusion. Commenters also noted that the lack of a requirement for ''reasonable efforts'' on the part of the generator is contrary to the basic premise of the exclusion, which is that generators will be responsible and ensure reclaimers properly manage and recycle the hazardous materials.

After considering the comments received, EPA is not allowing reclaimers to manage manifested federal hazardous waste under the exclusion. Although this provision may have increased recycling opportunities, the fact that the hazardous secondary material generator manages the hazardous secondary materials as manifested hazardous wastes would have decoupled the exclusion from the underlying rationale that the materials are not discarded.

E. Imports and Exports

In the March 2007 supplemental proposal, the Agency proposed to exclude hazardous secondary materials that are exported from the United States for reclamation at a facility located in a foreign country, provided the hazardous secondary material generator complies with the generator requirements under the transfer-based exclusion (e.g., notification, reasonable efforts, etc.), as well as notice and consent regarding planned exports of such hazardous secondary materials. We also requested comment on whether the Agency should allow exports under the generator-controlled exclusion.

Comments: Scope of Exports

Overall, commenters expressed few concerns with the specifics of the proposed export regulations, although a few disagreed with allowing exports of hazardous secondary materials under the proposed rule altogether. These commenters believed that allowing exports of such hazardous secondary materials would run contrary to international agreements (such as agreements established by the Organization for Economic Cooperation and Development (OECD) and the Basel Convention regarding transport of hazardous waste) and may also increase the risk of environmental damage in other countries. At least two commenters suggested limiting exports to our bilateral partners only (i.e., Canada and Mexico). On the other hand, some industry commenters argued that many companies have worldwide operations and would therefore benefit from broader provisions allowing exports of hazardous secondary materials to be managed under the control of the generator because it would improve the companies' ability to recycle hazardous secondary materials.

EPA's Response: Scope of Exports

After considering these comments, the Agency is largely maintaining the export provisions as proposed, with some minor modifications described below. We believe that hazardous secondary materials exported for legitimate reclamation in accordance with today's final rule are not discarded and, thus, not solid wastes and, therefore, we have no basis for prohibiting exports when a hazardous secondary material generator complies with the regulatory requirements.

We also disagree with commenters who believe today's rule runs contrary to international agreements controlling the movement of hazardous waste. We note the U.S. is an OECD Member and is, therefore, legally bound to comply with the OECD's ''Decision of the Council C(2001)107/FINAL, Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations, as amended by C(2004)20,'' which provides a framework for OECD Member countries to control transboundary movements of recoverable waste in an environmentally sound manner. The Amended 2001 Decision recognizes that Member countries may develop their own regulations to determine whether or not materials are controlled as hazardous wastes. Under today's rule, hazardous secondary materials meeting certain conditions and exported for reclamation are not solid wastes under U.S. regulation. The Agency notes, however, that once hazardous secondary materials reach the border of the receiving country, the hazardous secondary material is regulated in accordance with the receiving country's laws and regulations. In other words, such hazardous secondary materials that are not solid and hazardous wastes under the U.S. hazardous waste regulations may be solid and hazardous wastes under the receiving country's regulations and, therefore, facilities should be aware of the requirements that competent authorities of receiving countries may impose.

Additionally, some commenters asserted that today's rule was inconsistent with the Basel Convention, a separate multilateral international agreement governing the transboundary movements of hazardous wastes. The U.S., however, is not a party to the Basel Convention and thus is not held to the Convention's agreements (although, because the Convention prohibits exports between a Basel party and a non-Basel party, the U.S. may not export hazardous waste to any Basel party, absent a bilateral or multilateral agreement with that party). Beyond this point, EPA, in any case, considers today's rule to be consistent with Basel for the same reason that it is consistent with the OECD agreement described above.

In response to comments on allowing exports under the generator-controlled exclusion, we note this exclusion is subject to few restrictions and is largely based on the assumption that hazardous secondary materials are unlikely to be discarded because they would be closely managed and monitored by a single entity. However, this same assumption does not pertain to exports of hazardous secondary materials because EPA would not be able to ensure the close management and monitoring by a single entity of hazardous secondary materials in a foreign country. Accordingly, we believe that hazardous secondary materials exported for reclamation is excluded only if the receiving country has consented and is provided an opportunity to determine and ensure that hazardous secondary materials exported to its reclamation facilities are not discarded.

Additionally, we note that in today's rule we have replaced the term ''exporter,'' which was used in the March 2007 supplemental proposal, with the term ''hazardous secondary material generator.'' This is because, under the exclusion for hazardous secondary materials exported for reclamation (today's 40 CFR 261.4(a)(25)), the ''exporter'' is required to comply with the generator responsibilities listed under the transfer-based exclusion (such as reasonable efforts), as well as notice and consent and annual reports. By replacing the term ''exporter'' with ''hazardous secondary material generator,'' we are clarifying that for hazardous secondary materials exported for reclamation, the hazardous secondary material generator is responsible for notice and consent and for submitting annual reports. We would also like to clarify that intermediate facilities can still be used for exports (as with the transfer-based exclusion), but the generator, not the intermediate facility, must comply with the notice and consent and annual report requirements. This is because the intermediate facility cannot perform the generator responsibilities under the transfer-based exclusions and, therefore, cannot perform the duties of the ''exporter'' under this rule. We also note that this exclusion specifically references the condition in § 261.4(a)(24)(iv) that recycling be legitimate as specified in § 260.43.

Comments: Annual Reports

In the proposed rule, we solicited comment on whether facilities managing hazardous secondary materials under the exclusions should be required to submit periodic (e.g., annual) reports detailing their recycling activities, such as information on the types or volumes of hazardous secondary materials reclaimed or other relevant information.

With respect to exports, a few commenters suggested that we add to 40 CFR 261.4(a)(25) a requirement that hazardous secondary material generators submit annual reports regarding the exports of their hazardous secondary materials. This requirement would be similar to the requirement currently in 40 CFR part 262 subpart E, in which primary exporters must submit annual reports regarding exports of hazardous waste. Conversely, a few commenters urged EPA to finalize the export requirements, as proposed with at least one commenter explicitly agreeing with EPA's proposal not to require annual reports for hazardous secondary material generators.

EPA's Response: Annual Reports

The Agency agrees with those commenters who supported a requirement for hazardous secondary material generators to submit to EPA annual reports regarding the exports of their hazardous secondary materials. We believe that such a requirement will help determine that hazardous secondary materials exported for reclamation are handled as commodities and not discarded. We have, therefore, added a provision to 40 CFR 261.4(a)(25) requiring hazardous secondary material generators who export hazardous secondary materials to file a report with the Office of Enforcement and Compliance Assurance [19] that summarizes the types, quantities, frequency, and ultimate destination of all hazardous secondary materials exported for reclamation during the previous calendar year. Such reports would document the total amount of hazardous secondary materials exported during the calendar year, which is often not the same as the amount specified in an export notice. Such a report would also enable EPA to compare actual shipments in the annual report against proposed shipments in the export notice to ensure that the shipments occurred under the terms approved by the receiving country. Finally, such a report would enable EPA to provide summary information, if requested by a receiving country, that could assist the receiving country in determining what amount of hazardous secondary materials was received in that country for reclamation.

Comments and EPA's Response: Tacit Consent

In the March 2007 supplemental proposal, we specified that the hazardous secondary material generator must receive consent (through EPA) in writing from the receiving country before the hazardous secondary materials could be exported. Some commenters pointed out that under the existing export regulations for hazardous wastes exported to OECD Member countries, the receiving country may use tacit consent to respond to the notification (40 CFR part 262 subpart H). Commenters expressed concern that this was a point of confusion, as fully regulated hazardous wastes are eligible for tacit consent, whereas excluded hazardous secondary materials would require consent in writing. To eliminate this confusion, EPA has added a provision to the regulations that allows tacit consent for hazardous secondary materials exported to OECD Member countries similar to that allowed for hazardous wastes under 40 CFR part 262 subpart H. We note that Canada and Mexico, though OECD Member countries, typically require written consent for exports to their countries.

For a detailed description of today's exclusion for hazardous secondary materials exported for reclamation, see section VIII.C.5. of today's preamble.

F. Notification and Other Recordkeeping and Reporting Requirements

EPA proposed a total of three recordkeeping and reporting requirements in the March 2007 supplemental proposal: (1) A one-time notification to be submitted by hazardous secondary material generators and reclaimers (required for both the generator-controlled and the transfer-based exclusions); (2) for the transfer-based exclusion, a requirement for both the hazardous secondary material generator and reclaimer to maintain for three years records of all off-site shipments of excluded hazardous secondary materials (either sent by the generator or received by the reclaimer); and (3) notice and consent for hazardous secondary materials exported for reclamation in foreign countries.

Comments: General Recordkeeping and Reporting Requirements

Many commenters supported increasing the recordkeeping and reporting requirements in order to adequately monitor compliance with the exclusions and to measure increases in

[19] The Office of Enforcement and Compliance Assurance (OECA) is the office within EPA that implements the notice and consent process for exports.

safe hazardous waste recycling. Alternatively, some commenters urged EPA to finalize the requirements as proposed, cautioning that onerous reporting and recordkeeping requirements would discourage facilities from taking advantage of the exclusions. A few commenters questioned EPA's authority for including recordkeeping and reporting requirements altogether; these commenters argued that, since hazardous secondary materials are not solid wastes and thus not subject to regulation, recordkeeping and reporting requirements should not apply.

EPA's Response: General Recordkeeping and Reporting Requirements

EPA agrees with the majority of commenters and believes that additional recordkeeping and reporting requirements are necessary to enable effective and credible oversight. We therefore consider the recordkeeping and reporting requirements in today's rule to be the minimum information necessary to determine that hazardous secondary materials are reclaimed and not discarded. Some of the recordkeeping requirements that we are finalizing today are discussed in detail within other relevant sections of today's preamble (see section XVII.B. for our response to comments on documentation and certification of reasonable efforts and section VII.C. for a detailed description of financial assurance). This section focuses on our response to comments regarding the notification requirement and, for the transfer-based exclusion, the requirement that the generator maintain confirmations of receipt of hazardous secondary materials from the reclamation facility and intermediate facility.

Comments: Notification as a Condition of the Exclusion

In the March 2007 supplemental proposal, EPA noted that the one-time notification requirement under the authority of RCRA section 3007 would not be a condition of the exclusions, and that failure to notify, while constituting a violation of the notification regulations, would not affect the excluded status of the hazardous secondary materials.

A number of commenters disagreed with this rationale and argued instead that the notification requirement should be made a condition of the exclusions. These commenters stated that, as proposed, the notification requirement would create an unintended incentive for hazardous secondary material generators and reclaimers *not* to notify, because those who chose not to notify would likely evade oversight for many years and, if caught, could simply regard the ''paperwork violation,'' and possible penalty for that violation, as a cost of doing business. These commenters maintained that the failure of a hazardous secondary material generator or reclaimer to provide notification is a strong indication that these entities are either unaware of or trying to circumvent the regulatory requirements, in both cases possibly increasing the likelihood for environmental damage. Therefore, these commenters argued that failure to notify should be regarded as more serious than a reporting violation and should, therefore, remove the excluded status of the hazardous secondary materials.

Conversely, some commenters supported EPA's proposed approach, agreeing that if an entity fails to notify, it does not necessarily indicate that the hazardous secondary materials were discarded and, therefore, should not automatically affect the excluded status of the materials.

EPA's Response: Notification as a Condition of the Exclusion

At issue here is not the requirement to submit a notification, but rather the consequences an entity would face for failing to notify. Notification as a *requirement* under the authority of RCRA section 3007 of the exclusion means failure to notify would constitute a violation of the notification regulations. On the other hand, notification as a *condition* of the exclusion means failure to notify would potentially result in the loss of the exclusion for the hazardous secondary materials (i.e., the hazardous secondary materials would become solid and hazardous wastes and subject to full Subtitle C regulation). In context with this issue, EPA considered the intent of the notification, which is to provide basic information to regulatory agencies about who will be managing hazardous secondary materials under the exclusions. This basic information enables regulatory agencies to administer oversight and set enforcement priorities, but does not allow regulatory agencies to directly determine that hazardous secondary materials were discarded. In other words, a generator or reclaimer could fail to notify yet still be legitimately recycling their hazardous secondary materials according to the conditions of the exclusion. Therefore, EPA is retaining notification as a requirement under the authority of RCRA section 3007, and, thus, notification is not a condition of today's exclusions.

Comments: Format of Notification

In the March 2007 supplemental proposal, EPA requested comment on whether the notification should be submitted in a particular format and discussed the option of using the Subtitle C Site Identification Form (EPA Form 8700–12) to collect the information. By far, the majority of commenters were in favor of using the Site ID form, pointing out that EPA would effectively minimize burden by leveraging this form because it is already familiar to the regulated community. Of the very few commenters opposed to using the Site ID form, some argued that the form was not appropriate for collecting information on hazardous secondary materials because it is primarily used to collect information regarding hazardous wastes. However, other commenters thought the Site ID form was appropriate because it is currently used to collect information on other types of recycling activities not subject to full Subtitle C regulation, such as used oil and universal waste activities. Finally, some commenters supported use of the Site ID form because it would result in standardized and consistent data that users could electronically access through EPA's databases.

EPA's Response: Format of Notification

EPA agrees with the majority of commenters and is requiring hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers and intermediate facilities managing hazardous secondary materials to use the Site ID form (EPA Form 8700–12) when notifying in accordance with today's rule. We believe that the Site ID form will provide standardized data, while minimizing the collection burden because many facilities notifying under today's rule are already familiar with the form and will not need to invest resources in learning a new form and process. EPA also agrees with commenters who stated that the form is appropriate for today's rule, since it already collects information on other types of recycling activities. However, EPA will modify the current Site ID form in order to accommodate the notification requirement for today's rule.

Comments: Types of Information in Notification

In the March 2007 supplemental proposal, EPA proposed that generators and reclaimers of hazardous secondary materials include in the notification the name, address, and EPA ID number (if

applicable) of the generator or reclaimer; the name and number of a contact person; the type of hazardous secondary materials that would be managed according to the exclusion; and when the hazardous secondary materials would begin to be managed in accordance with the exclusion. Many commenters, particularly states, argued that this information was insufficient to monitor hazardous secondary material generators and reclaimers adequately and, instead, suggested additional types of information to include in the notification, such as quantity of the hazardous secondary materials managed under the exclusion, the name and EPA ID number of the reclaimer receiving the hazardous secondary materials and a description of the recycling process. These commenters argued that additional information was important to monitor compliance of the facilities with the exclusions and to measure increases in safe hazardous secondary materials recycling.

On the other hand, some commenters urged EPA to retain the basic information in the notification as proposed. These commenters questioned how additional information would assist with defining discard and also noted that EPA, historically, has not required notification for the existing self-implementing exclusions from the definition of solid waste located in 40 CFR 261.4.

EPA's Response: Types of Information in Notification

After carefully considering these comments, we agree with those commenters who support requiring additional information in the notification in order to monitor compliance with the exclusions adequately. We believe today's notification requirement reflects the minimum amount of information needed to identify which facilities will be managing hazardous secondary materials under today's rule in order to enable regulatory agencies to administer oversight and ensure that hazardous secondary materials are reclaimed and not discarded. We, however, did not include suggested data elements that might be difficult or complex to collect, such as a description of the recycling process, and did not include information that is more appropriately documented and maintained at the facility. For example, some commenters suggested adding a requirement that generators indicate the identity of the reclaimer receiving their hazardous secondary materials for reclamation; however, under today's transfer-based exclusion, this information is already documented as part of the requirement for hazardous secondary material generators to keep records of all off-site shipments.

We consider the information we are requiring in the notification under today's rule to reflect what responsible companies would routinely collect as part of their normal business operations. For example, responsible companies track quantities of valuable commodities that are managed on-site or shipped off-site and, thus, we believe reporting quantities of hazardous secondary materials managed in the notification will not present an undue burden.

Furthermore, we note that EPA currently requires notification under certain of the 261.4 exclusions, such as for spent materials generated and recovered within the primary mineral processing industry (40 CFR 261.4(a)(17)) and for hazardous secondary materials used to make zinc micronutrient fertilizers (40 CFR 261.4(a)(20)) and, thus, we do not agree with those commenters who believe that the notification requirement is inconsistent with the existing solid waste exclusion requirements.

For a detailed discussion on the notification requirement that EPA is finalizing today, see sections VII.C. and VIII.C.

Comments: Periodic Reporting

In the March 2007 supplemental proposal, EPA proposed that hazardous secondary material generators and reclaimers submit a one-time notification, but asked for comment on whether facilities using the exclusion should be required to submit periodic (e.g., annual) reports detailing their recycling activities.

Several commenters supported requiring periodic reports (or periodic notification). These commenters argued that data collected in a one-time notification would become obsolete very quickly and would likely require substantial investment in order to 'clean up' the information before it could be used, a resource burden that would likely fall on the states. For example, over time, some facilities that originally submitted a one-time notification would cease managing hazardous secondary materials according to the exclusion. Some commenters argued that, by using a one-time notification approach, it would be a challenge to identify these facilities and, subsequently, a challenge to compile a list of facilities who are currently managing hazardous secondary materials according to the exclusions, thereby inhibiting the states' ability to monitor compliance at these facilities.

Furthermore, as one state commenter said, some generators managing hazardous secondary materials will go out of business and without a steady feed of updated information, states have no way of knowing which generating facilities have closed and, thus, are unable to ensure that their hazardous secondary materials were reclaimed and not discarded. This leaves states acutely vulnerable to costs incurred from potential environmental damage caused by abandonment of the hazardous secondary materials.

Other commenters noted that periodic notifications would allow public agencies to compile credible information regarding hazardous secondary materials recycling that can be used to demonstrate success, target additional recycling opportunities, and improve the public's understanding and acceptance of recycling practices. One commenter also supported a clear requirement to file periodically in order to reduce confusion regarding when to re-notify and also to ensure that the information was kept accurate and current.

On the other hand, some commenters urged EPA to finalize the notification requirements as proposed and stressed that numerous recordkeeping and reporting requirements may inhibit facilities from taking advantage of the exclusions, thereby discouraging further increases in recycling.

EPA's Response: Periodic Reporting

In considering these comments, EPA reflected on the intent of the notification requirement, which is to provide basic information to regulatory agencies about who is managing hazardous secondary materials under the exclusions in order to monitor compliance with the exclusions. As commenters noted, with a one-time notification approach, there is no assurance that the information collected in EPA's databases over time will accurately reflect facilities that are managing hazardous secondary materials according to the exclusion. Therefore, the Agency can imagine instances where precious resources are required to be spent on 'cleaning up' the data before regulatory authorities can use it to identify facilities who are currently managing hazardous secondary materials under the exclusions. With a one-time notification, we can also foresee problems where regulatory agencies spend time and resources monitoring compliance at facilities that have since stopped managing hazardous secondary materials at some point in the past. This inefficient use of resources would serve to lower the effectiveness of regulators

to monitor compliance overall and could potentially increase the risk of environmental damage from abuse of today's exclusions.

EPA further believes that responsibility for submitting and maintaining updated information lies with the hazardous secondary material generators, reclaimers, and intermediate facilities that use today's exclusions. We understand arguments made by commenters that, as originally proposed, the one-time notification would in effect reverse this responsibility, placing an unreasonable burden on the states and EPA to 'clean up' the data every time a regulating agency sought to use the information. Instead, the incremental burden to facilities who must submit periodic notifications is minimal compared to the considerable public expense that states and EPA would likely incur over time in order to use the information submitted in a one-time notification. Once an initial notification is submitted, to re-notify, a facility need only review the previous notification and either make changes if necessary or confirm that the information remains accurate. EPA has chosen to use the Site ID form for this notification because it is standardized, electronically-accessible, and familiar to the regulated community and, therefore, will assist facilities by reducing the overall time and effort required to report the information. Currently, large quantity generators on average spend $364 a year on biennial reporting under full Subtitle C regulation, whereas under today's rule, an initial notification is estimated to be only a third of that cost, with subsequent notifications likely costing even less.[20] EPA has designed the notification requirement in today's rule to strike an appropriate balance between providing essential information to regulators, while keeping additional burden at a minimum.

We are convinced of the validity of the above arguments raised by commenters in support of periodic reporting and agree that the limitations of a one-time notification approach would undermine the purpose of the notification. Therefore, EPA is requiring hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities managing hazardous secondary materials to notify the Regional Administrator prior to operating under the exclusions and by March 1 of each even-numbered year thereafter. We chose the two-year time frame to reflect both commenters' suggestions (of those who supported periodic reporting, most suggested annual or biennial reporting) and to best fit with the biennial reporting process for hazardous wastes (pursuant to 40 CFR 262.41, biennial reports are due by March 1 of each even-numbered year). Since many facilities are accustomed to the biennial reporting process and likely have structured their processes around the biennial report schedule, we chose the same calendar date for the notification requirement in order to allow facilities to leverage their existing processes and submit the notification at the same time their biennial report is due.

Comments: Confirmation of Receipt

In the March 2007 supplemental proposal, EPA requested comment on whether hazardous secondary material generators should be required to maintain confirmations of receipt of the hazardous secondary materials by the reclaimer. Many commenters expressed support for this requirement, citing that responsible commercial recyclers routinely issue receipt confirmations or ''recycling certificates'' to assure the generator that its hazardous secondary materials reached the intended destination and were not discarded. Of those who supported the requirement, many argued that EPA should not specify a specific form of documentation so that facilities could leverage existing business practices already in place to track valuable commodities. A few commenters continued to urge EPA to be conscious of the imposition of additional recordkeeping and reporting requirements lest the Agency discourage recycling of hazardous secondary materials.

EPA's Response: Confirmation of Receipt

We agree with commenters who support requiring confirmation of receipts and are, therefore, adding to 40 CFR 261.4(a)(24) a requirement that generators maintain confirmation of receipts from reclaimers and intermediate facilities for all off-site shipments of excluded hazardous secondary materials for a period of three years. Under today's rule, hazardous secondary materials may be transferred to intermediate facilities for storage or, where reclamation consists of multiple steps occurring at separate facilities, may be transferred to more than one reclaimer. This requirement would confirm that the hazardous secondary materials did in fact reach the reclaimer (or each reclaimer, if reclamation occurs at separate facilities) and any intermediate facility as originally intended and were not discarded. EPA also agrees with commenters that responsible companies would produce and maintain receipts as part of their normal business operations and, thus, the Agency believes this requirement will not pose an undue burden. The Agency is not specifying a certain form or format for this documentation, but instead provides examples of routine business records that would contain the appropriate information in section VIII.C.4. of today's preamble and in today's rule.

XVIII. Major Comments on Legitimacy

A. Codification of Legitimacy Factors

EPA's October 2003 proposal to codify the legitimacy criteria was in response to the comments that have been made over the years by both industry and states that the existing legitimacy guidance is useful, but somewhat hard for members of the regulated community to know about because it could only be found in preamble discussions and guidance. The March 2007 supplemental proposal made some adjustments to the October 2003 proposal, including a change from the term ''criteria'' to ''factors,'' but left intact the general intention to codify those legitimacy factors for all recycling. As expected, the Agency received public comments from both state environmental agencies and from industry on our approach.

Comments: Codification of Legitimacy.

State commenters were unanimously in favor of codifying the legitimacy factors in the regulations. In response to the October 2003 proposal, twenty-three states expressed their support for codification. In comments to the March 2007 supplemental proposal, two additional states supported codification of the proposed factors. All twelve states that commented on legitimacy in both proposals expressed their strong support for codification in both their 2003 and 2007 comments.

States have long advocated for establishing regulations that specifically address the legitimacy of recycling. In response to EPA's proposals, many states commented that they are currently relying on the concept of legitimacy as laid out in definition of solid waste preambles and in the 1989 ''Lowrance Memo'' guidance because they are the best sources of information that can be used in evaluating a recycling operation. Codification is a

[20] Estimates are from the Regulatory Impact Analysis for U.S. EPA's 2008 Final Rule Amendments to the Industrial Recycling Exclusions from the Definition of Solid Waste.

priority to the states because, as a regulation, the requirement for recycling to be legitimate would be better known and understood by the regulated community and it would be easier for states to monitor compliance. One commenter stated that it makes more sense to implement a regulation than a collection of statements found in guidance.

Industry commenters, on the other hand, were split on the issue of codification. Including comments from both the October 2003 proposal and the March 2007 supplemental proposal, just over half of the industry commenters opposed codification of the legitimacy factors, although they tended to express support in their comments for the purpose and goals of the legitimacy factors and agree with the goal of identifying which processes are true recycling and which are sham recycling. Several industry commenters stated that the guidance is working well already and many of those opposed to codification expressed concern that if the legitimacy factors were codified, they would lose the flexibility in the guidance that allows the factors to apply to many varied industrial sectors and processes, automatically becoming more stringent. Another concern expressed by the commenters regarding codification of the legitimacy factors was that, in their view, the terms used in the regulatory text are too ambiguous and should be clarified before they can be part of a regulation. These commenters argue that codification of the factors without addressing these concerns would automatically be more stringent than having guidance, thereby inappropriately inhibiting legitimate recycling.

About one-third of the forty-two industry commenters on the issue of whether or not to codify backed the codification of the legitimacy factors. Many of these commenters represented segments of the waste management industry, but a number of representatives of generating industries also made this comment. The industry commenters that supported codification stated that they did so because it would provide clarity, consistency, and predictability by making it more apparent which hazardous secondary materials and processes are covered by the recycling exclusions. One commenter noted the value in the legitimacy factors going through the notice and comment process since they are being used by the states in implementation of the regulations and another expressed an expectation that the codified requirements would lead to more uniformity in interpretation between implementing agencies. Several of these commenters also stated that they also valued the flexibility of the structure of the Lowrance memo and stressed the importance of the codified legitimacy factors retaining that flexibility.

In addition, several more industry commenters stated that they saw the value in codifying the legitimacy factors and could support its codification under certain conditions. The suggested conditions included the codification of only the two proposed mandatory factors, codification of the factors in conjunction with finalizing what we called the ''broader exclusion'' option in the October 2003 proposal, and codification of legitimacy factors to be used only with the definition of solid waste exclusions that were included within the supplemental proposal in March 2007.

EPA's Response: Codification of Legitimacy.

In today's final rule, EPA is codifying the legitimacy factors as a requirement for today's exclusions and for the non-waste determinations, but not for all recycling. To avoid confusion among the regulated community, as well as the state and other implementing regulatory agencies about the status of recycling under the existing exclusions, EPA is not codifying the legitimacy factors as specifically applicable to existing exemptions in today's final rule. In developing the codified legitimacy language, we did not intend to raise questions about the status of legitimacy determinations that underlie existing exclusions from the definition of solid waste, or about case-specific determinations that have been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances, including determinations made in letters of interpretation and inspection reports, remain in effect.

In codifying the legitimacy provisions for the exclusions and non-waste determinations in today's final rule, EPA has taken into consideration all the comments it received in response to the October 2003 proposal and March 2007 supplemental proposal on the structure of the legitimacy factors, as well as on the individual factors themselves and has made the appropriate changes to the factors to address those comments.

In response to a general comment, EPA is aware of the comments that each of the terms in the legitimacy regulations should be more clearly defined and the suggestions for specific tests for each of the factors. We are, however, seeking a balance between having a set of specific tests and having the flexibility needed for a requirement that applies to the range of recycling practices in various industries in different industrial or commercial settings.

Therefore, in response to comments, the discussion of legitimacy in today's preamble describes more clearly what EPA means by the terms we use in the regulatory text for this element of the final rule. The Agency also is providing more examples of both legitimate and sham recycling than were included in the discussions of the individual factors in the preambles for the October 2003 proposal and March 2007 supplemental proposal to illustrate the meaning of the legitimacy factors. The Agency also is stressing the importance of case-by-case determinations that are based on the facts of a specific situation.

B. Effect on Current Determinations of Legitimate Recycling Activities

In the March 2007 supplemental proposal, EPA stated its opinion that the concept of legitimate recycling originally proposed in October 2003 is not substantively different from our longstanding policy, as articulated in the 1989 Lowrance Memo and subsequent preambles. We stated that we were simply reorganizing, streamlining, and clarifying the existing legitimacy principles. Thus, we stated in the March 2007 supplemental proposal that we believe that the regulatory definition of legitimate recycling, when applied to specific recycling scenarios, would result in determinations that were consistent with EPA's earlier policy. We went on to say that we did not believe the regulated community or implementing agencies would need to revisit previous legitimacy determinations. However, we did request examples of determinations which could be impacted by the codification.

Comments: Relationships With Existing Determinations

Commenters expressed concern that, in spite of EPA's intentions, the codification could prompt implementing agencies to revisit past legitimacy determinations. In addition, comments on the October 2003 proposed rule suggested that implementing agencies could interpret the proposed regulatory text as meaning that a recycling activity must satisfy all four of the factors to be considered legitimate. Several commenters on the March 2007 supplemental proposal stated that legitimacy should not apply to the existing recycling exclusions in the current regulations and others were

concerned that codification may lead implementing agencies to consider only the four factors and not consider other key information about the recycling activity.

EPA's Response: Relationships With Existing Determinations

Regarding the existing exclusions in the regulations, EPA acknowledges that, in establishing a specific exclusion, we have already determined in the rulemaking record that the specific recycling practice is excluded from the definition of solid waste provided all the conditions of the rule are met. However, the Agency has always enforced its rules on the basis that any recycling must be legitimate (See *U.S.* v. *Self*, 2 F. 3d 1071, 1079 (10th Cir. 1993); *U.S.* v. *Marine Shale Processors*, 81 F. 3d 1361, 1366 (5th Cir. 1996): *Marine Shale Processors* v. *EPA*, 81 F. 3d 1371, 1381–83 (5th Cir. 1996)). This is meant to prevent a company from claiming to be operating under an existing exclusion and simply using that as a way to avoid full RCRA Subtitle C regulation.

However, to avoid confusion among the regulated community and state and other implementing agencies about the status of recycling under existing exclusions, we have decided that the focus of this rule should be the specific changes it is making to the definition of solid waste in the form of the exclusions and non-waste determinations finalized today. Thus, the legitimacy factors codified in 40 CFR 260.43 only apply to the exclusions and non-waste determination process being finalized in this rule and we do not expect implementing agencies to revisit past legitimacy determinations based on this final rule preamble language.

Also, it should be noted that the regulatory language does not preclude other considerations when looking at the codified factors for making legitimacy determinations. We recognize that additional information about the recycling activity could be helpful and could be used when assessing the four legitimacy factors and in making a determination about whether a specific recycling activity is legitimate. In fact, we encourage the regulated community and implementing agencies to use any and all information about the recycling process to come to an informed decision on the legitimacy of a hazardous secondary material recycling operation. However, given the public comment on the October 2003 proposed rule and the March 2007 supplemental proposal, no other factors have been identified and we believe that the four legitimacy factors codified in this rule include the relevant principles of legitimate recycling for the purposes of the exclusions and non-waste determinations being finalized today.

C. Revised Structure for the Definition of Legitimate Recycling

In the March 2007 supplemental proposal, we proposed a new structure for the definition of legitimate recycling. The first part consisted of those factors that must be met, which included a requirement that the hazardous secondary materials being recycled provide a useful contribution to the recycling process or to the product of the recycling process and a requirement that the product of the recycling process be valuable. EPA considers these two factors to be fundamental to legitimate recycling and if a recycling process does not meet them, it is sham recycling (i.e., treatment or disposal of a hazardous waste under the guise of recycling).

The second part of the proposed structure included two additional factors that must be taken into account when a legitimacy determination is being made. We explained that while these two additional factors are important in determining whether a particular process is legitimate, there may be circumstances under which a legitimate recycling process might not conform to one or both of these factors. The two additional factors are whether the hazardous secondary materials are managed as a valuable commodity and whether the product of the recycling process contains significant concentrations of hazardous constituents. We note, however, that in cases where a recycling practice does not meet one or both of these factors, the hazardous secondary material generator and/or recycler should be able to demonstrate why the recycling is in fact still legitimate.

Comments: Revised Structure

The public comments on the individual factors in the March 2007 supplemental proposal showed that, as in the comments to the October 2003 proposal, there continues to be general agreement from industry and state commenters on two factors (useful contribution and valuable product/intermediate). Commenters were virtually unanimous in their agreement that these two factors are crucial indicators of legitimacy and should be included in the concept of legitimacy. In other words, there was agreement that recycling cannot be legitimate if the material being recycled does not provide a useful contribution to the process or to the product and if the recycling process does not yield a product or intermediate that is valuable to someone. Certain commenters requested that EPA provide additional information on how it defines these terms and, while there was some disagreement with the specifics laid out in the preamble, there was little disagreement with the basic overarching concepts.

Although there was support for the structure for legitimacy that was proposed in the March 2007 supplemental proposal, most states, the environmental community, and the waste management industry argued that all four of the factors should be mandatory requirements-that is, they must all be met for the recycling activity to be considered legitimate recycling. Industry had a more mixed response to this issue with some supporting the proposed structure and others preferring that the factors be finalized as balancing factors. Others expressed their opinion that while they preferred non-mandatory criteria, the proposed approach was reasonable. Several commenters expressed their preference for keeping the legitimacy factors as guidance, but stated that if the Agency decided to codify the legitimacy factors, they preferred the structure as proposed in the March 2007 supplemental proposal.

EPA's Response: Revised Structure

EPA agrees with the commenters on the importance of the two factors (useful contribution and valuable product/intermediate) that were proposed to be mandatory in evaluating legitimate recycling and, for this final rule, we have decided that these two concepts are, in fact, at the very core of what it means to recycle legitimately. Therefore, the final regulatory language states in 40 CFR 260.43(b) that ''[l]egitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product of the recycling process, and the recycling process must produce a valuable product or intermediate.'' This statement is followed by clauses (1) and (2) that give more details on how the Agency defines these concepts.

EPA has determined that the other two factors are still important in making legitimacy determinations, but do not necessarily have to be met for the recycling activity to be considered legitimate. Instead, the regulations state that a person making a legitimacy determination must consider these two factors, which are found in § 260.43(c) of the final language. In stating that the factors must be considered, EPA expects that those making legitimacy determinations will evaluate how the

hazardous secondary materials in question are managed as compared to analogous raw materials and how levels of hazardous constituents in their products compare with the levels of hazardous constituents in analogous products. If the generator or recycler determines that one or both of these factors are not met, that person should be prepared to explain why their recycling activity is nevertheless still legitimate. As described in § 260.43(c)(3) of the regulatory text, in evaluating the extent to which these factors are met and in determining whether a process that does not meet one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations. We would note that the facility may be requested to demonstrate the legitimacy of their recycling process and explain why failure to meet one or both of these factors does not affect the legitimacy of the recycling process.

Comments: Mandatory Factors

As part of the October 2003 proposal, the Agency solicited comment on whether the factors should continue to be used in the same way as the previous guidance had been used, as factors to be balanced or considered in making an overall determination, or whether the factors should be structured differently in the final rule, such as in the form of mandatory requirements that must all be met. Based on the comments received on that proposed rulemaking, we proposed a new structure in the March 2007 supplemental proposal with two mandatory factors and two factors that must be taken into account, but not necessarily met in every situation (72 FR 14198).

Many state implementing agencies argued that all the factors should be written as mandatory requirements that must be met. Most industry commenters (but not all) did not. The main argument in favor of making the factors mandatory requirements is that commenters argued that this approach would result in legitimacy determinations that are more objective and more enforceable. The main arguments against making all the factors mandatory requirements is that the overall determination is made on a case-by-case basis, which is often facility-specific, and not all legitimate recycling can fit into such a rigid system.

EPA's Response: Mandatory Factors

The Agency can see both state and industry viewpoints and, in the end, as described above, has decided upon a course of action that results in a compromise between the two approaches. In section IX of this preamble, we explain in detail the final design of the legitimacy factors, which includes two factors that must be met (useful contribution and valuable product/intermediate) and two factors that must be taken into account in making an overall legitimacy determination. We believe this approach and the attendant regulatory language is clearer than the existing guidance, yet retains enough flexibility to account for the variety of legitimate hazardous secondary materials recycling practices that exist today.

D. Comments on the Specific Factors

In developing the legitimacy factors, the Agency sought a balance between having a set of specific tests and having the flexibility that is necessary to allow the four legitimacy factors to apply to hazardous secondary material recycling practices in the many industrial or commercial settings to which the factors would be applied. As a result, each of the legitimacy factors included a term or terms that drew public comments arguing that the factors were not clearly enough defined. The underlined terms in the following excerpts from the regulatory text demonstrate what these terms are:

- Factor 1: ''Legitimate recycling must involve a hazardous secondary material that provides a *useful contribution* to the recycling process or to a product of the recycling process.''
- Factor 2: ''The recycling process must produce a *valuable* product or intermediate.''
- Factor 3: ''The generator and recycler should manage the material as a *valuable* commodity * * * Where there is no analogous raw material, the hazardous secondary material should be *contained*.''
- Factor 4: ''The product of the recycling process does not contain *significant* concentrations of hazardous constituents [or] contain concentrations * * * at levels that are *significantly* elevated from those found in analogous products.''

The October 2003 proposal gave some narrative descriptions of these terms to explain what they mean in the context of legitimate recycling, but that proposal did not provide any concrete tests for how those specific terms are to be used when judging whether a process and/or hazardous secondary material meets these factors.

Comments: Defining Legitimacy Terms

For each of the four factors, the Agency received public comments that focused specifically on the meaning of and the difficulties in implementing these factors when the terms are not accompanied by a test for the hazardous secondary material generators and recyclers to use when making determinations of legitimacy. For the first factor, the Agency received several comments on the definition of ''useful contribution'' from the October 2003 proposal. For the second factor, over twenty commenters submitted comments on the definition of ''valuable'' in response to the October 2003 proposal. In addition, the Agency received several comments on the definition of ''valuable'' and on the definition of ''contained'' related to the third factor and over twenty comments on the definition of ''significant'' in the fourth factor. We also received some additional comments on the March 2007 supplemental proposal relating to the same definitional terms in each factor.

The comments on these terms will be described in more depth in the discussion below for each of the applicable factors, but, in general, the comments showed a wide range of opinions: Some commenters found the discussion in the preamble to define the terms was adequate and appropriate, other commenters objected to the terms as not being clearly defined, while still other commenters found the terms to be too subjective to be a useful tool. We also received comments that suggested alternative ways to define the terms to be clearer or to better meet the Agency's objectives.

EPA's Response: Defining Legitimacy Terms

The Agency has incorporated the ideas generated by the comment process into the final rule, as appropriate. The final language and decisions regarding the legitimacy factors are laid out below in this section and in section IX of this preamble, where the final legitimacy language is discussed more fully. However, after considering the comments, we have decided that we would not develop specific definitions or precise tests that hazardous secondary material generators and recyclers must use when making legitimacy determinations. Instead, the Agency has bolstered our preamble discussion on the meaning of these terms and has included more examples than we had in the preambles to the October 2003 proposal and the March 2007 supplemental proposal.

EPA's decision not to include specific bright-line tests for the final legitimacy factors reflects the fact that legitimacy determinations do not lend themselves to the application of absolute distinctions, especially given the breadth of recycling practices and recycled hazardous secondary materials that exist in industry. The main argument we received for developing specific tests was that, without specific tests, those making legitimacy determinations may be uncertain about whether their regulatory agency would agree with that interpretation of the recycling scenario. This may lead to reduced recycling rates if companies choose not to take advantage of the exclusions for recycling rather than risk interpreting their activities differently than the regulator does.

Although we understand the concerns behind this argument, we are addressing them by including more discussion and explanations of the final factors in the preamble to the final rule. The complexities of defining ''valuable commodity/product,'' ''useful contribution,'' ''contained,'' and ''significant'' so that they can be determined through a bright-line test and are still appropriate for all industries, all recycling processes, and all recycled hazardous secondary materials are too great for the Agency to be able to design a simple and straightforward system of tests to be used in making such determinations. The complex regulatory system of tests for different types of industries or different processes that would be necessary would not be efficient or accessible to most generators, especially small businesses.

In addition, we believe that legitimacy determinations are best made on a case-by-case basis, which has always been the case, with the facts of a specific situation in hand. In a case-by-case determination, a series of specific tests may not be as useful and as accurate in determining legitimacy as careful consideration of the hazardous secondary material, the recycling process, and the specifics of the situation would be. If a person has any questions as to the legitimacy of a particular recycling activity, he can always approach the appropriate regulatory agency for assistance in making a legitimacy determination.

Comments: Factor 1—The Hazardous Secondary Material Provides a Useful Contribution

Factor 1 expresses the fundamental principle that hazardous secondary materials must actually be useful (i.e., contribute positively) to the recycling process and is intended to prevent the practice of incorporating hazardous secondary materials within manufacturing operations simply as a means of disposing of them. The Agency firmly believes that this concept is crucial to the definition of legitimacy and is finalizing it as part of the core definition. This factor, along with the second factor described below, must be met for any recycling activity to be considered legitimate recycling. The regulatory text for this factor is found in 40 CFR 260.43(b)(1).

In general, we received much support for and agreement with the underlying principle of this factor—that the hazardous secondary materials must provide some useful contribution to either the recycling process or the recycled product. Commenters asked for clarification on a number of issues related to this factor, specifically in regard to the October 2003 proposal and how the economics of recycling is connected to this factor and how the economics of recycling should be evaluated. In the March 2007 supplemental proposal, we described how the economics of recycling relates not only to the useful contribution factor but, in fact, to all of the factors of legitimacy and explained our thinking about how evaluating the economics of recycling transactions should be undertaken.

EPA's Response: Factor 1—The Hazardous Secondary Material Provides a Useful Contribution

The Agency is today finalizing this factor as part of the core definition of legitimate recycling and as a factor that must be met for the recycling to be considered legitimate under § 260.43. We also revised the October 2003 proposal discussion regarding the consideration of economics related to this criterion, and we expanded its consideration beyond just the useful contribution criterion. Today, we are offering further guidance, similar to the March 2007 supplemental proposal, which explains how economics may be considered in making legitimacy determinations and how it may apply to the mandatory factors and the factors that must be taken into account.

Comments and EPA's Response: Factor 1—Contribution to the Process

EPA also received comments on our statements in the October 2003 proposal that indicated that not every component of a hazardous secondary material does or must contribute to the recycling process or product of the recycling process in order for there to be an overall contribution. In particular, one state agency favored allowing the non-hazardous component of hazardous secondary materials to provide the useful contribution and one industry commenter agreed that not all of the hazardous secondary material would have to contribute for this factor to be met. Another state agency asked us to clarify that the statement ''not every component of a hazardous secondary material would necessarily have to contribute to the product or the process to meet this criterion'' was applicable only in the context of this factor.

It has been the Agency's longstanding policy that in a legitimacy determination not every constituent or component in a hazardous secondary material would have to contribute to a product of the recycling process or intermediate or to the recycling process in order for there to be an overall contribution and this applies to the provision in § 260.43 as well. For example, the use of hazardous secondary materials in zinc fertilizer is considered legitimate recycling when the zinc, a non-hazardous constituent, is the main contribution to the fertilizer. Another example is the use of CRT glass used in copper smelters as a fluxing agent. In this case, the glass provides a useful contribution by facilitating the manufacturing process. Thus, we agree with those commenters who raised questions about this issue and are restating our position here.

Comments and EPA's Response: Factor 1—Efficiency of the Process

Another issue that was discussed in the October 2003 proposal arising in the context of useful contribution was the efficiency of a recycling process in recovering or regenerating the useful component of the hazardous secondary material. One example we used was the recovery of copper from a hazardous secondary material. We stated that where the process was reasonably efficient and recovered all but a small percentage of the copper, it looked like legitimate recycling. However, where a small percentage of copper in the hazardous secondary material is recovered, sham recycling may be indicated. However, we did not discuss recovery rates in the middle range (e.g., 50% of copper recovered from a particular recycling process) and some commenters asked for clarification, including how the factor applies to hazardous secondary materials that are contributing to the recycling process either as a carrier or a catalyst.

The Agency is clarifying in today's preamble and regulatory text that the useful contribution of a hazardous secondary material to the recycling

process or product can be demonstrated in a number of ways. We provided a number of different ways such a material could contribute to the process in the preamble to the October 2003 proposed rule (68 FR 61584–61585) and did not mean to imply that the hazardous secondary material would have to meet all of the examples to provide a useful contribution. For example, hazardous secondary materials could provide a useful contribution to a process by serving as a carrier or catalyst and the process efficiency would not factor into the demonstration of this factor in this example.

In general, the regulated community should look to typical industry recovery rates to determine if the recycling recovery rates are reasonably efficient in terms of making a useful contribution to the recycling process or product. In addition, it should be noted that EPA would generally look at the quantity or the rate of recovery of the overall process, not the recovery rate of a single step in the process, when analyzing this factor for legitimacy. For example, if one step in the process recovers a small percentage of the constituent, but the overall process recovers a much larger percentage, the Agency would consider the overall efficiency of the recycling process in determining whether hazardous secondary materials are providing a useful contribution. This assumes that there is enough of the target constituent present in the hazardous secondary materials to contribute meaningfully to the recycling activity.

Comments and EPA's Response: Factor 1—Residuals

In the discussion of useful contribution in the October 2003 proposal, in the context of process efficiency, we stated that a ''pattern of mismanagement of the residues'' may be an indicator of sham recycling (68 FR 61584). We received several comments asking us to explain the connection between useful contribution of the hazardous secondary materials and management of residues. Several commenters questioned this statement and disagreed that how a facility managed its residues had any bearing on whether the hazardous secondary materials going into a recycling process were being legitimately recycled.

We agree with the commenters who suggested that the management of residuals from the recycling process is not an indicator of whether the hazardous secondary materials provide a useful contribution and thus is not a factor in determining whether legitimate recycling is occurring. For these reasons, we are making it clear that the management of recycling residuals is not a consideration in making legitimacy determinations. Instead, as part of today's final rule, we are requiring that any residuals that are generated from the recycling process be managed in a manner that is protective of human health and the environment. Specifically, there is a requirement for hazardous secondary material generators to make reasonable efforts to ensure that the hazardous secondary materials are legitimately recycled and, among other things, that the reclaimer manages the hazardous secondary materials in a manner that is protective of human health and the environment, including how any recycling residuals are managed. Finally, we note that the generation of residuals that are solid wastes are subject to the waste characterization and identification requirements in 40 CFR Part 261 as a newly generated waste.

Comments: Factor 2—The Recycling Process Yields a Valuable Product/Intermediate

This factor is intended to capture the fundamental concept that legitimate recycling must produce something of value. For the purposes of evaluating this factor, a product of the recycling process or intermediate would be considered valuable if it can be shown to have either economic value or value that is more intrinsic (*i.e.*, it is useful to the end user, even though it may not be salable as a product or commodity in the open marketplace). The regulatory text for this factor can be found in 40 CFR 260.43(b)(2).

In general, most commenters agreed with the concept that the recycling process must produce something of value. Many commenters also stressed the importance of keeping the concept of ''intrinsic'' value—that is, a product does not have to be sold to have value. Instead, it can be used as an effective substitute for a commercial product or as a useful ingredient in an industrial process. However, other commenters disagreed, contending that intrinsic value is too subjective to use to determine compliance. One commenter also thought this factor was redundant with the factor that hazardous secondary materials must provide a useful contribution and should be deleted.

Another common concern in the comments was how to evaluate whether the product or intermediate is valuable. Some commenters stressed the importance of evaluating this factor over time, given that markets and prices fluctuate, and others argued that it must be done on a case-by-case basis.

EPA's Response: Factor 2—The Recycling Process Yields a Valuable Product

In general, the Agency agrees with the commenters who stated that a product's value can be either monetary or intrinsic. Clearly, not all valuable products are sold. For example, many legitimate recycling situations exist where the intermediate or product of the recycling process has value and is used on-site, sent off-site to another facility owned by the same company, or even traded between companies. There are a number of already established networks where hazardous secondary materials are exchanged among and across industries. This rule does not interfere with those ongoing exchanges where such materials are being legitimately recycled. One example of such a program is the U.S. Business Council for Sustainable Development's by-product synergy program which has conducted a number of regional pilots in which diverse industries are brought together to facilitate feedstock and by-product exchanges. No money is exchanged in these types of programs.

We are also clarifying in the regulatory text that the product of the recycling process can be either a commercial product or intermediate, as long as it has value to the end user. In addition, we are further clarifying that the regulated community does not need to evaluate each step in the recycling process to determine if the final products or intermediates are valuable. Rather, an individual recycler or generator would look at its final product or intermediate and must be able to demonstrate why it has value.

We understand the concerns of some commenters that intrinsic value is harder to demonstrate than the value of a product of the recycling process that is sold in the open marketplace. While this demonstration is not as straightforward, there are a number of ways the end user can demonstrate the intrinsic value of the recycled intermediate or product. Some examples include showing that the product of the recycling process replaces an alternative product or material that would otherwise have to be purchased or by demonstrating that a product of the recycling process or intermediate meets specific product specifications or established industry standards. Another approach to demonstrating the value of a product of the recycling process or intermediate would be to compare its characteristics (e.g., its physical/chemical properties or its usefulness for

certain applications) with comparable products or intermediates made from raw materials.

Finally, we disagree with the commenter who stated that this factor is equivalent to the hazardous secondary material making a useful contribution to a product or intermediate. It is certainly possible for a recycling process to result in the production of a valuable product or intermediate without the hazardous secondary materials added to the process making any contribution whatsoever. For example, this would be the case when hazardous secondary materials are added to the process and all of the hazardous secondary materials, including the hazardous constituents, end up in the residuals, which are discarded, and the materials added to the process provide no benefit whatsoever. This is the essence of sham recycling. A vast majority of the commenters saw the need for both factors and after exploring the concept of legitimate recycling further, we were unable to find any examples of legitimate recycling that did not meet both of the core factors (i.e., the hazardous secondary material provides a useful contribution and the recycling process produces a product of value), nor did any commenters provide us with such examples. Thus, we are retaining both concepts as factors that must be met in order for a process to be considered legitimate recycling.

Comments: Factor 3—How the Hazardous Secondary Material To Be Recycled Is Managed

This factor on the management of hazardous secondary materials was designed to illustrate that hazardous secondary materials that are bound for recycling should be managed to prevent releases into the environment in the same way that valuable commodities would reasonably be expected to be managed. Hazardous secondary materials that are recycled are valuable production inputs. As such, we believe that such materials should be managed in a way that retains their value and prevents significant losses to the environment. Hazardous secondary materials that are mismanaged to the extent that they are released into the environment are not recycled.

This factor is one of the two legitimacy factors that EPA believes needs to be considered. However, in some cases, it may not be clear that the factor is met or it may not be met, yet the recycling activity can still be legitimate. The regulatory text for the factor can be found in 40 CFR 260.43(c)(1) and it states that the handler should manage the hazardous secondary material ''as a valuable commodity.'' If an analogous raw material exists, the hazardous secondary material should be managed, ''at a minimum, in a manner consistent with the management of the raw material.'' If there is no analogous raw material, the proposal states that the hazardous secondary material should be ''contained.''

The response from commenters on this factor was mixed in response to both the October 2003 proposal and the March 2007 supplemental proposal. Many states and environmental organizations commented that the factor should be mandatory and some argued that it should include a strict test. Many commenters from the generating industry and the waste management industry stated that they support this factor and believe that it is a fair and reasonable indicator of legitimacy. Some industry commenters thought that this factor should be mandatory, whereas others commented that the factor should neither be codified nor mandatory. At least one commenter stated that the factor was not necessary because of other existing disincentives for mismanagement. Representatives from extractive industries were most strongly opposed to this factor, stating that EPA cannot include legitimacy requirements on secondary materials that are going to be recycled because they are not in EPA's jurisdiction.

EPA's Response: Factor 3—How the Hazardous Secondary Material To Be Recycled Is Managed

Today, we are finalizing this factor as one of the two factors that must be considered during a legitimacy determination, but not necessarily met. We modified the language of this factor since the October 2003 proposal and are finalizing it basically as proposed in the March 2007 supplemental proposal.

EPA has decided that it is most appropriate to finalize this factor as one of the factors that must be considered rather than as a mandatory factor. Although we believe that this factor is an important part of a legitimacy determination because hazardous secondary materials that are not being managed carefully may be materials that the recycler does not value for its process, the factor is not part of what the Agency considers the core of legitimacy. In addition, as discussed in section IX of this preamble, EPA and commenters were able to identify situations in which this factor is not met, but the recycling appears to be legitimate because the hazardous secondary materials are still being managed in a responsible manner. EPA does not want to restrict legitimate recycling and, therefore, in these cases, the facility could make a determination of legitimacy without meeting this factor, but should be prepared to explain why its recycling is legitimate.

EPA also believes that this factor can be critical when considering whether hazardous secondary materials are legitimately recycled and EPA disagrees with commenters who argued that evaluating ''materials management'' is outside the scope of RCRA because hazardous secondary materials are not solid wastes due to being excluded. EPA believes that the commenters' argument is circular. The hazardous secondary materials are excluded only if the recycling is legitimate. How materials are managed is part of determining legitimate recycling. EPA has the authority to define legitimate recycling and, therefore, has the authority to require this evaluation.

Comments: Definition of Terms in Factor 3

Commenters stated that compliance with this factor is dependent on the regulated community and regulators understanding what EPA means by it. In the October 2003 proposal, we proposed that the factor read, ''[w]here there is no analogous raw material, the secondary material should be managed to minimize the potential for releases to the environment.'' Many commenters stated that the term ''minimize'' in this context was particularly unclear. State commenters argued that the term ''minimize'' did not provide enough guidance or could be interpreted to allow unclear amounts of hazardous secondary materials to be released, leaving room for potential mismanagement of that material, whereas some industry commenters asked if this standard meant they would have to meet or exceed controls required for regulated hazardous wastes in their recycling operations. Several commenters also asked about the term ''valuable commodity'' and how ''valuable'' is defined.

EPA's Response: Definition of Terms in Factor 3

EPA agrees that terms for this factor should be more clear to facilitate compliance. Although we have not developed a specific test or codified definitions to explain this factor, we have adjusted some of the language in the factor to address this concern and are providing further explanation of what we intend by this factor in today's preamble so that it is better understood and can be consistently applied.

In the March 2007 supplemental proposal, we modified the language for this factor to state instead that ''[w]here there is no analogous raw material, the hazardous secondary material should be contained.'' This change addressed the ambiguity of the word ''minimize,'' as well as state comments that the storage requirements in this factor needed to be better defined. The Agency believes that facilities that value hazardous secondary materials as part of their manufacturing process will contain those materials to prevent their release. The term ''contained'' is also being used elsewhere in the exclusions being finalized. EPA is defining this term in the same way throughout: A recyclable material is ''contained'' if it is placed in a unit that controls the movement of that material out of the unit into the environment. We also believe that the standard for contained is more clear for states and industry than the standard to minimize potential releases to the environment was in the October 2003 proposal.

We also want to clarify the use of several other terms on which we received comments. These terms are discussed briefly here and in more depth in section IX of this preamble, where the legitimacy factors are fully described. ''Analogous raw material,'' also defined elsewhere in the exclusions, is a raw material for which a hazardous secondary material is a substitute and which serves the same function and has similar physical and chemical properties as the hazardous secondary material. Materials generally would not be considered analogous if their chemical makeup were very different from one another—particularly if the hazardous secondary materials contain hazardous constituents that necessitate management processes that the raw material does not—or if their physical properties are different.

Regarding the term ''valuable commodity,'' EPA believes that hazardous secondary materials should be managed in the same or similar manner as raw materials that have been purchased or obtained at some cost. The legitimacy criteria are designed to determine whether a process is like manufacturing rather than like waste management. We believe that the standard for management of the hazardous secondary materials is reasonable for helping assess whether disposal in the guise of normal manufacturing is occurring.

Comments: Factor 4—Comparisons of Toxics in the Product

This factor was designed to prevent hazardous constituents from being ''discarded'' by being incorporated into a product made from hazardous secondary materials. The factor identifies this situation as being hazardous constituents that are in a product made from hazardous secondary materials when they are not in analogous products, or when hazardous constituents are at significantly higher levels in products made from hazardous secondary materials than in analogous products that contain such hazardous constituents, or when the product exhibits one or more of the hazardous characteristics and the analogous product does not. An analogous product can either be the final product of manufacturing or, in some cases, an intermediate in a process. These hazardous constituents are often called ''toxics along for the ride'' (TARs) and, if present, could be an indicator of discard.

This factor is the second of the two legitimacy factors that EPA believes needs to be considered but, in some cases, does not need to be met for the recycling activity to be considered legitimate. We modified the language of this factor since the October 2003 proposal and are finalizing the factor basically as proposed in the March 2007 supplemental proposal. The regulatory text for the factor can be found in 40 CFR 260.43(c)(2) and it states that the person making the determination should look at the product of the recycling process and compare it to analogous products that are made without hazardous secondary materials. The person making the determination should examine the concentrations of hazardous constituents to learn whether the product of the recycling process contains significant concentrations of hazardous constituents when the analogous product contains none, whether it contains significantly elevated levels of hazardous constituents when compared to the analogous product that contain such hazardous constituents, or whether it exhibits a hazardous characteristic when the analogous product does not.

The Agency received many comments on the fourth factor in response to both the October 2003 proposal and the March 2007 supplemental proposal. The comments the Agency received on Factor 4 were very mixed, ranging from commenters who argued that this factor should be one of the factors that must be met to those who stated that the factor is irrelevant and should not be considered as part of a legitimacy determination.

EPA's Response: Factor 4—Comparisons of Toxics in the Product

Today, we are finalizing this factor as one of the two factors that must be considered during a legitimacy determination, but not necessarily met. EPA maintains that this factor is an important way of determining whether a recycling process is, in fact, true recycling rather than a ''sham.''

If hazardous secondary materials with a toxic constituent or toxic constituents in amounts or concentrations greater than analogous raw materials are simply being run through a manufacturing process, it is an indication that those hazardous secondary materials may be being discarded in the guise of recycling. Toxics that are illegally disposed of in this manner can become exposure risks and could harm human health and the environment. EPA has jurisdiction over materials being discarded and, therefore, is requiring that this factor be considered in legitimacy determinations. The factor is not one of the mandatory factors because the Agency has identified situations where higher levels of toxic constituents may not be relevant or applicable and, thus, would not be an indicator of ''sham'' recycling if this factor is not met, as discussed in section IX of this preamble. In these cases, the facility could make a determination of legitimacy without meeting this factor, but should be prepared to explain why its recycling is legitimate.

Comments: Factor 4—the Term ''Significant'' and Alternative Approaches

Many of these comments sought further guidance on the meaning of the term ''significant'' in the proposed regulatory text, stating that the definition in the proposal was unclear or subjective, which may lead to a wide range of possible interpretations of the term. Commenters also expressed concern that a definition that is too vague may discourage recycling. In a related topic, commenters also responded to EPA's request for comments on two alternate approaches in the October 2003 proposal: (1) An approach that would establish a ''bright line'' for complying with the factor by specifically defining the terms ''significant amounts'' and ''significantly elevated'' in the regulatory text and (2) an approach that would require the use of risk assessment tools to determine if a product with elevated levels of a hazardous constituent due to use of hazardous secondary materials in its manufacture process posed a greater risk to human

health or the environment than the analogous product made from raw materials.

On the whole, commenters were not enthusiastic about the two alternative approaches that EPA suggested. Most commenters stated that a specific test of either nature would not be appropriate because of the wide variety of recycling situations to which it would have to apply.

EPA's Response: Factor 4—the Term ''Significant'' and Alternative Approaches

The Agency believes that designing a specific test, such as those described in the preamble to the October 2003 proposal, that is applicable to the many different recycling scenarios possible in the exclusions and non-waste determinations would be difficult, if not impossible. Thus, we agree with those commenters who argued against adopting such a specific test. Therefore, the Agency has more clearly described in this preamble to the final rule what it means by ''significant'' so that members of the regulated community can be confident in their evaluations of whether their products made from hazardous secondary materials contain ''toxics along for the ride.'' Therefore, members of the regulated community will neither be discouraged from recycling nor be forced to seek an opinion from a regulatory agency in every case. Details on implementation of this factor are in section IX of today's preamble.

Comments: Factor 4—Comparing the Products Instead of Hazardous Secondary Materials

Most commenters responded positively to a change the Agency made in its October 2003 proposal to compare the product of the recycling process to the analogous product made from raw materials rather than comparing the hazardous secondary materials to the analogous raw materials. EPA discussed this shift in its October 2003 proposal at 68 FR 61586–61587.

However, several commenters argued that the change is an attempt by the Agency to regulate products or stated that certain unique elements of their production processes made it so that this factor should not apply to their industry or their particular process. In addition, some commenters were concerned that under this factor, in some cases, the generator would have to know what was being done with its hazardous secondary material several steps downstream in the recycling process when it was incorporated into a final product.

EPA's Response: Factor 4—Comparing the Products Instead of Hazardous Secondary Materials

The Agency believes that for an entity to ensure that hazardous secondary materials are being legitimately recycled and not discarded, it needs to know what happens to the hazardous secondary materials once they leave the generator's control. However, in response to these comments, we are clarifying in today's preamble that the final legitimacy factor allows the entity conducting the legitimacy determination to make the comparison on ''toxics'' either between the final products or between the hazardous secondary material and the analogous raw material it replaces. If the comparison of materials going into the process shows no significant difference in levels of toxics, the product of the recycling process will not significantly differ from analogous products in those levels either. In cases where the generator finds it too complex to compare the product from its recycling process to the analogous product made from the virgin raw material, it can, instead, compare the chemistry of the materials going into the process to evaluate this factor.

Comments and EPA's Response: Relevance of Factor 4 to a Particular Process

Regarding the implementation of this factor, several commenters raised the concern that many products that are made from hazardous secondary materials do not have analogous products made from raw materials because they are always or have always been made from a combination of primary and in-process materials and that these are cases where this factor is not relevant to that particular recycling process. The commenters stated that this is especially true in the mineral extraction industries, but also may be the case in other industries as well.

The Agency is aware that there are situations where there may not be analogous products made from raw materials. In that case, the facility can opt to compare the toxic constituents in the hazardous secondary material it is using against those in an analogous raw material instead. We also note that while this factor needs to be considered, it is not mandatory because EPA recognizes that in some situations, it will not be relevant to a particular industrial process. In the case where the facility considers this factor and decides that it is not applicable to its process, the Agency suggests that the facility evaluate the presence of hazardous constituents in its product and document both that it considered this factor and the reasons it believes the factor is not relevant.

E. Consideration of Economics in Legitimacy

Comments: Economics Considerations

EPA received several comments in response to the preamble discussion about how to consider economics in the context of making legitimacy determinations in the March 2007 supplemental proposal. EPA did not propose that economic consideration be codified within the regulatory definition of legitimate recycling and instead offered guidance on how economic consideration is relevant to determining the legitimacy of a recycling operation.

EPA received only positive comments on the preamble discussion about consideration of economics in legitimacy. Specifically, EPA agrees with commenters who supported our position on the following: The economics of recycling are relevant to making legitimacy determinations, the economics of recycling are in fact different from traditional manufacturing, a recycling activity can be legitimate if a recycler charges a fee to accept hazardous secondary materials, economic considerations need to take into account the fluctuations in market prices of raw materials, and negative economic factors can contribute to environmental problems, such as speculative accumulation, abandonment, and sham recycling.

However, EPA received many comments from both industry and recycling associations that opposed the October 2003 proposal to codify the economics consideration as a separate ''factor to be considered.'' These commenters generally argued that consideration of economics was inherent within the four legitimacy factors (e.g., both of the mandatory factors, as well as the two factors which must be considered) and, therefore, a separate factor was not warranted. On the other hand, a few commenters (primarily states) requested that EPA codify a separate economics factor to be considered and they supported the inclusion of an enforceable factor for legitimacy determinations.

EPA's Response: Economics Considerations

EPA agrees with those commenters who argued that economic considerations are inherent within the legitimacy factors. We believe that one specific factor cannot encompass all

economic scenarios for the entire universe of hazardous secondary materials recycling. Furthermore, we do not believe that a separate enforceable factor in the regulations strengthens the definition of legitimate recycling, but we do believe that articulating how economic considerations can influence the legitimacy factors adds real value to the legitimacy determinations made by state regulators and the regulated community.

Based on the comments we received, the Agency is not codifying specific regulatory language on economic considerations. Instead, today's preamble offers guidance and clarification on how economics may be considered in making legitimacy determinations, similar to the preamble discussion in the March 2007 supplemental proposal. For more detailed information on economic considerations, please refer to ''How consideration of economics applies to legitimacy'' in section IX of today's rulemaking.

Comments and EPA's Response: Specific Test for Economics

EPA received some comments on the need for a specific test for consideration of economics. Commenters that supported a specific test believed it could include an accounting of economic flows over a period of time to determine longevity; an annual regulatory review of markets and a facility's economics; a ''rebuttable presumption that the recycling is legitimate where the recycler pays for the secondary materials,'' similar to manufacturing operations; and a requirement that payment for recycled products and intermediates be more than nominal if considered to be a sign of positive economics. One comment was also submitted which expressly opposed a specific test, citing that markets fluctuate too much to analyze the flows of revenues.

EPA believes that none of the examples suggested by the commenters are applicable to a broad universe of recycling activities. We also acknowledge that fluctuations in markets for hazardous secondary materials and recycled products, and subsequent impacts in revenue flows, create another challenging aspect of developing a test for the consideration of economics. Therefore, we believe that it is not possible to craft an economic test for legitimacy that can accommodate all legitimate recycling activities. As stated in section IX of today's rulemaking, we believe that this preamble discussion provides sufficient guidance on how to consider economics in legitimacy determinations.

F. Documentation of Legitimacy

Comments and EPA's Response: Documentation of Legitimacy

Several of the public comments stated that it is important that the hazardous secondary material generator or recycler of a recycled material maintain documentation that substantiates how the recycling activity complies with the legitimacy requirements. The comments stated that these records would show how the recycling activity meets the factors or, if a factor is not applicable, the records would document why it is not necessary for it to meet that factor. In this way, the hazardous secondary material generator or recycler could show that it considered all the factors. Other commenters objected to any recordkeeping requirements documenting that a recycling activity is legitimate.

After considering the comments, the Agency has determined that for the purpose of the legitimacy factors in the final rule, 40 CFR 261.2(f) applies. Section 261.2(f) states that, in the context of an enforcement action to implement Subtitle C of RCRA, a person claiming that a material is not a solid waste or is conditionally exempt from regulation is responsible for showing that they meet the terms of the exclusion and must provide appropriate documentation to show why they are eligible. For the legitimacy requirements finalized today, this provision would require that persons claiming that their recycling activity is legitimate would have the burden to provide documentation showing how the hazardous secondary materials provide a useful contribution to the recycling process and how the product of the recycling activity—whether it is a consumer product or a process intermediate—is valuable. In addition, the documentation would have to show that the hazardous secondary material generator or recycler considered the other two factors and determined for each of them that either the activity meets the factor or that the factor does not apply to this recycling activity and why it is not relevant or appropriate to consider.

In addition, as part of today's transfer-based exclusion, the hazardous secondary material generator has to undertake reasonable efforts to ensure its hazardous secondary materials will be legitimately recycled pursuant to § 260.43. As part of the reasonable efforts requirements, generators must document their reasonable efforts per § 261.4(a)(24)(v)(C).

XIX. Major Comments on the Non-Waste Determination Process

In the March 2007 supplemental proposal, EPA proposed a non-waste determination process that would provide persons with an administrative process for receiving a formal determination that their hazardous secondary materials are not discarded and, therefore, not solid waste. The process would be voluntary and available in addition to the two self-implementing exclusions. EPA proposed three types of non-waste determinations: (1) For hazardous secondary materials reclaimed in a continuous industrial process; (2) for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate; and (3) for hazardous secondary materials reclaimed under the control of the generator, such as through contracts similar to tolling arrangements. For each type of non-waste determination, EPA proposed a set of criteria which the hazardous secondary materials would have to meet in order to receive a formal non-waste determination from the regulatory authority. For a detailed description of the non-waste determination process that EPA is finalizing today, see section X of today's preamble.

Comments: Finalizing the Non-Waste Determination Process

Overall, many commenters supported the non-waste determination process because it provides persons with regulatory certainty and offers a flexible alternative to the self-implementing exclusions included in today's rule. On the other hand, some commenters argued that the non-waste determination process would be resource-intensive, placing a significant burden on the states that would have to perform a case-by-case review of each application. One commenter said that, historically, many hazardous waste facilities have sought formal approval of their recycling practices from regulators and that EPA may be underestimating the number of applications that states would receive from the regulated community. Additionally, one state commenter mentioned that the non-waste determination process would increase regulatory inconsistency between states and at least two state commenters saw no reason to establish a formal non-waste determination process since they viewed the current variance procedure under 40 CFR 260.33 and their own state

determination processes as an effective means to the same end. Finally, a few commenters did not support the non-waste determination process because of its lack of explicit conditions, such as those conditions required for the two self-implementing exclusions in today's rule.

EPA's Response: Finalizing the Non-Waste Determination Process

EPA agrees with the majority of commenters who support the non-waste determination process as an alternative way for hazardous secondary material generators to seek regulatory certainty in circumstances involving reclamation of hazardous secondary materials which do not clearly fit under today's self-implementing exclusions. EPA, however, does not agree with commenters who believe the non-waste determination would cause significant burden to states. Instead, we anticipate that the vast majority of persons will choose to use the self-implementing exclusions because this would be less resource intensive for the facility. In fact, the Agency does not envision any person submitting such an application if they are considered ''under the control of the generator'' because there are relatively few restrictions for this exclusion, and, indeed, it would probably require less effort than seeking a non-waste determination. Thus, the Agency only expects a limited number of persons to submit applications where the regulatory status is unclear under today's exclusions and a formal non-waste determination may be appropriate. EPA further believes that, by modeling the non-waste determination process after the current variance procedures, it has kept the additional burden to the states at a minimum because states can leverage their existing processes.

EPA believes that requiring explicit conditions, such as those required for today's self-implementing exclusions, is not warranted for hazardous secondary materials receiving non-waste determinations because persons are, instead, required to make specific demonstrations as to how the hazardous secondary materials meet the eligibility criteria. Furthermore, regulatory authorities, if they so choose, may stipulate conditions within the non-waste determination as appropriate and relevant on a case-by-case basis. One purpose of the non-waste determination is to provide a measure of flexibility not provided by the self-implementing solid waste exclusions and specifying the conditions to be imposed would defeat this purpose.

With respect to the comment regarding inconsistency among state non-waste determinations, EPA notes that, by allowing states to become authorized to conduct their own RCRA hazardous waste programs, the RCRA statute provides states flexibility to regulate hazardous waste more stringently than required under the federal regulations. Additionally, states sometimes take different interpretations of the same or similar regulations. This situation ultimately leads to variations between state regulations and interpretations, which EPA views as inherent to the RCRA structure and, thus, not a quality unique to the non-waste determination process.

We also want to clarify that, although today's non-waste determination process is similar to the current variance procedures, non-waste determinations are technically not variances in which EPA regulations otherwise classify materials as solid wastes and facilities may apply for an exception. Instead, the new procedure would apply to cases in which hazardous secondary materials are not discarded, but which do not fit within the self-implementing exclusions, or for which the restrictions and conditions of the exclusions are not applicable.

A. Eligibility for Non-Waste Determination Process

Comments: Scope of Non-Waste Determinations

In the March 2007 supplemental proposal, EPA indicated that non-waste determinations would be limited to reclamation activities and would not apply to recycling of ''inherently waste-like'' materials, as defined at 40 CFR 261.2(d), recycling of materials that are ''used in a manner constituting disposal,'' or ''used to produce products that are placed on the land,'' (40 CFR 261.2(c)(1)), or ''burning materials for energy recovery'' or ''used to produce a fuel or otherwise contained in fuels'' (40 CFR 261.2(c)(2)).

EPA received a number of comments urging the Agency to broaden the non-waste determinations to include all recycling scenarios in which hazardous secondary materials are not discarded. Some commenters supported expanding the scope to allow recycling for ''burning for energy recovery'' and ''use constituting disposal.'' These commenters argued that EPA could achieve further increases in recycling if the Agency broadened the scope of the hazardous secondary materials eligible to apply for a non-waste determination. On the other hand, some commenters agreed with EPA's proposed scope and supported limiting eligibility to only hazardous secondary materials being reclaimed. Alternatively, a few commenters supported limiting eligibility only to those circumstances where the recycling of hazardous secondary materials would not meet either a condition of the self-implementing exclusions or one of the legitimacy criteria, but still would not be considered discard. These commenters also argued that narrowing the eligibility would effectively limit the number of applications submitted and thus reduce the overall burden on the states.

EPA's Response: Scope of Non-Waste Determinations

EPA agrees with those commenters who supported limiting non-waste determinations to reclamation activities. With respect to ''burning for energy recovery'' and ''use constituting disposal,'' EPA confirms that these types of recycling are ineligible for today's non-waste determination process. EPA believes that these types of recycling activities would best be left to other rulemaking proceedings. Furthermore, we disagree with those commenters who suggest further limiting the eligibility to only those cases where reclamation of the hazardous secondary materials would specifically violate a condition of today's self-implementing exclusions. We believe that by modeling the non-waste determination procedure after the existing variance procedure, we have ensured that any additional burden to the states will be kept at a minimum and thus further limits on eligibility are not necessary.

Comments: Whether the Hazardous Constituents in the Hazardous Secondary Materials Are Reclaimed Rather Than Released to the Air, Water, or Land

Overall, we received only a few comments that discussed the specific criteria that EPA proposed for the non-waste determinations. For the criterion regarding whether the hazardous constituents in the hazardous secondary materials are reclaimed rather than released to the air, water, or land at significantly higher concentrations, some commenters argued that this criterion was inappropriate for determining discard because these types of releases are inevitable when reclaiming hazardous secondary materials. At least two commenters suggested that EPA should establish a ''bright line'' to clearly define ''significantly higher concentrations'' in order to provide persons with greater

regulatory certainty. Other commenters expressed concern that this criterion (as well as the other criteria within 40 CFR 260.34) would be construed to apply to other types of recycling, including those eligible for today's self-implementing exclusions.

EPA's Response: Whether the Hazardous Constituents in the Hazardous Secondary Materials Are Reclaimed Rather Than Released to the Air, Water, or Land

EPA disagrees with commenters who believe this criterion is not relevant for determining if hazardous secondary materials are being discarded. By indicating that such releases must not be at ''significantly higher concentrations'' than would otherwise be released during the production process, we believe we have set a reasonable and meaningful bar that applicants must meet in order to demonstrate that their hazardous secondary materials are reclaimed and not discarded. Hazardous secondary materials that fail to meet this criterion may exhibit an indication that they are discarded and that such handling may present a greater risk of adverse impacts to human health and the environment. Regarding those commenters who support a ''bright line'' in order to define ''significantly higher concentrations,'' EPA believes that, given the wide variety of production processes and recycling practices, establishing a ''one size fits all'' objective standard is not practical and would invite inefficiency.

EPA also confirms that this criterion, and the other criteria in 40 CFR 260.34, are specific to the relevant non-waste determinations, and thus are not required for the self-implementing exclusions or those exclusions found in 40 CFR 261.4, unless they are specifically included under state regulations as a criteria to consider.

Comments and EPA's Response: Whether the Capacity of the Production Process Would Allow for Use of the Hazardous Secondary Material in a Reasonable Time Frame

For the criterion regarding whether the capacity of the production process would allow for use of the hazardous secondary material in a reasonable time frame (proposed explicitly for the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process), some commenters regarded this criterion as consistent with judicial direction and, thus, supported adding this criterion to the other non-waste determinations. Since EPA would consider hazardous secondary materials that were eternally ''stored'' for future recycling to be akin to discard, EPA agrees with these commenters that all non-waste determinations should take into account whether the hazardous secondary materials will be reclaimed within a ''reasonable time frame.'' Therefore, in this final rule, EPA has added this criterion (with appropriate modifications to the language) to the non-waste determination for hazardous secondary materials indistinguishable in all relevant aspects from a product or intermediate. As with the non-waste determination for hazardous secondary materials reclaimed in a continuous industrial process, a person does not need to demonstrate that the hazardous secondary material meets the speculative accumulation limits per 40 CFR 261.1(c)(8), but he must provide sufficient information about the hazardous secondary material and the process to demonstrate that the material will in fact be reclaimed in a reasonable time frame and will not be abandoned. However, a person may still choose to use the speculative accumulation time frame as a default if he so chooses.

Comments: Non-Waste Determination for Hazardous Secondary Materials Reclaimed Under the Control of the Generator

A few commenters disagreed with the non-waste determination for hazardous secondary materials reclaimed under the control of the generator via a tolling arrangement or similar contractual arrangement. These commenters believed that the generator would be unable to maintain control over its hazardous secondary materials and residuals once at the reclamation facility and, thus, could not reliably meet the criteria for this non-waste determination. One state foresaw major enforcement problems with situations involving a commercial facility that handles hazardous secondary materials from multiple customers in a single process and then mismanages the residuals from that unit. As the residuals would be linked back to multiple generators, the liability for the mismanaged residuals would be difficult to detangle. On the other hand, some commenters felt that all tolling arrangements, including those eligible for the self-implementing exclusion, would best be evaluated through the non-waste determination process. These commenters argued that the regulatory authority should be required to review all tolling arrangements and their respective liability provisions in order to ensure that the hazardous secondary materials will not be discarded.

EPA's Response: Non-Waste Determination for Hazardous Secondary Materials Reclaimed Under the Control of the Generator

We did not intend for such circumstances where a hazardous secondary material generator was unable to maintain control and responsibility over his hazardous secondary materials to be eligible for a non-waste determination for hazardous secondary materials reclaimed under the control of the generator. Where an applicant's hazardous secondary materials are intermingled with materials from other hazardous secondary material generators in a way that renders the applicant unable to maintain control and liability over his specific materials, the applicant would have been effectively precluded from obtaining this formal non-waste determination since he would ultimately fail the first criterion.

EPA, however, has decided not to finalize the non-waste determination for materials reclaimed under the control of the generator because EPA could not identify any comments which described in detail other specific situations involving tolling or contractual arrangements that would not already be covered under today's self-implementing generator-controlled exclusion. We, therefore, remain unclear as to what other arrangements exist where the generator would retain control over its hazardous secondary materials to ensure they are reclaimed and not discarded. Without this clear picture, EPA believes we cannot finalize this non-waste determination and thus we are not including it in today's final rule.

B. Process for Non-Waste Determinations

In the March 2007 supplemental proposal, EPA proposed that the non-waste determination process would be the same as that for the solid waste variances found in 40 CFR 260.33. In order to obtain a non-waste determination, a facility must apply to the Administrator or the authorized state. The Administrator or authorized state evaluates the application and issues a draft notice and opportunity for comment in the locality where the facility is located. The Administrator or authorized state would then issue a final decision based on the evaluation of the comments received.

Comments and EPA's Response: Requirement To Renew Applications

A few commenters argued that non-waste determinations should be

renewed, either periodically or in the event of certain changes to the recycling process, so that regulators can ensure that the hazardous secondary materials continue to be reclaimed and not discarded.

EPA agrees with those commenters who believe that certain changes in the recycling process should logically trigger a re-review of the circumstances. Therefore, in the event of a change that affects how hazardous secondary materials meet one or more of the criteria upon which a non-waste determination has been based, EPA is requiring persons to re-apply to the Administrator or the authorized state for a formal determination that the hazardous secondary material continues to meet the relevant criteria and is not discarded and, therefore, not a solid waste.

Comments and EPA's Response: Timelines for Regulators

Some commenters expressed concerns about the length of time an applicant would need to wait before receiving a formal determination from their regulatory authority, explaining that particularly lengthy delays would adversely affect business operations. Although we understand this concern, requiring non-waste determinations to be made within a specific time frame would be difficult, as each case varies in complexity with some requiring more time to review than others. Furthermore, EPA would be challenged to prescribe one time frame that would accommodate numerous state regulatory agencies that vary in staffing and workloads. Therefore, we are not requiring regulators to issue determinations within a certain period of time.

Comments and EPA's Response: Public Comment Process

At least two commenters suggested updating the format for public notice. For example, instead of requiring notice through a ''newspaper advertisement or radio broadcast'' (as EPA proposed), public notice should be allowed to include electronic formats, such as posting on a Web site or distribution through e-mail, in order to reduce costs. Other commenters supported requiring public notice for a broader audience, not necessarily limited to the ''locality where the recycler is located.'' These commenters argued that non-waste determinations may have national implications and would be more appropriately published in the **Federal Register** or made available through the EPA Docket Center.

In response to these comments, EPA notes the non-waste determination process was purposely structured to follow the same procedures as outlined for solid waste variances in 40 CFR 260.33 in order to leverage the existing structure and keep additional burden on the states to a minimum. EPA, furthermore, believes that any changes to the type of format required for public notice would be more appropriately handled as part of a separate, wholesale effort to update all public notice requirements in the federal hazardous waste regulations. Therefore, for today's rule, EPA is retaining the same public notice provisions as proposed and required in 40 CFR 260.33.

XX. How Will These Regulatory Changes Be Administered and Enforced in the States?

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer the RCRA Subtitle C hazardous waste program within the state. Following authorization, EPA retains Subtitle C enforcement authority, although authorized states have primary enforcement responsibility. EPA retains authority under sections 3007, 3008, 3013, 3017 and 7003. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. The federal requirements no longer applied in the authorized state and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (*see* 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

B. Effect on State Authorization

Today's rule eliminates specific requirements that apply to hazardous secondary materials currently managed as hazardous waste. EPA believes that today's final rule describes the appropriate scope of the federal program under RCRA. These exclusions will encourage recycling and are consistent with RCRA's statutory objective of conserving valuable material and energy resources.

EPA strongly encourages states to adopt the regulations being finalized today. When EPA authorizes a state to implement the RCRA hazardous waste program, EPA determines whether the state program is consistent with the federal program and whether it is no less stringent. This process, codified in 40 CFR part 271, ensures national consistency and minimum standards, while providing flexibility to the states in implementing the rules. In making this determination, EPA evaluates the state requirements to ensure they are no less stringent than the federal requirements. Because today's rule eliminates specific requirements for hazardous secondary materials that are currently managed as hazardous waste, state programs would no longer need to include those specific requirements in order to be consistent with EPA's regulations.

However, if a state were, through implementation of state waiver authorities or other state laws, to allow compliance with the provisions of today's rule in advance of adoption or authorization, EPA would not generally consider such implementation a concern for purposes of enforcement or state authorization. Of course, the state could not implement the requirements in a way that was less stringent than the federal requirements in today's rule.

In the case of the case-by-case non-waste determinations found in 40 CFR 260.34, a non-waste determination may be granted by the state if the state is either authorized for this provision or if the following conditions are met: (1) The state determines the hazardous secondary material meets the applicable criteria for the non-waste determination; (2) the state requests that EPA review its determination; and (3) EPA approves the state determination.

It should be noted that, under RCRA section 3009, a state may adopt standards that are more stringent than the federal program. Thus, a state is not required to adopt today's final rule or a state may choose to adopt only parts of today's final rule. Some states incorporate the federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, EPA anticipates that the exclusions in today's final rule will be adopted by these states, consistent with state laws and state administrative procedures, unless they take explicit action as specified by their respective state laws to decline the revisions. We note that if states choose not to adopt the provisions of today's final rule concerning exports, then any hazardous secondary materials that are exported would be subject to the hazardous waste export requirements in 40 CFR part 262 subparts E or H, or analogous export requirements that are part of a state's RCRA authorized program. EPA also notes that, as described in this preamble, we believe that the legitimacy provision finalized in § 260.43 is substantially the same as and no more stringent than the existing regulatory scheme in which all recycling must be legitimate. If a state agency were to adopt the four legitimacy factors in § 260.43 for all recycling, EPA would consider their regulations to be equivalent to the federal requirements.

XXI. Administrative Requirements for This Rulemaking?

A. Executive Order 12866: Regulatory Planning and Review

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because today's action contains novel policy issues (EO 12866 Section 3(f)(4)) and because its potential impact on the economy will be greater than the $100 million or more annual effect, meeting the ''economically significant'' threshold of EO 12866 Section 3(f)(1). Because this rule meets two of the EO 12866 ''significant'' criteria, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB's recommendations have been documented in the docket for this action. EPA also prepared an analysis of the potential economic costs and benefits associated with this proposed action. The analysis is contained in our ''Regulatory Impact Analysis'' (RIA) which is available from the docket (*http://www.regulations.gov*) and is briefly summarized below.

Assuming full adoption of this final rule by all RCRA-authorized states, EPA's best estimate (i.e., ''expected value'') of the future average annual net benefits of this final rule to the national economy is $95 million per year, affecting about 5,600 facilities in 280 industries in 21 economic sectors. However, the sensitivity analysis section of our RIA for this final rule identifies 11 numerical uncertainty factors behind our calculation of this best estimate. Future variation in one or more of these factors may result in future annual net benefits ranging between $19 million to $333 million in any given future year. Therefore, EPA is classifying this final rule as ''economically significant'' because the $333 million per year upper-bound of our net benefits uncertainty range exceeds the $100 million ''annual effect'' threshold established by section 3(f)(1) of the 1993 Executive Order 12866.''

This action is expected to remove from RCRA regulation 1.5 million tons per year of hazardous secondary materials currently managed as RCRA hazardous waste. These affected hazardous secondary materials consist of about 98% that are currently reclaimed as RCRA hazardous waste, and about 2% of hazardous waste that is currently disposed of (e.g., landfilled, incinerated, or deepwell injected), which EPA expects may switch from disposal to reclamation as a result of this action. This $95 million annual net cost savings estimate is 11% less than the $107 million annual net cost savings estimated in our 2007 RIA in support of the March 2007 supplemental proposal for this action. This difference is largely explained by enhancements made to the methodology of the RIA based on public comments received from 30 organizations on our 2003 and 2007 RIA's in support of this action, as well as by updates of key data underlying the RIA.

These impact estimates are EPA's best estimates within the economic impact estimation uncertainty range of $19 million to $333 million in annual materials management cost savings for the net effect of the exclusions. These impact ranges reflect the overall uncertainty range of −80% to +249% across eleven different uncertainty factors addressed as a sensitivity analysis in our RIA. The specific uncertainty factors evaluated are (1) state government adoption, (2) future fluctuations in affected hazardous secondary materials generation tonnages, (3) within-year discrepancies between hazardous secondary materials generation and corresponding management tonnages, (4) future industrial production levels, (5) omission of SQG facility counts in our impact estimates by artifact that we based the impacts on LQG and TSDRF data from the RCRA Biennial Report database, (6) Biennial Report database quality assurance considerations, (7) physical and chemical quality of the hazardous secondary materials affected, (8) impact estimation methodology level of effort, (9) changes in future market price of commodities recovered from recycled material, (10) the possibility of same-company facilities sharing offsite captive recycling facility, and (11) the possibility of baseline disposal switchover to onsite recycling. Concerning the uncertainty of state government adoption, included as one component of potential industry cost savings is the transfer effect of an expected $5 million reduction in future annual state government hazardous waste fee revenues if all state governments adopt today's rule.

With respect to each of the regulatory exclusions in today's action, the $95 million per year net cost savings effect consists of approximately (a) $7 million per year for hazardous secondary materials reclaimed under the control of the generator in either land or non-land based units (which includes on-site, same-company, and tolling exclusions), plus (b) $87 million per year cost savings for exclusion of other offsite transfers, plus (c) $1 million per year in cost savings for case-by-case non-waste determinations.

Embedded in this overall impact estimate is $4.7 million per year in potential commodity market value of three categories of 15 constituents in affected materials we expect may begin to be recovered from hazardous secondary materials that would otherwise continue to be disposed of as hazardous wastes in the absence of today's action: (1) Commodity metals (chromium, copper, lead, molybdenum disulfide, nickel, zinc), (2) commodity solvents (acetone, alkyl benzenes, C9–C10 alkyl benzenes, methanol, methyl ethyl ketone, toluene, xylene), and (3)

other commodity materials (acids, carbon). However, the RIA estimate of potential new induced recycling does not include an evaluation of whether the U.S. or global recycling markets are large enough to sustain this potential future increase in supply of recovered materials. Market conditions for recycled hazardous secondary materials can vary considerably over time. Demand for recycled solvents, for example, is largely dependent on the petroleum market because virgin solvents are made from petroleum products, and high petroleum prices encourage solvent recycling. Similarly, high metals prices obviously favor the recycling of metal-bearing hazardous secondary materials.

The RIA, available from the docket (*http://www.regulations.gov*), provides many more details and descriptions about these assorted components of expected economic impacts, including potential distributional effects on other industries not directly subject to today's action.

B. Paperwork Reduction Act (Information Collection Request)

The information collection requirements in this rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The information collection request has been updated since the March 2007 supplemental proposal to reflect the final rule requirements and to respond to public comments.

The information requirements established for this action are voluntary to the extent that the exclusions being finalized today are voluntary and represent an overall reduction in burden as compared with the alternative information requirements associated with managing the hazardous secondary materials as hazardous waste. The information requirements help ensure that (1) entities operating under the regulatory exclusions contained in today's action are held accountable to the applicable requirements; (2) state inspectors can verify compliance with the restrictions and conditions of the exclusions when needed; and (3) hazardous secondary materials exported for recycling are actually handled as commodities abroad.

For the recordkeeping and reporting requirements applicable to hazardous secondary materials sent for reclamation, the aggregate annual burden to respondents over the three-year period covered by this ICR is estimated to be 11,552 hours, with a cost to affected entities (*i.e.*, industrial facilities) of $1,417,242. However, this represents an annual reduction in burden to respondents of 52,050 hours, representing a cost reduction of $3,474,035 per year. The estimated annual operation and maintenance costs to affected entities are $739,469 per year, primarily for purchasing audit or other similar type reports. There are no startup costs and no costs for purchases of services. Administrative costs to the Agency are estimated to be 1,257 hours per year, representing an annual cost of $49,891. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. For more information regarding the expected economic impact of this action, please refer to our ''Regulatory Impact Analysis'' available from the docket for this final rule.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Because today's action is designed to lower the cost of industrial hazardous secondary materials management for entities subject to today's requirements, this final rule will not result in an adverse economic impact effect on affected small entities. EPA therefore concludes that today's action will relieve regulatory burden for all size entities, including small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed

under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not include a Federal mandate that may result in expenditures of $100 million or more for state, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this rule imposes no enforceable duty on any state, local, or tribal governments. Although one public commenter noted that many states choose to incorporate EPA's regulations by reference, EPA does not require them to do so. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding $100 million. Therefore, today's rule is not subject to the requirements of sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

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

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no state and local government bodies that incur direct compliance costs by this rulemaking. State and local government implementation expenditures are expected to be less than $500,000 in any one year. Thus, the requirements of Section 6 of the Executive Order do not apply to this final rule. Although one public commenter noted that many states choose to incorporate EPA's regulations by reference, EPA does not require them to do so.

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

Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure a meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. This final rule does not have tribal implications, as specified in Executive Order 13175. It does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this final rule.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. An assessment of countervailing risk and a discussion of how today's rule addresses those risks can be found in Chapter 11 of the Regulatory Impact Analysis, found in the docket for today's rulemaking.

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

This final rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule reduces regulatory burden and as explained in our Regulatory Impact Analysis, may possibly induce fuel efficiency and energy savings from the voluntary shifting of some types of hazardous secondary materials, where it is cost-effective for firms to do so, from current landfill and incineration to reclamation. It therefore should not adversely affect energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act of 1995

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

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Environmental Justice

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to the concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

This final rule would streamline the requirements for certain hazardous secondary materials sent for reclamation. Facilities that would be affected by today's final rule include those generating hazardous secondary materials, as well as facilities which reclaim such materials. Disposal and treatment facilities would not be affected by this final rule. While commenters assert that minorities now comprise a majority in neighborhoods

with commercial hazardous waste facilities, and much larger (over two-thirds) majorities can be found in neighborhoods with clustered facilities, EPA does not believe that such neighborhoods will be adversely impacted by today's rule. As explained in Chapter 11 of the Regulatory Impact Analysis found in the docket to today's rule, EPA has performed an assessment of potential countervailing risks and has determined that the conditions address those risks and no net impact is expected. Thus, overall, no disproportionate impacts to minorities or low income communities are expected.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally provides that before a rule may take effect, the agency promulgating the rule must submit a report containing the rule and other required information to the U.S. Senate, the U.S. House of Representatives, and to the Comptroller General of the United States, prior to publication of the rule in the **Federal Register**. Furthermore, a ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**. Today's action is expected to be a ''major rule'' as defined by 5 U.S.C. 804(2) according to the first of its three ''major rule'' definitions: ''The term ''major rule'' means any rule that the Administrator of the Office of Information and Regulatory Affairs of OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (C) 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 and export markets.'' EPA has submitted a copy of this rule to each House of the Congress and to the Comptroller General, and this rule will be effective December 29, 2008.

List of Subjects

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements, Permit application requirements, Permit modification procedures, Waste treatment and disposal.

Dated: October 7, 2008.

Stephen L. Johnson,

Administrator.

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

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6935, 6937, 6938, 6939 and 6974.

Subpart B—Definitions

■ 2. Section 260.10 is amended by revising the definitions of ''Facility'' and ''Transfer facility'' and by adding in alphabetical order the definitions of ''Hazardous secondary material,'' ''Hazardous secondary material generated and reclaimed under the control of the generator'' and ''Hazardous secondary material generator,'' ''Intermediate facility,'' and ''Land-based unit'' to read as follows:

§ 260.10 Definitions.

* * * * *

Facility means:

(1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(2) For the purpose of implementing corrective action under 40 CFR 264.101 or 267.101, all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h).

(3) Notwithstanding paragraph (2) of this definition, a remediation waste management site is not a facility that is subject to 40 CFR 264.101, but is subject to corrective action requirements if the site is located within such a facility.

* * * * *

Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.

Hazardous secondary material generated and reclaimed under the control of the generator means:

(1) That such material is generated and reclaimed at the generating facility (for purposes of this defintion, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

(2) That such material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in § 260.10, and if the generator provides one of the following certifications: ''on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert the name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material,'' or ''on behalf of [insert generator facility name] I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material.'' For purposes of this paragraph, ''control'' means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to ''control'' such facilities, or

(3) That such material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: ''On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name], has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will

reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process. For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

Hazardous secondary material generator means any person whose act or process produces hazardous secondary materials at the generating facility. For purposes of this paragraph, ''generating facility'' means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator. For the purposes of § 261.2(a)(2)(ii) and § 261.4(a)(23), a facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator.

* * * * *

Intermediate facility means any facility that stores hazardous secondary materials for more than 10 days, other than a hazardous secondary material generator or reclaimer of such material.

* * * * *

Land-based unit means an area where hazardous secondary materials are placed in or on the land before recycling. This definition does not include land-based production units.

* * * * *

Transfer facility means any transportation-related facility, including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste or hazardous secondary materials are held during the normal course of transportation.

* * * * *

■ 3. Section 260.30 is amended by revising the section heading, the introductory text, paragraph (b), and adding paragraphs (d) and (e) to read as follows:

§ 260.30 Non-waste determinations and variances from classification as a solid waste.

In accordance with the standards and criteria in § 260.31 and § 260.34 and the procedures in § 260.33, the Administrator may determine on a case-by-case basis that the following recycled materials are not solid wastes:

* * * * *

(b) Materials that are reclaimed and then reused within the original production process in which they were generated;

* * * * *

(d) Hazardous secondary materials that are reclaimed in a continuous industrial process; and

(e) Hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

* * * * *

■ 4. Section 260.33 is amended by revising the section heading, the introductory text, paragraph (a) and adding paragraph (c) to read as follows:

§ 260.33 Procedures for variances from classification as a solid waste, for variances to be classified as a boiler, or for non-waste determinations.

The Administrator will use the following procedures in evaluating applications for variances from classification as a solid waste, applications to classify particular enclosed controlled flame combustion devices as boilers, or applications for non-waste determinations.

(a) The applicant must apply to the Administrator for the variance or non-waste determination. The application must address the relevant criteria contained in § 260.31, § 260.32, or § 260.34, as applicable.

* * * * *

(c) For non-waste determinations, in the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in § 260.34 upon which a non-waste determination has been based, the applicant must re-apply to the Administrator for a formal determination that the hazardous secondary material continues to meet the relevant criteria and therefore is not a solid waste.

■ 5. Section 260.34 is added to Subpart C to read as follows:

§ 260.34 Standards and criteria for non-waste determinations.

(a) An applicant may apply to the Administrator for a formal determination that a hazardous secondary material is not discarded and therefore not a solid waste. The determinations will be based on the criteria contained in paragraphs (b) or (c) of this section, as applicable. If an application is denied, the hazardous secondary material might still be eligible for a solid waste variance or exclusion (for example, one of the solid waste variances under § 260.31). Determinations may also be granted by the State if the State is either authorized for this provision or if the following conditions are met:

(1) The State determines the hazardous secondary material meets the criteria in paragraphs (b) or (c) of this section, as applicable;

(2) The State requests that EPA review its determination; and

(3) EPA approves the State determination.

(b) The Administrator may grant a non-waste determination for hazardous secondary material which is reclaimed in a continuous industrial process if the applicant demonstrates that the hazardous secondary material is a part of the production process and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43 and on the following criteria:

(1) The extent that the management of the hazardous secondary material is part of the continuous primary production process and is not waste treatment;

(2) Whether the capacity of the production process would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

(3) Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

(4) Other relevant factors that demonstrate the hazardous secondary material is not discarded.

(c) The Administrator may grant a non-waste determination for hazardous secondary material which is indistinguishable in all relevant aspects from a product or intermediate if the applicant demonstrates that the hazardous secondary material is comparable to a product or intermediate and is not discarded. The determination will be based on whether the hazardous secondary material is legitimately

recycled as specified in § 260.43 and on the following criteria:

(1) Whether market participants treat the hazardous secondary material as a product or intermediate rather than a waste (for example, based on the current positive value of the hazardous secondary material, stability of demand, or any contractual arrangements);

(2) Whether the chemical and physical identity of the hazardous secondary material is comparable to commercial products or intermediates;

(3) Whether the capacity of the market would use the hazardous secondary material in a reasonable time frame and ensure that the hazardous secondary material will not be abandoned (for example, based on past practices, market factors, the nature of the hazardous secondary material, or any contractual arrangements);

(4) Whether the hazardous constituents in the hazardous secondary material are reclaimed rather than released to the air, water or land at significantly higher levels from either a statistical or from a health and environmental risk perspective than would otherwise be released by the production process; and

(5) Other relevant factors that demonstrate the hazardous secondary material is not discarded.

■ 6. Section 260.42 is added to Subpart C to read as follows:

§ 260.42 Notification requirement for hazardous secondary materials.

(a) Hazardous secondary material generators, tolling contractors, toll manufacturers, reclaimers, and intermediate facilities managing hazardous secondary materials which are excluded from regulation under § 261.2(a)(2)(ii), § 261.4(a)(23), (24), or (25) must send a notification prior to operating under the exclusion(s) and by March 1 of each even numbered year thereafter to the Regional Administrator using EPA Form 8700–12 that includes the following information:

(1) The name, address, and EPA ID number (if applicable) of the facility;

(2) The name and telephone number of a contact person;

(3) The NAICS code of the facility;

(4) The exclusion under which the hazardous secondary materials will be managed (e.g., § 261.2(a)(2)(ii), § 261.4(a)(23), (24), and/or (25));

(5) For reclaimers and intermediate facilities managing hazardous secondary materials in accordance with § 261.4(a)(24) or (25), whether the reclaimer or intermediate facility has financial assurance (not applicable for persons managing hazardous secondary materials generated and reclaimed under the control of the generator);

(6) When the facility expects to begin managing the hazardous secondary materials in accordance with the exclusion;

(7) A list of hazardous secondary materials that will be managed according to the exclusion (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes);

(8) For each hazardous secondary material, whether the hazardous secondary material, or any portion thereof, will be managed in a land-based unit;

(9) The quantity of each hazardous secondary material to be managed annually; and

(10) The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

(b) If a hazardous secondary material generator, tolling contractor, toll manufacturer, reclaimer or intermediate facility has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the exclusion(s), the facility must notify the Regional Administrator within thirty (30) days using EPA Form 8700–12. For purposes of this section, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages and/or reclaims hazardous secondary materials under the exclusion(s) and does not expect to manage any amount of hazardous secondary materials for at least one year.

■ 7. Section 260.43 is added to Subpart C to read as follows:

§ 260.43 Legitimate recycling of hazardous secondary materials regulated under § 260.34, § 261.2(a)(2)(ii), and § 261.4(a)(23), (24), or (25).

(a) Persons regulated under § 260.34 or claiming to be excluded from hazardous waste regulation under § 261.2(a)(2)(ii), § 261.4(a)(23), (24), or (25) because they are engaged in reclamation must be able to demonstrate that the recycling is legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address the requirements of § 260.43(b) and must consider the requirements of § 260.43(c) below.

(b) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process, and the recycling process must produce a valuable product or intermediate.

(1) The hazardous secondary material provides a useful contribution if it

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

(2) The product or intermediate is valuable if it is

(i) Sold to a third party; or

(ii) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(c) The following factors must be considered in making a determination as to the overall legitimacy of a specific recycling activity.

(1) The generator and the recycler should manage the hazardous secondary material as a valuable commodity. Where there is an analogous raw material, the hazardous secondary material should be managed, at a minimum, in a manner consistent with the management of the raw material. Where there is no analogous raw material, the hazardous secondary material should be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(2) The product of the recycling process does not

(i) Contain significant concentrations of any hazardous constituents found in Appendix VIII of part 261 that are not found in analogous products; or

(ii) Contain concentrations of any hazardous constituents found in Appendix VIII of part 261 at levels that are significantly elevated from those found in analogous products; or

(iii) Exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit.

(3) In making a determination that a hazardous secondary material is legitimately recycled, persons must evaluate all factors and consider legitimacy as a whole. If, after careful evaluation of these other considerations, one or both of the factors are not met, then this fact may be an indication that the material is not legitimately recycled.

However, the factors in this paragraph do not have to be met for the recycling to be considered legitimate. In evaluating the extent to which these factors are met and in determining

whether a process that does not meet one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 8. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

Subpart A—[Amended]

■ 9. Section 261.1 is amended by revising paragraph (c)(4) to read as follows:

§ 261.1 Purpose and scope.

* * * * *

(c) * * *

(4) A material is ''reclaimed'' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of §§ 261.2(a)(2)(ii), 261.4(a)(23), and 261.4(a)(24) smelting, melting and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in § 266.100(d)(1)–(3) of this chapter, and if the residuals meet the requirements specified in § 266.112 of this chapter.

* * * * *

■ 10. Section 261.2 is amended by revising paragraph (a)(1), (a)(2), (c)(3) and Table 1 in paragraph (c)(4) to read as follows:

§ 261.2 Definition of solid waste.

* * * * *

(a)(1) A *solid waste* is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31 or that is not excluded by a non-waste determination under §§ 260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

(C) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(D) A military munition identified as a solid waste in § 266.202.

(ii) A hazardous secondary material is not discarded if it is generated and reclaimed under the control of the generator as defined in § 260.10, it is not speculatively accumulated as defined in § 261.1(c)(8), it is handled only in non-land-based units and is contained in such units, it is generated and reclaimed within the United States and its territories, it is not otherwise subject to material-specific management conditions under § 261.4(a) when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2), it does not meet the listing description for K171 or K172 in § 261.32, and the reclamation of the material is legitimate, as specified under § 260.43. (See also the notification requirements of § 260.42). (For hazardous secondary materials managed in land-based units, see § 261.4(a)(23)).

* * * * *

(c) * * *

(3) Reclaimed. Materials noted with a ''—'' in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an ''*'' in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

(4) * * *

TABLE 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§ 261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	—	—
Scrap metal other than excluded scrap metal (see 261.1(c)(9))	(*)	(*)	(*)	(*)

Note: The terms ''spent materials,'' ''sludges,'' ''by-products,'' and ''scrap metal'' and ''processed scrap metal'' are defined in § 261.1.

* * * * *

■ 11. Section 261.4 is amended by adding new paragraphs (a)(23), (24), and (25) to read as follows:

§ 261.4 Exclusions.

(a) * * *

(23) Hazardous secondary material generated and reclaimed within the United States or its territories and managed in land-based units as defined in § 260.10 of this chapter is not a solid waste provided that:

(i) The material is contained;

(ii) The material is a hazardous secondary material generated and reclaimed under the control of the generator, as defined in § 260.10;

(iii) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(iv) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2 of this chapter), and it does not meet the listing description for K171 or K172 in § 261.32;

(v) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter; and

(vi) In addition, persons claiming the exclusion under this paragraph (a)(23) must provide notification as required by § 260.42 of this chapter. (For hazardous secondary material managed in a non-land-based unit, see § 261.2(a)(2)(ii)).

(24) Hazardous secondary material that is generated and then transferred to another person for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in § 260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR Parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, it is not a spent lead-acid battery (see § 266.80 and § 273.2 of this chapter), and it does not meet the listing description for K171 or K172 in § 261.32;

(iv) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

(A) The material must be contained.

(B) Prior to arranging for transport of hazardous secondary materials to a reclamation facility (or facilities) where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make reasonable efforts to ensure that each reclaimer intends to properly and legitimately reclaim the hazardous secondary material and not discard it, and that each reclaimer will manage the hazardous secondary material in a manner that is protective of human health and the environment. If the hazardous secondary material will be passing through an intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards, the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator, and the hazardous secondary material generator must perform reasonable efforts to ensure that the intermediate facility will manage the hazardous secondary material in a manner that is protective of human health and the environment. Reasonable efforts must be repeated at a minimum of every three years for the hazardous secondary material generator to claim the exclusion and to send the hazardous secondary materials to each reclaimer and any intermediate facility. In making these reasonable efforts, the generator may use any credible evidence available, including information gathered by the hazardous secondary material generator, provided by the reclaimer or intermediate facility, and/or provided by a third party. The hazardous secondary material generator must affirmatively answer all of the following questions for each reclamation facility and any intermediate facility:

(1) Does the available information indicate that the reclamation process is legitimate pursuant to § 260.43 of this chapter? In answering this question, the hazardous secondary material generator can rely on their existing knowledge of the physical and chemical properties of the hazardous secondary material, as well as information from other sources (e.g., the reclamation facility, audit reports, etc.) about the reclamation process. (By responding to this question, the hazardous secondary material generator has also satisfied its requirement in § 260.43(a) of this chapter to be able to demonstrate that the recycling is legitimate).

(2) Does the publicly available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator notified the appropriate authorities of hazardous secondary materials reclamation activities pursuant to § 260.42 of this chapter and have they notified the appropriate authorities that the financial assurance condition is satisfied per paragraph (a)(24)(vi)(F) of this section? In answering these questions, the hazardous secondary material generator can rely on the available information documenting the reclamation facility's and any intermediate facility's compliance with the notification requirements per § 260.42 of this chapter, including the requirement in § 260.42(a)(5) to notify EPA whether the reclaimer or intermediate facility has financial assurance.

(3) Does publicly available information indicate that the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified as a significant non-complier with RCRA Subtitle C? In answering this question, the hazardous secondary material generator can rely on the publicly available information from EPA or the state. If the reclamation facility or any intermediate facility that is used by the hazardous secondary material generator has had a formal enforcement action taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the hazardous secondary material generator have credible evidence that the facilities will manage the hazardous secondary materials properly? In answering this question, the hazardous secondary material generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials.

(4) Does the available information indicate that the reclamation facility and any intermediate facility that is used by the hazardous secondary material generator have the equipment and trained personnel to safely recycle the hazardous secondary material? In answering this question, the generator may rely on a description by the reclamation facility or by an independent third party of the equipment and trained personnel to be used to recycle the generator's hazardous secondary material.

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, does the reclamation facility have the permits required (if any) to manage the residuals? If not, does the reclamation facility have a contract with an appropriately permitted facility to dispose of the residuals? If not, does the hazardous secondary material generator have credible evidence that the residuals will be managed in a manner that is protective of human health and the environment? In answering these questions, the hazardous secondary material generator can rely on publicly available information from EPA or the

state, or information provided by the facility itself.

(C) The hazardous secondary material generator must maintain for a minimum of three years documentation and certification that reasonable efforts were made for each reclamation facility and, if applicable, intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards prior to transferring hazardous secondary material. Documentation and certification must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. The certification statement must:

(1) Include the printed name and official title of an authorized representative of the hazardous secondary material generator company, the authorized representative's signature, and the date signed;

(2) Incorporate the following language: ''I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of excluded hazardous secondary materials to [insert name(s) of reclamation facility and any intermediate facility], reasonable efforts were made in accordance with § 261.4(a)(24)(v)(B) to ensure that the hazardous secondary materials would be recycled legitimately, and otherwise managed in a manner that is protective of human health and the environment, and that such efforts were based on current and accurate information.''

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(3) The type and quantity of hazardous secondary material in the shipment.

(E) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt); and

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in § 260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;

(3) The type and quantity of hazardous secondary material in the shipment; and

(4) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An ''analogous raw material'' is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility has financial assurance as required under subpart H of 40 CFR part 261.

(vii) In addition, all persons claiming the exclusion under this paragraph (a)(24) of this section must provide notification as required under § 260.42 of this chapter.

(25) Hazardous secondary material that is exported from the United States and reclaimed at a reclamation facility located in a foreign country is not a solid waste, provided that the hazardous secondary material generator complies with the applicable requirements of paragraph (a)(24)(i)–(v) of this section (excepting paragraph (a)(v)(B)(*2*) of this section for foreign reclaimers and foreign intermediate facilities), and that the hazardous secondary material generator also complies with the following requirements:

(i) Notify EPA of an intended export before the hazardous secondary material is scheduled to leave the United States. A complete notification must be submitted at least sixty (60) days before the initial shipment is intended to be shipped off-site. This notification may cover export activities extending over a twelve (12) month or lesser period. The notification must be in writing, signed by the hazardous secondary material generator, and include the following information:

(A) Name, mailing address, telephone number and EPA ID number (if applicable) of the hazardous secondary material generator;

(B) A description of the hazardous secondary material and the EPA hazardous waste number that would

apply if the hazardous secondary material was managed as hazardous waste and the U.S. DOT proper shipping name, hazard class and ID number (UN/NA) for each hazardous secondary material as identified in 49 CFR parts 171 through 177;

(C) The estimated frequency or rate at which the hazardous secondary material is to be exported and the period of time over which the hazardous secondary material is to be exported;

(D) The estimated total quantity of hazardous secondary material;

(E) All points of entry to and departure from each foreign country through which the hazardous secondary material will pass;

(F) A description of the means by which each shipment of the hazardous secondary material will be transported (e.g., mode of transportation vehicle (air, highway, rail, water, etc.), type(s) of container (drums, boxes, tanks, etc.));

(G) A description of the manner in which the hazardous secondary material will be reclaimed in the receiving country;

(H) The name and address of the reclaimer, any intermediate facility and any alternate reclaimer and intermediate facilities; and

(I) The name of any transit countries through which the hazardous secondary material will be sent and a description of the approximate length of time it will remain in such countries and the nature of its handling while there (for purposes of this section, the terms ''Acknowledgement of Consent'', ''receiving country'' and ''transit country'' are used as defined in 40 CFR 262.51 with the exception that the terms in this section refer to hazardous secondary materials, rather than hazardous waste):

(ii) Notifications submitted by mail should be sent to the following mailing address: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, (Mail Code 2254A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand-delivered notifications should be delivered to: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, Environmental Protection Agency, Ariel Rios Bldg., Room 6144, 12th St. and Pennsylvania Ave., NW., Washington, DC 20004. In both cases, the following shall be prominently displayed on the front of the envelope: ''Attention: Notification of Intent to Export.''

(iii) Except for changes to the telephone number in paragraph (a)(25)(i)(A) of this section and decreases in the quantity of hazardous secondary material indicated pursuant to paragraph (a)(25)(i)(D) of this section, when the conditions specified on the original notification change (including any exceedance of the estimate of the quantity of hazardous secondary material specified in the original notification), the hazardous secondary material generator must provide EPA with a written renotification of the change. The shipment cannot take place until consent of the receiving country to the changes (except for changes to paragraph (a)(25)(i)(I) of this section and in the ports of entry to and departure from transit countries pursuant to paragraphs (a)(25)(i)(E) of this section) has been obtained and the hazardous secondary material generator receives from EPA an Acknowledgment of Consent reflecting the receiving country's consent to the changes.

(iv) Upon request by EPA, the hazardous secondary material generator shall furnish to EPA any additional information which a receiving country requests in order to respond to a notification.

(v) EPA will provide a complete notification to the receiving country and any transit countries. A notification is complete when EPA receives a notification which EPA determines satisfies the requirements of paragraph (a)(25)(i) of this section. Where a claim of confidentiality is asserted with respect to any notification information required by paragraph (a)(25)(i) of this section, EPA may find the notification not complete until any such claim is resolved in accordance with 40 CFR 260.2.

(vi) The export of hazardous secondary material under this paragraph (a)(25) is prohibited unless the receiving country consents to the intended export. When the receiving country consents in writing to the receipt of the hazardous secondary material, EPA will send an Acknowledgment of Consent to the hazardous secondary material generator. Where the receiving country objects to receipt of the hazardous secondary material or withdraws a prior consent, EPA will notify the hazardous secondary material generator in writing. EPA will also notify the hazardous secondary material generator of any responses from transit countries.

(vii) For exports to OECD Member countries, the receiving country may respond to the notification using tacit consent. If no objection has been lodged by any receiving country or transit countries to a notification provided pursuant to paragraph (a)(25)(i) of this section within thirty (30) days after the date of issuance of the acknowledgement of receipt of notification by the competent authority of the receiving country, the transboundary movement may commence. In such cases, EPA will send an Acknowledgment of Consent to inform the hazardous secondary material generator that the receiving country and any relevant transit countries have not objected to the shipment, and are thus presumed to have consented tacitly. Tacit consent expires one (1) calendar year after the close of the thirty (30) day period; renotification and renewal of all consents is required for exports after that date.

(viii) A copy of the Acknowledgment of Consent must accompany the shipment. The shipment must conform to the terms of the Acknowledgment of Consent.

(ix) If a shipment cannot be delivered for any reason to the reclaimer, intermediate facility or the alternate reclaimer or alternate intermediate facility, the hazardous secondary material generator must re-notify EPA of a change in the conditions of the original notification to allow shipment to a new reclaimer in accordance with paragraph (iii) of this section and obtain another Acknowledgment of Consent.

(x) Hazardous secondary material generators must keep a copy of each notification of intent to export and each Acknowledgment of Consent for a period of three years following receipt of the Acknowledgment of Consent.

(xi) Hazardous secondary material generators must file with the Administrator no later than March 1 of each year, a report summarizing the types, quantities, frequency and ultimate destination of all hazardous secondary materials exported during the previous calendar year. Annual reports submitted by mail should be sent to the following address: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division (Mail Code 2254A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand-delivered reports should be delivered to: Office of Enforcement and Compliance Assurance, Office of Federal Activities, International Compliance Assurance Division, Environmental Protection Agency, Ariel Rios Bldg., Room 6144, 12th St. and Pennsylvania Ave., NW., Washington, DC 20004. Such reports must include the following information:

(A) Name, mailing and site address, and EPA ID number (if applicable) of

the hazardous secondary material generator;

(B) The calendar year covered by the report;

(C) The name and site address of each reclaimer and intermediate facility;

(D) By reclaimer and intermediate facility, for each hazardous secondary material exported, a description of the hazardous secondary material and the EPA hazardous waste number that would apply if the hazardous secondary material was managed as hazardous waste, DOT hazard class, the name and U.S. EPA ID number (where applicable) for each transporter used, the total amount of hazardous secondary material shipped and the number of shipments pursuant to each notification;

(E) A certification signed by the hazardous secondary material generator which states: ''I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment.''

(xii) All persons claiming an exclusion under this paragraph (a)(25) must provide notification as required by § 260.42 of this chapter.

* * * * *

Subparts F–G [Reserved]

■ 12. In part 261, Subpart F and Subpart G are added and reserved.

■ 13. Part 261 is amended by adding new Subpart H to read as follows:

Subpart H—Financial Requirements for Management of Excluded Hazardous Secondary Materials

Sec.

261.140 Applicability.
261.141 Definitions of terms as used in this subpart.
261.142 Cost estimate.
261.143 Financial assurance condition.
261.144–261.146 [reserved].
261.147 Liability requirements.
261.148 Incapacity of owners or operators, guarantors, or financial institutions.
261.149 Use of State-required mechanisms.
261.150 State assumption of responsibility.
261.151 Wording of the instruments.

Subpart H—Financial Requirements for Management of Excluded Hazardous Secondary Materials

§ 261.140 Applicability.

(a) The requirements of this subpart apply to owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR § 261.4(a)(24), except as provided otherwise in this section.

(b) States and the Federal government are exempt from the financial assurance requirements of this subpart.

§ 261.141 Definitions of terms as used in this subpart.

The terms defined in § 265.141(d), (f), (g), and (h) of this chapter have the same meaning in this subpart as they do in § 265.141 of this chapter.

§ 261.142 Cost estimate.

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of disposing of any hazardous secondary material as listed or characteristic hazardous waste, and the potential cost of closing the facility as a treatment, storage, and disposal facility.

(1) The estimate must equal the cost of conducting the activities described in paragraph (a) of this section at the point when the extent and manner of the facility's operation would make these activities the most expensive; and

(2) The cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct these activities. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of parent corporation in § 265.141(d) of this chapter.) The owner or operator may use costs for on-site disposal in accordance with applicable requirements if he can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

(3) The cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under § 265.5113(d) of this chapter, facility structures or equipment, land, or other assets associated with the facility.

(4) The owner or operator may not incorporate a zero cost for hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under § 265.5113(d) of this chapter that might have economic value.

(b) During the active life of the facility, the owner or operator must adjust the cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with § 261.143. For owners and operators using the financial test or corporate guarantee, the cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Regional Administrator as specified in § 261.143(e)(3). The adjustment may be made by recalculating the cost estimate in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified in paragraphs (b)(1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the cost estimate by the inflation factor. The result is the adjusted cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator must revise the cost estimate no later than 30 days after a change in a facility's operating plan or design that would increase the costs of conducting the activities described in paragraph (a) or no later than 60 days after an unexpected event which increases the cost of conducting the activities described in paragraph (a) of this section. The revised cost estimate must be adjusted for inflation as specified in paragraph (b) of this section.

(d) The owner or operator must keep the following at the facility during the operating life of the facility: The latest cost estimate prepared in accordance with paragraphs (a) and (c) and, when this estimate has been adjusted in accordance with paragraph (b), the latest adjusted cost estimate.

§ 261.143 Financial assurance condition.

Per § 261.4(a)(24)(vi)(F) of this chapter, an owner or operator of a reclamation or intermediate facility must have financial assurance as a condition of the exclusion as required under § 261.4(a)(24) of this chapter. He must choose from the options as specified in paragraphs (a) through (e) of this section.

(a) *Trust fund.* (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund which conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement must be identical to the wording specified in § 261.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see § 261.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current cost estimate covered by the agreement.

(3) The trust fund must be funded for the full amount of the current cost estimate before it may be relied upon to satisfy the requirements of this section.

(4) Whenever the current cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(5) If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate.

(6) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the Regional Administrator for release of the amount in excess of the current cost estimate covered by the trust fund.

(7) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a) (5) or (6) of this section, the Regional Administrator will instruct the trustee to release to the owner or operator such funds as the Regional Administrator specifies in writing. If the owner or operator begins final closure under subpart G of 40 CFR part 264 or 265, an owner or operator may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Regional Administrator. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. No later than 60 days after receiving bills for partial or final closure activities, the Regional Administrator will instruct the trustee to make reimbursements in those amounts as the Regional Administrator specifies in writing, if the Regional Administrator determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Regional Administrator has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, in accordance with § 265.143(i) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Regional Administrator does not instruct the trustee to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(8) The Regional Administrator will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(b) *Surety bond guaranteeing payment into a trust fund.* (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Regional Administrator. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in § 261.151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements specified in paragraph (a) of this section, except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Regional Administrator with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in paragraph (a) of this section;

(B) Updating of Schedule A of the trust agreement (see § 261.151(a)) to show current cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before loss of the exclusion under § 261.4(a)(24) of this chapter or

(ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin closure issued by the Regional Administrator becomes final, or within 15 days after an order to begin closure is issued by a U.S. district court or other court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the Regional Administrator's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section.

(7) Whenever the current cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current cost estimate and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current cost estimate decreases, the penal sum may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Regional Administrator. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Regional Administrator, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the Regional Administrator has given prior written consent based on his receipt of evidence of alternate

financial assurance as specified in this section.

(c) *Letter of credit.* (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph and submitting the letter to the Regional Administrator. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in § 261.151(c).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Regional Administrator will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements of the trust fund specified in paragraph (a) of this section, except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Regional Administrator with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in paragraph (a) of this section;

(B) Updating of Schedule A of the trust agreement (see § 261.151(a)) to show current cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: The EPA Identification Number (if any issued), name, and address of the facility, and the amount of funds assured for the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Regional Administrator by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Regional Administrator have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section.

(7) Whenever the current cost estimate increases to an amount greater than the amount of the credit, the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current cost estimate and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current cost estimate decreases, the amount of the credit may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

(8) Following a determination by the Regional Administrator that the hazardous secondary materials do not meet the conditions of the exclusion under § 261.4(a)(24), the Regional Administrator may draw on the letter of credit.

(9) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Regional Administrator will draw on the letter of credit. The Regional Administrator may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Regional Administrator will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Regional Administrator.

(10) The Regional Administrator will return the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(d) *Insurance.* (1) An owner or operator may satisfy the requirements of this section by obtaining insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the Regional Administrator At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) The wording of the certificate of insurance must be identical to the wording specified in § 261.151(d).

(3) The insurance policy must be issued for a face amount at least equal to the current cost estimate, except as provided in paragraph (f) of this section. The term ''face amount'' means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(4) The insurance policy must guarantee that funds will be available whenever needed to pay the cost of removal of all hazardous secondary materials from the unit, to pay the cost of decontamination of the unit, to pay the costs of the performance of activities required under subpart G of 40 CFR parts 264 or 265, as applicable, for the facilities covered by this policy. The policy must also guarantee that once funds are needed, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Regional Administrator, to such party or parties as the Regional Administrator specifies.

(5) After beginning partial or final closure under 40 CFR parts 264 or 265, as applicable, an owner or operator or any other authorized person may request reimbursements for closure expenditures by submitting itemized bills to the Regional Administrator. The owner or operator may request reimbursements only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure activities, the Regional Administrator will instruct the insurer to make reimbursements in such amounts as the Regional Administrator specifies in writing if the Regional Administrator determines that the expenditures are in accordance with the approved plan or otherwise justified. If the Regional Administrator has reason to believe that the maximum cost over the remaining life of the facility will be significantly greater than the face

amount of the policy, he may withhold reimbursement of such amounts as he deems prudent until he determines, in accordance with paragraph (h) of this section, that the owner or operator is no longer required to maintain financial assurance for the particular facility. If the Regional Administrator does not instruct the insurer to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the Regional Administrator consents to termination of the policy by the owner or operator as specified in paragraph (i)(10) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in this section, will constitute a significant violation of these regulations warranting such remedy as the Regional Administrator deems necessary. Such violation will be deemed to begin upon receipt by the Regional Administrator of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Regional Administrator. Cancellation, termination, or failure to renew may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Regional Administrator and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

(i) The Regional Administrator deems the facility abandoned; or

(ii) Conditional exclusion or interim status is lost, terminated, or revoked; or

(iii) Closure is ordered by the Regional Administrator or a U.S. district court or other court of competent jurisdiction; or

(iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(v) The premium due is paid.

(9) Whenever the current cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current cost estimate and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current cost estimate decreases, the face amount may be reduced to the amount of the current cost estimate following written approval by the Regional Administrator.

(10) The Regional Administrator will give written consent to the owner or operator that he may terminate the insurance policy when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(e) *Financial test and corporate guarantee.* (1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of either paragraph (e)(1) (i) or (ii) of this section:

(i) The owner or operator must have:

(A) Two of the following three ratios: A ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current cost estimates and the current plugging and abandonment cost estimates.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth at least six times the sum of the current cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current cost estimates and the current plugging and abandonment cost estimates.

(2) The phrase ''current cost estimates'' as used in paragraph (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner's or operator's chief financial officer (§ 261.151(e)). The phrase ''current plugging and abandonment cost estimates'' as used in paragraph (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner's or operator's chief financial officer (§ 144.70(f) of this chapter).

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the Regional Administrator:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 261.151(e); and

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(iii) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that the owner or operator satisfies paragraph (e)(1)(i) of this section that are different from the data in the audited financial statements referred to in paragraph (e)(3)(ii)of this section or any other audited financial statement or data filed with the SEC, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report shall be based upon an agreed upon procedures engagement in accordance with professional auditing standards and shall describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of the comparison, and the reasons for any differences.

(4) The owner or operator may obtain an extension of the time allowed for

submission of the documents specified in paragraph (e)(3) of this section if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the Regional Administrator of each Region in which the owner's or operator's facilities to be covered by the financial test are located. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA Identification Number (if any issued), name, address, and current cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these regulations in this subpart;

(v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (e)(3) of this section; and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (e)(3) of this section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (e)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, he must send notice to the Regional Administrator of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Regional Administrator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (e)(3) of this section. If the Regional Administrator finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) The Regional Administrator may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (e)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Regional Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) The owner or operator is no longer required to submit the items specified in paragraph (e)(3) of this section when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with paragraph (i) of this section.

(10) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a ''substantial business relationship'' with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (e)(1) through (8) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in § 261.151(g)(1). A certified copy of the guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a ''substantial business relationship'' with the owner or operator, this letter must describe this ''substantial business relationship'' and the value received in consideration of the guarantee. The terms of the guarantee must provide that:

(i) Following a determination by the Regional Administrator that the hazardous secondary materials at the owner or operator's facility covered by this guarantee do not meet the conditions of the exclusion under § 261.4(a)(24) of this chapter, the guarantor will dispose of any hazardous secondary material as hazardous waste and close the facility in accordance with closure requirements found in parts 264 or 265 of this chapter, as applicable, or establish a trust fund as specified in paragraph (a) of this section in the name of the owner or operator in the amount of the current cost estimate.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Regional Administrator. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Regional Administrator, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(f) *Use of multiple financial mechanisms.* An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in paragraphs (a) through (d) of this section, respectively, of this section, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The Regional

Administrator may use any or all of the mechanisms to provide for the facility.

(g) *Use of a financial mechanism for multiple facilities.* An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Regional Administrator must include a list showing, for each facility, the EPA Identification Number (if any issued), name, address, and the amount of funds assured by the mechanism. If the facilities covered by the mechanism are in more than one Region, identical evidence of financial assurance must be submitted to and maintained with the Regional Administrators of all such Regions. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for any of the facilities covered by the mechanism, the Regional Administrator may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) *Removal and Decontamination Plan for Release* (1) An owner or operator of a reclamation facility or an intermediate facility who wishes to be released from his financial assurance obligations under § 261.4(a)(24)(vi)(F) of this chapter must submit a plan for removing all hazardous secondary material residues to the Regional Administrator at least 180 days prior to the date on which he expects to cease to operate under the exclusion.

(2) The plan must include, at least:

(A) For each hazardous secondary materials storage unit subject to financial assurance requirements under § 261.4(a)(24)(vi)(F), a description of how all excluded hazardous secondary materials will be recycled or sent for recycling, and how all residues, contaminated containment systems (liners, etc), contaminated soils, subsoils, structures, and equipment will be removed or decontaminated as necessary to protect human health and the environment, and

(B) A detailed description of the steps necessary to remove or decontaminate all hazardous secondary material residues and contaminated containment system components, equipment, structures, and soils including, but not limited to, procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination necessary to protect human health and the environment; and

(C) A detailed description of any other activities necessary to protect human health and the environment during this timeframe, including, but not limited to, leachate collection, run-on and run-off control, etc; and

(D) A schedule for conducting the activities described which, at a minimum, includes the total time required to remove all excluded hazardous secondary materials for recycling and decontaminate all units subject to financial assurance under § 261.4(a)(24)(vi)(F) and the time required for intervening activities which will allow tracking of the progress of decontamination.

(3) The Regional Administrator will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the plan and request modifications to the plan no later than 30 days from the date of the notice. He will also, in response to a request or at his discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning the plan. The Regional Administrator will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The Regional Administrator will approve, modify, or disapprove the plan within 90 days of its receipt. If the Regional Administrator does not approve the plan, he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Regional Administrator will approve or modify this plan in writing within 60 days. If the Regional Administrator modifies the plan, this modified plan becomes the approved plan. The Regional Administrator must assure that the approved plan is consistent with paragraph (h) of this section. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(4) Within 60 days of completion of the activities described for each hazardous secondary materials management unit, the owner or operator must submit to the Regional Administrator, by registered mail, a certification that all hazardous secondary materials have been removed from the unit and the unit has been decontaminated in accordance with the specifications in the approved plan. The certification must be signed by the owner or operator and by a qualified Professional Engineer. Documentation supporting the Professional Engineer's certification must be furnished to the Regional Administrator, upon request, until he releases the owner or operator from the financial assurance requirements for § 261.4(a)(24)(vi)(F).

(i) *Release of the owner or operator from the requirements of this section.* Within 60 days after receiving certifications from the owner or operator and a qualified Professional Engineer that all hazardous secondary materials have been removed from the facility or a unit at the facility and the facility or a unit has been decontaminated in accordance with the approved plan per paragraph (h), the Regional Administrator will notify the owner or operator in writing that he is no longer required under § 261.4(a)(24)(vi)(F) to maintain financial assurance for that facility or a unit at the facility, unless the Regional Administrator has reason to believe that all hazardous secondary materials have not been removed from the facility or unit at a facility or that the facility or unit has not been decontaminated in accordance with the approved plan. The Regional Administrator shall provide the owner or operator a detailed written statement of any such reason to believe that all hazardous secondary materials have not been removed from the unit or that the unit has not been decontaminated in accordance with the approved plan.

§§ 261.144–261.146 [Reserved]

§ 261.147 Liability requirements.

(a) *Coverage for sudden accidental occurrences.* An owner or operator of a hazardous secondary material reclamation facility or an intermediate facility subject to financial assurance requirements under § 261.4(a)(24)(vi)(F) of this chapter, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraphs (a) (1), (2), (3), (4), (5), or (6) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Secondary Material Facility Liability Endorsement, or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 261.151(h). The wording of the certificate of insurance must be identical to the wording specified in § 261.151(i). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrators if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as ''primary'' coverage and shall specify other assurance as ''excess'' coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (a)(1) through (a)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material reclamation facility or intermediate facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (a)(1) through (a)(6) of this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material reclamation facility or intermediate facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (a)(1) through (a)(6) of this section.

(b) Coverage for nonsudden accidental occurrences. An owner or operator of a hazardous secondary material reclamation facility or intermediate facility with land-based units, as defined in § 260.10 of this chapter, which are used to manage hazardous secondary materials excluded under § 261.4(a)(24) of this chapter or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate. This liability coverage may be demonstrated as specified in paragraph (b)(1), (2), (3), (4), (5), or (6) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Secondary Material Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 261.151(h). The wording of the certificate of insurance must be identical to the wording specified in § 261.151(i). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrators if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a

financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as ''primary'' coverage and shall specify other assurance as ''excess'' coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (b)(1) through (b)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material treatment and/or storage facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (b)(1) through (b)(6) of this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material treatment and/or storage facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (b)(1) through (b)(6) of this section.

(c) *Request for variance.* If an owner or operator can demonstrate to the satisfaction of the Regional Administrator that the levels of financial responsibility required by paragraph (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment and/or storage at the facility or group of facilities, the owner or operator may obtain a variance from the Regional Administrator. The request for a variance must be submitted in writing to the Regional Administrator. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The Regional Administrator may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the Regional Administrator to determine a level of financial responsibility other than that required by paragraph (a) or (b) of this section.

(d) *Adjustments by the Regional Administrator.* If the Regional Administrator determines that the levels of financial responsibility required by paragraph (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment and/or storage at the facility or group of facilities, the Regional Administrator may adjust the level of financial responsibility required under paragraph (a) or (b) of this section as may be necessary to protect human health and the environment. This adjusted level will be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the Regional Administrator determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, pile, or land treatment facility, he may require that an owner or operator of the facility comply with paragraph (b) of this section. An owner or operator must furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator requests to determine whether cause exists for such adjustments of level or type of coverage.

(e) *Period of coverage.* Within 60 days after receiving certifications from the owner or operator and a qualified Professional Engineer that all hazardous secondary materials have been removed from the facility or a unit at the facility and the facility or a unit has been decontaminated in accordance with the approved plan per § 261.143(h), the Regional Administrator will notify the owner or operator in writing that he is no longer required under § 261.4(a)(24)(vi)(F) to maintain liability coverage for that facility or a unit at the facility, unless the Regional Administrator has reason to believe that that all hazardous secondary materials have not been removed from the facility or unit at a facility or that the facility or unit has not been decontaminated in accordance with the approved plan.

(f) *Financial test for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of paragraph (f)(1) (i) or (ii) of this section:

(i) The owner or operator must have:

(A) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) Tangible net worth of at least $10 million; and

(C) Assets in the United States amounting to either:

(*1*) At least 90 percent of his total assets; or

(*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's, or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth of at least $10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting to either:

(*1*) At least 90 percent of his total assets; or

(*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase ''amount of liability coverage'' as used in paragraph (f)(1) of this section refers to the annual aggregate amounts for which coverage is required under paragraphs (a) and (b) of this section and the annual aggregate amounts for which coverage is required under paragraphs (a) and (b) of 40 CFR 264.147 and 265.147.

(3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the Regional Administrator:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 261.151(f). If an owner or operator is using the financial test to demonstrate both assurance as specified by § 261.143(e), *and* liability coverage, he must submit the letter specified in § 261.151(f) to cover both forms of financial responsibility; a separate letter as specified in § 261.151(e) is not required.

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

(iii) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that the owner or operator satisfies paragraph (f)(1)(i) of this

section that are different from the data in the audited financial statements referred to in paragraph (f)(3)(ii) of this section or any other audited financial statement or data filed with the SEC, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report shall be based upon an agreed upon procedures engagement in accordance with professional auditing standards and shall describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of the comparison, and the reasons for any difference.

(4) The owner or operator may obtain a one-time extension of the time allowed for submission of the documents specified in paragraph (f)(3) of this section if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the Regional Administrator of each Region in which the owner's or operator's facilities to be covered by the financial test are located. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA Identification Number, name, address, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these regulations;

(v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (f)(3) of this section; and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (f)(3) of this section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must obtain insurance, a letter of credit, a surety bond, a trust fund, or a guarantee for the entire amount of required liability coverage as specified in this section. Evidence of liability coverage must be submitted to the Regional Administrator within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(7) The Regional Administrator may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (f)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Regional Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this section within 30 days after notification of disallowance.

(g) *Guarantee for liability coverage.* (1) Subject to paragraph (g)(2) of this section, an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as ''guarantee.'' The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a ''substantial business relationship'' with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (f)(6) of this section. The wording of the guarantee must be identical to the wording specified in § 261.151(g)(2). A certified copy of the guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a ''substantial business relationship'' with the owner or operator, this letter must describe this ''substantial business relationship'' and the value received in consideration of the guarantee.

(i) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(ii) [Reserved]

(2)(i) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(A) The State in which the guarantor is incorporated; and

(B) Each State in which a facility covered by the guarantee is located have submitted a written statement to EPA that a guarantee executed as described in this section and § 264.151(g)(2) is a legally valid and enforceable obligation in that State.

(ii) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this section only if:

(A) The non-U.S. corporation has identified a registered agent for service of process in each State in which a facility covered by the guarantee is located and in the State in which it has its principal place of business; and if

(B) The Attorney General or Insurance Commissioner of each State in which a facility covered by the guarantee is located and the State in which the guarantor corporation has its principal place of business, has submitted a written statement to EPA that a guarantee executed as described in this section and § 261.151(h)(2) is a legally valid and enforceable obligation in that State.

(h) *Letter of credit for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit that conforms to the requirements of this paragraph and submitting a copy of the letter of credit to the Regional Administrator.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(3) The wording of the letter of credit must be identical to the wording specified in § 261.151(j).

(4) An owner or operator who uses a letter of credit to satisfy the requirements of this section may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(5) The wording of the standby trust fund must be identical to the wording specified in § 261.151(m).

(i) *Surety bond for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond that conforms to the requirements of this paragraph and submitting a copy of the bond to the Regional Administrator.

(2) The surety company issuing the bond must be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the surety bond must be identical to the wording specified in § 261.151(k) of this chapter.

(4) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(i) The State in which the surety is incorporated; and

(ii) Each State in which a facility covered by the surety bond is located have submitted a written statement to EPA that a surety bond executed as described in this section and § 261.151(k) is a legally valid and enforceable obligation in that State.

(j) *Trust fund for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator.

(2) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the Fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this paragraph, ''the full amount of the liability coverage to be provided'' means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust fund must be identical to the wording specified in § 261.151(l).

§ 261.148 Incapacity of owners or operators, guarantors, or financial institutions.

(a) An owner or operator must notify the Regional Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A guarantor of a corporate guarantee as specified in § 261.143(e) must make such a notification if he is named as debtor, as required under the terms of the corporate guarantee.

(b) An owner or operator who fulfills the requirements of § 261.143 or § 261.147 by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must establish other financial assurance or liability coverage within 60 days after such an event.

§ 261.149 Use of State-required mechanisms.

(a) For a reclamation or intermediate facility located in a State where EPA is administering the requirements of this subpart but where the State has regulations that include requirements for financial assurance of closure or liability coverage, an owner or operator may use State-required financial mechanisms to meet the requirements of § 261.143 or § 261.147 if the Regional Administrator determines that the State mechanisms are at least equivalent to the financial mechanisms specified in this subpart. The Regional Administrator will evaluate the equivalency of the mechanisms principally in terms of certainty of the availability of: Funds for the required closure activities or liability coverage; and the amount of funds that will be made available. The Regional Administrator may also consider other factors as he deems appropriate. The owner or operator must submit to the Regional Administrator evidence of the establishment of the mechanism together with a letter requesting that the State-required mechanism be considered acceptable for meeting the requirements of this subpart. The submission must include the following information: The facility's EPA Identification Number (if available), name, and address, and the amount of funds for closure or liability coverage assured by the mechanism. The Regional Administrator will notify the owner or operator of his determination regarding the mechanism's acceptability in lieu of financial mechanisms specified in this subpart. The Regional Administrator may require the owner or operator to submit additional information as is deemed necessary to make this determination. Pending this determination, the owner or operator will be deemed to be in compliance with the requirements of § 261.143 or § 261.147, as applicable.

(b) If a State-required mechanism is found acceptable as specified in paragraph (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this subpart by increasing the funds available through the State-required mechanism or using additional financial mechanisms as specified in this subpart. The amount of funds available through the State and Federal mechanisms must at least equal the amount required by this subpart.

§ 261.150 State assumption of responsibility.

(a) If a State either assumes legal responsibility for an owner's or operator's compliance with the closure or liability requirements of this part or assures that funds will be available from State sources to cover those requirements, the owner or operator will be in compliance with the requirements of § 261.143 or § 261.147 if the Regional Administrator determines that the State's assumption of responsibility is at

least equivalent to the financial mechanisms specified in this subpart. The Regional Administrator will evaluate the equivalency of State guarantees principally in terms of: Certainty of the availability of funds for the required closure activities or liability coverage; and the amount of funds that will be made available. The Regional Administrator may also consider other factors as he deems appropriate. The owner or operator must submit to the Regional Administrator a letter from the State describing the nature of the State's assumption of responsibility together with a letter from the owner or operator requesting that the State's assumption of responsibility be considered acceptable for meeting the requirements of this subpart. The letter from the State must include, or have attached to it, the following information: The facility's EPA Identification Number (if available), name, and address, and the amount of funds for closure or liability coverage that are guaranteed by the State. The Regional Administrator will notify the owner or operator of his determination regarding the acceptability of the State's guarantee in lieu of financial mechanisms specified in this subpart. The Regional Administrator may require the owner or operator to submit additional information as is deemed necessary to make this determination. Pending this determination, the owner or operator will be deemed to be in compliance with the requirements of § 265.143 or § 265.147, as applicable.

(b) If a State's assumption of responsibility is found acceptable as specified in paragraph (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this subpart by use of both the State's assurance and additional financial mechanisms as specified in this subpart. The amount of funds available through the State and Federal mechanisms must at least equal the amount required by this subpart.

§ 261.151 Wording of the instruments.

(a)(1) A trust agreement for a trust fund, as specified in § 261.143(a) must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Trust Agreement

Trust Agreement, the ''Agreement,'' entered into as of [date] by and between [name of the owner or operator], a [name of State] [insert ''corporation,'' ''partnership,'' ''association,'' or ''proprietorship''], the ''Grantor,'' and [name of corporate trustee], [insert ''incorporated in the State of _____ ----'' or ''a national bank''], the ''Trustee.''

Whereas, the United States Environmental Protection Agency, ''EPA,'' an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a facility regulated under parts 264, or 265, or satisfying the conditions of the exclusion under § 261.4(a)(24) shall provide assurance that funds will be available if needed for care of the facility under 40 CFR parts 264 or 265, subparts G, as applicable ,

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term ''Grantor'' means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term ''Trustee'' means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Cost Estimates. This Agreement pertains to the facilities and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number (if available), name, address, and the current cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the ''Fund,'' for the benefit of EPA in the event that the hazardous secondary materials of the grantor no longer meet the conditions of the exclusion under § 261.4(a)(24). The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payments from the Fund. The Trustee shall make payments from the Fund as the EPA Regional Administrator shall direct, in writing, to provide for the payment of the costs of the performance of activities required under subpart G of 40 CFR parts 264 or 265 for the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the EPA Regional Administrator from the Fund for expenditures for such activities in such amounts as the beneficiary shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the EPA Regional Administrator specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*, including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing

with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depositary with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Regional Administrator a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Regional Administrator to the Trustee shall be in writing, signed by the EPA Regional Administrators of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate EPA Regional Administrator, or by the Trustee and the appropriate EPA Regional Administrator if the Grantor ceases to exist.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of [insert name of State].

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written: The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 261.151(a)(1) as such regulations were constituted on the date first above written.

[Signature of Grantor]
[Title]

Attest:
[Title]
[Seal]
[Signature of Trustee]

Attest:
[Title]
[Seal]

(2) The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in § 261.143(a) of this chapter. State requirements may differ on the proper content of this acknowledgment.

State of _____
County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

(b) A surety bond guaranteeing payment into a trust fund, as specified in § 261.143(b) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Financial Guarantee Bond

Date bond executed:
Effective date:
Principal: [legal name and business address of owner or operator]
Type of Organization: [insert ''individual,'' ''joint venture,'' ''partnership,'' or ''corporation'']
State of incorporation: _____
Surety(ies): [name(s) and business address(es)]
EPA Identification Number, name, address and amount(s) for each facility guaranteed by this bond: _____
Total penal sum of bond: $ _____
Surety's bond number: _____

Know All Persons By These Presents, That we, the Principal and Surety(ies) are firmly bound to the U.S. EPA in the event that the hazardous secondary materials at the reclamation or intermediate facility listed below no longer meet the conditions of the exclusion under 40 CFR 261.4(a)(24), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum ''jointly and severally'' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Resource Conservation and Recovery Act as amended (RCRA), to have a permit or interim status in order to own or operate each facility identified above, or to meet conditions under 40 CFR sections 261.4(a)(24), and

Whereas said Principal is required to provide financial assurance as a condition of permit or interim status or as a condition of an exclusion under 40 CFR sections 261.4(a)(24) and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of each facility identified above, fund the standby trust fund in the amount(s) identified above for the facility,

Or, if the Principal shall satisfy all the conditions established for exclusion of hazardous secondary materials from coverage as solid waste under 40 CFR sections 261.4(a)(24),

Or, if the Principal shall fund the standby trust fund in such amount(s) within 15 days after a final order to begin closure is issued by an EPA Regional Administrator or a U.S. district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance, as specified in subpart H of 40 CFR part 261, as applicable, and obtain the EPA Regional Administrator's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the EPA Regional Administrator(s) from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by an EPA Regional Administrator that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the EPA Regional Administrator.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the EPA Regional Administrator(s), as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

[The following paragraph is an optional rider that may be included but is not required.]

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the EPA Regional Administrator(s).

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 261.151(b) as such regulations were constituted on the date this bond was executed.

Principal

[Signature(s)]

_____

[Name(s)]

_____

[Title(s)]

_____

[Corporate seal] _____

Corporate Surety(ies)

[Name and address]
State of incorporation: _____
Liability limit:
$ _____
[Signature(s)]
[Name(s) and title(s)]
[Corporate seal]
[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]
Bond premium: $ _____

(c) A letter of credit, as specified in § 261.143(c) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

Regional Administrator(s)

Region(s) _____

U.S. Environmental Protection Agency

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No._____ in your favor, in the event that the hazardous secondary materials at the covered reclamation or intermediary facility(ies) no longer meet the conditions of the exclusion under 40 CFR 261.4(a)(24), at the request and for the account of [owner's or operator's name and address] up to the aggregate amount of [in words] U.S. dollars $_____, available upon presentation of

(1) your sight draft, bearing reference to this letter of credit No.____, and

(2) your signed statement reading as follows: ''I certify that the amount of the draft is payable pursuant to regulations issued under authority of the Resource Conservation and Recovery Act of 1976 as amended.''

This letter of credit is effective as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least 1 year] on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and [owner's or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and [owner's or operator's name], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner's or operator's name] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 261.151(c) as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution] [Date]

This credit is subject to [insert ''the most recent edition of the Uniform Customs and Practice for Documentary Credits, published

and copyrighted by the International Chamber of Commerce,'' or ''the Uniform Commercial Code'']. (d) A certificate of insurance, as specified in § 261.143(e) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certificate of Insurance

Name and Address of Insurer (herein called the ''Insurer''):

_____

Name and Address of Insured (herein called the ''Insured''):

_____

Facilities Covered: [List for each facility: The EPA Identification Number (if any issued), name, address, and the amount of insurance for all facilities covered, which must total the face amount shown below.

Face Amount:

_____

Policy Number: _____

Effective Date:

_____

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance so that in accordance with applicable regulations all hazardous secondary materials can be removed from the facility or any unit at the facility and the facility or any unit at the facility can be decontaminated at the facilities identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 40 CFR 261.143(d) as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the EPA Regional Administrator(s) of the U.S. Environmental Protection Agency, the Insurer agrees to furnish to the EPA Regional Administrator(s) a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is identical to the wording specified in 40 CFR 261.151(d) such regulations were constituted on the date shown immediately below.

[Authorized signature for Insurer]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: _____

[Date]

(e) A letter from the chief financial officer, as specified in § 261.143(e) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Letter From Chief Financial Officer

[Address to Regional Administrator of every Region in which facilities for which financial responsibility is to be demonstrated through the financial test are located].

I am the chief financial officer of [name and address of firm]. This letter is in support of this firm's use of the financial test to demonstrate financial assurance, as specified in subpart H of 40 CFR part 261.

[Fill out the following nine paragraphs regarding facilities and associated cost estimates. If your firm has no facilities that belong in a particular paragraph, write ''None'' in the space indicated. For each facility, include its EPA Identification Number (if any issued), name, address, and current cost estimates.]

1. This firm is the owner or operator of the following facilities for which financial assurance is demonstrated through the financial test specified in subpart H of 40 CFR 261. The current cost estimates covered by the test are shown for each facility: _____.

2. This firm guarantees, through the guarantee specified in subpart H of 40 CFR part 261, the following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are shown for each facility: _____ . The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee_____, or (3) engaged in the following substantial business relationship with the owner or operator _____, and receiving the following value in consideration of this guarantee_____]. [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].

3. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 261, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR part 261. The current cost estimates covered by such a test are shown for each facility:_____.

4. This firm is the owner or operator of the following hazardous secondary materials management facilities for which financial assurance is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR part 261 or equivalent or substantially equivalent State mechanisms. The current cost estimates not covered by such financial assurance are shown for each facility:_____.

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under part 144. The current closure cost estimates as required by 40 CFR 144.62 are shown for each facility:_____.

6. This firm is the owner or operator of the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility: _____ .

7. This firm guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, the closure or post-closure care of the following facilities owned or operated by the guaranteed party. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility: _____. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee _____; or (3) engaged in the following substantial business relationship with the owner or operator ____, and receiving the following value in consideration of this guarantee ____]. [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].

8. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 264 or 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility: ____.

9. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: ____.

This firm [insert ''is required'' or ''is not required''] to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this firm ends on [month, day]. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended [date].

[Fill in Alternative I if the criteria of paragraph (e)(1)(i) of § 261.143 of this chapter are used. Fill in Alternative II if the criteria of paragraph (e)(1)(ii) of § 261.143(e) of this chapter are used.]

Alternative I

1. Sum of current cost estimates [total of all cost estimates shown in the nine paragraphs above] $____

*2. Total liabilities [if any portion of the cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4] $____

*3. Tangible net worth $_____

*4. Net worth $_____-

*5. Current assets $_____

*6. Current liabilities $_____

7. Net working capital [line 5 minus line 6] $_____

*8. The sum of net income plus depreciation, depletion, and amortization $_____-

*9. Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) $_____-

10. Is line 3 at least $10 million? (Yes/No) _____

11. Is line 3 at least 6 times line 1? (Yes/No) _____-

12. Is line 7 at least 6 times line 1? (Yes/No) _____-

*13. Are at least 90% of firm's assets located in the U.S.? If not, complete line 14 (Yes/No) _____

14. Is line 9 at least 6 times line 1? (Yes/No) _____-

15. Is line 2 divided by line 4 less than 2.0? (Yes/No) _____-

16. Is line 8 divided by line 2 greater than 0.1? (Yes/No) _____-

17. Is line 5 divided by line 6 greater than 1.5? (Yes/No) _____-

Alternative II

1. Sum of current cost estimates [total of all cost estimates shown in the eight paragraphs above] $_____-

2. Current bond rating of most recent issuance of this firm and name of rating service _____-

3. Date of issuance of bond _____-

4. Date of maturity of bond _____-

*5. Tangible net worth [if any portion of the cost estimates is included in ''total liabilities'' on your firm's financial statements, you may add the amount of that portion to this line] $_____-

*6. Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) $_____-

7. Is line 5 at least $10 million? (Yes/No) _____

8. Is line 5 at least 6 times line 1? (Yes/No) _____

*9. Are at least 90% of firm's assets located in the U.S.? If not, complete line 10 (Yes/No) ____

10. Is line 6 at least 6 times line 1? (Yes/No) _____-

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 261.151(e) as such regulations were constituted on the date shown immediately below.

[Signature] _____

[Name] _____

[Title] _____

[Date]

_____

(f) A letter from the chief financial officer, as specified in Sec. 261.147(f) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Letter From Chief Financial Officer

[Address to Regional Administrator of every Region in which facilities for which financial responsibility is to be demonstrated through the financial test are located].

I am the chief financial officer of [firm's name and address]. This letter is in support of the use of the financial test to demonstrate financial responsibility for liability coverage under § 261.147[insert ''and costs assured § 261.143(e)'' if applicable] as specified in subpart H of 40 CFR part 261.

[Fill out the following paragraphs regarding facilities and liability coverage. If there are no facilities that belong in a particular paragraph, write ''None'' in the space indicated. For each facility, include its EPA Identification Number (if any issued), name, and address].

The firm identified above is the owner or operator of the following facilities for which liability coverage for [insert ''sudden'' or ''nonsudden'' or ''both sudden and nonsudden''] accidental occurrences is being demonstrated through the financial test specified in subpart H of 40 CFR part 261:_____

The firm identified above guarantees, through the guarantee specified in subpart H of 40 CFR part 261, liability coverage for [insert ''sudden'' or ''nonsudden'' or ''both sudden and nonsudden''] accidental occurrences at the following facilities owned or operated by the following: _____-. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee -_____; or (3) engaged in the following substantial business relationship with the owner or operator _____-, and receiving the following value in consideration of this guarantee _____-]. [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter.]

The firm identified above is the owner or operator of the following facilities for which liability coverage for [insert ''sudden'' or ''nonsudden'' or ''both sudden and nonsudden''] accidental occurrences is being demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265:_____

The firm identified above guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, liability coverage for [insert ''sudden'' or ''nonsudden'' or ''both sudden and nonsudden''] accidental occurrences at the following facilities owned or operated by the following: ____. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee ____; or (3) engaged in the following substantial business relationship with the owner or operator ____, and receiving the following value in consideration of this guarantee ____]. [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter.]

[If you are using the financial test to demonstrate coverage of both liability and costs assured under § 261.143(e) or closure or post-closure care costs under 40 CFR 264.143, 264.145, 265.143 or 265.145, fill in the following nine paragraphs regarding facilities and associated cost estimates. If there are no facilities that belong in a particular paragraph, write ''None'' in the space indicated. For each facility, include its EPA identification number (if any issued), name, address, and current cost estimates.]

1. This firm is the owner or operator of the following facilities for which financial assurance is demonstrated through the financial test specified in subpart H of 40 CFR 261. The current cost estimates covered by the test are shown for each facility:_____.

2. This firm guarantees, through the guarantee specified in subpart H of 40 CFR part 261, the following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are shown for each facility:_____. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee_____, or (3) engaged in the following substantial business relationship with the owner or operator _____, and receiving the following value in consideration of this guarantee_____]. [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].

3. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 261, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR part 261. The current cost estimates covered by such a test are shown for each facility:_____.

4. This firm is the owner or operator of the following hazardous secondary materials management facilities for which financial assurance is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR part 261 or equivalent or substantially equivalent State mechanisms. The current cost estimates not covered by such financial assurance are shown for each facility:_____.

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under part 144. The current closure cost estimates as required by 40 CFR 144.62 are shown for each facility:_____.

6. This firm is the owner or operator of the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility: _____.

7. This firm guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, the closure or post-closure care of the following facilities owned or operated by the guaranteed party. The

current cost estimates for the closure or post-closure care so guaranteed are shown for each facility: _____. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee _____; or (3) engaged in the following substantial business relationship with the owner or operator _____, and receiving the following value in consideration of this guarantee _____].

[Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].

8. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 264 or 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility: _____.

9. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: _____.

This firm [insert ''is required'' or ''is not required''] to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this firm ends on [month, day]. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended [date].

Part A. Liability Coverage for Accidental Occurrences

[Fill in Alternative I if the criteria of paragraph (f)(1)(i) of Sec. 261.147 are used. Fill in Alternative II if the criteria of paragraph (f)(1)(ii) of Sec. 261.147 are used.]

Alternative I

1. Amount of annual aggregate liability coverage to be demonstrated $_____-.

*2. Current assets $_____-.

*3. Current liabilities $_____-.

4. Net working capital (line 2 minus line 3) $_____-.

*5. Tangible net worth $_____-.

*6. If less than 90% of assets are located in the U.S., give total U.S. assets $_____ .

7. Is line 5 at least $10 million? (Yes/No) _____-.

8. Is line 4 at least 6 times line 1? (Yes/No) _____-.

9. Is line 5 at least 6 times line 1? (Yes/No) _____-.

*10. Are at least 90% of assets located in the U.S.? (Yes/No) _____. If not, complete line 11.

11. Is line 6 at least 6 times line 1? (Yes/No) _____.

Alternative II

1. Amount of annual aggregate liability coverage to be demonstrated $_____-.

2. Current bond rating of most recent issuance and name of rating service _____ _____-.

3. Date of issuance of bond _____—.

4. Date of maturity of bond _____—.

*5. Tangible net worth $_____-.

*6. Total assets in U.S. (required only if less than 90% of assets are located in the U.S.) $_____-.

7. Is line 5 at least $10 million? (Yes/No) _____-.

8. Is line 5 at least 6 times line 1? _____ .

9. Are at least 90% of assets located in the U.S.? If not, complete line 10. (Yes/No) ——.

10. Is line 6 at least 6 times line 1? _____-.

[Fill in part B if you are using the financial test to demonstrate assurance of both liability coverage and costs assured under § 261.143(e) or closure or post-closure care costs under 40 CFR 264.143, 264.145, 265.143 or 265.145.]

Part B. Facility Care and Liability Coverage

[Fill in Alternative I if the criteria of paragraphs (e)(1)(i) of Sec. 261.143 and (f)(1)(i) of Sec. 261.147 are used. Fill in Alternative II if the criteria of paragraphs (e)(1)(ii) of Sec. 261.143 and (f)(1)(ii) of Sec. 261.147 are used.]

Alternative I

1. Sum of current cost estimates (total of all cost estimates listed above) $_____-

2. Amount of annual aggregate liability coverage to be demonstrated $_____-

3. Sum of lines 1 and 2 $_____

*4. Total liabilities (if any portion of your cost estimates is included in your total liabilities, you may deduct that portion from this line and add that amount to lines 5 and 6) $_____-

*5. Tangible net worth $_____

*6. Net worth $_____-

*7. Current assets $_____

*8. Current liabilities $_____

9. Net working capital (line 7 minus line 8) $_____

*10. The sum of net income plus depreciation, depletion, and amortization $_____-

*11. Total assets in U.S. (required only if less than 90% of assets are located in the U.S.) $_____

12. Is line 5 at least $10 million? (Yes/No)

13. Is line 5 at least 6 times line 3? (Yes/No)

14. Is line 9 at least 6 times line 3? (Yes/No)

*15. Are at least 90% of assets located in the U.S.? (Yes/No) If not, complete line 16.

16. Is line 11 at least 6 times line 3? (Yes/No)

17. Is line 4 divided by line 6 less than 2.0? (Yes/No)

18. Is line 10 divided by line 4 greater than 0.1? (Yes/No)

19. Is line 7 divided by line 8 greater than 1.5? (Yes/No)

Alternative II

1. Sum of current cost estimates (total of all cost estimates listed above) $____-

2. Amount of annual aggregate liability coverage to be demonstrated $____-

3. Sum of lines 1 and 2 $____

4. Current bond rating of most recent issuance and name of rating service _____-

5. Date of issuance of bond _____—

6. Date of maturity of bond _____—

*7. Tangible net worth (if any portion of the cost estimates is included in ''total liabilities'' on your financial statements you may add that portion to this line) $____-

*8. Total assets in the U.S. (required only if less than 90% of assets are located in the U.S.) $____-

9. Is line 7 at least $10 million? (Yes/No)

10. Is line 7 at least 6 times line 3? (Yes/No)

*11. Are at least 90% of assets located in the U.S.? (Yes/No) If not complete line 12.

12. Is line 8 at least 6 times line 3? (Yes/No)

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 261.151(f) as such regulations were constituted on the date shown immediately below.

[Signature] _____

[Name] _____

[Title] _____

[Date] _____

(g)(1) A corporate guarantee, as specified in § 261.143(e) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Corporate Guarantee for Facility Care

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of the State of [insert name of State], herein referred to as guarantor. This guarantee is made on behalf of the [owner or operator] of [business address], which is [one of the following: ''our subsidiary''; ''a subsidiary of [name and address of common parent corporation], of which guarantor is a subsidiary''; or ''an entity with which guarantor has a substantial business relationship, as defined in 40 CFR 264.141(h) and 265.141(h)'' to the United States Environmental Protection Agency (EPA).

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 261.143(e).

2. [Owner or operator] owns or operates the following facility(ies) covered by this guarantee: [List for each facility: EPA Identification Number (if any issued), name, and address.

3. ''Closure plans'' as used below refer to the plans maintained as required by subpart H of 40 CFR part 261 for the care of facilities as identified above.

4. For value received from [owner or operator], guarantor guarantees that in the event of a determination by the Regional Administrator that the hazardous secondary materials at the owner or operator's facility covered by this guarantee do not meet the conditions of the exclusion under § 261.4(a)(24), the guarantor will dispose of any hazardous secondary material as hazardous waste, and close the facility in accordance with closure requirements found in parts 264 or 265 of this chapter, as applicable, or establish a trust fund as specified in § 261.143(a) in the name of the owner or operator in the amount of the current cost estimate.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and to [owner or operator] that he intends to provide alternate financial assurance as specified in subpart H of 40 CFR part 261, as applicable, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless [owner or operator] has done so.

6. The guarantor agrees to notify the EPA Regional Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

7. Guarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor, he shall establish alternate financial assurance as specified in of 40 CFR parts 264, 265, or subpart H of 40 CFR part 261, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.

8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure plan, the extension or reduction of the time of performance, or any other modification or alteration of an obligation of the owner or operator pursuant to 40 CFR parts 264, 265, or Subpart H of 40 CFR part 261.

9. Guarantor agrees to remain bound under this guarantee for as long as [owner or operator] must comply with the applicable financial assurance requirements of 40 CFR parts 264 and 265 or the financial assurance condition of 40 CFR 261.4(a)(24)(vi)(F) for the above-listed facilities, except as provided in paragraph 10 of this agreement.

10. [Insert the following language if the guarantor is (a) a direct or higher-tier corporate parent, or (b) a firm whose parent corporation is also the parent corporation of the owner or operator]:

Guarantor may terminate this guarantee by sending notice by certified mail to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and to [owner or operator], provided that this guarantee may not be terminated unless and until [the owner or operator] obtains, and the EPA Regional Administrator(s) approve(s), alternate coverage complying with 40 CFR 261.143.

[Insert the following language if the guarantor is a firm qualifying as a guarantor due to its ''substantial business relationship'' with the owner or operator]

Guarantor may terminate this guarantee 120 days following the receipt of notification, through certified mail, by the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and by [the owner or operator].

11. Guarantor agrees that if [owner or operator] fails to provide alternate financial assurance as specified in 40 CFR parts 264, 265, or subpart H of 40 CFR 261, as applicable, and obtain written approval of such assurance from the EPA Regional Administrator(s) within 90 days after a notice of cancellation by the guarantor is received by an EPA Regional Administrator from guarantor, guarantor shall provide such alternate financial assurance in the name of [owner or operator].

12. Guarantor expressly waives notice of acceptance of this guarantee by the EPA or by [owner or operator]. Guarantor also expressly waives notice of amendments or modifications of the closure plan and of amendments or modifications of the applicable requirements of 40 CFR parts 264, 265, or subpart H of 40 CFR 261.

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR 261.151(g)(1) as such regulations were constituted on the date first above written.

Effective date: _____

[Name of guarantor] _____

[Authorized signature for guarantor] _____

[Name of person signing] _____

[Title of person signing] _____

Signature of witness or notary: _____

(2) A guarantee, as specified in Sec. 261.147(g) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Guarantee for Liability Coverage

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of [if incorporated within the United States insert ''the State of ____-'' and insert name of State; if incorporated outside the United States insert the name of the country in which incorporated, the principal place of business within the United States, and the name and address of the registered agent in the State of the principal place of business], herein referred to as guarantor. This guarantee is made on behalf of [owner or operator] of [business address], which is one of the following: ''our subsidiary;'' ''a subsidiary of [name and address of common parent corporation], of which guarantor is a subsidiary;'' or ''an entity with which guarantor has a substantial business relationship, as defined in 40 CFR [either 264.141(h) or 265.141(h)]'', to any and all third parties who have sustained or may sustain bodily injury or property damage caused by [sudden and/or nonsudden] accidental occurrences arising from operation of the facility(ies) covered by this guarantee.

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 261.147(g).

2. [Owner or operator] owns or operates the following facility(ies) covered by this guarantee: [List for each facility: EPA identification number (if any issued), name, and address; and if guarantor is incorporated outside the United States list the name and address of the guarantor's registered agent in each State.] This corporate guarantee satisfies RCRA third-party liability requirements for [insert ''sudden'' or ''nonsudden'' or ''both sudden and nonsudden''] accidental occurrences in above-named owner or operator facilities for coverage in the amount of [insert dollar amount] for each occurrence and [insert dollar amount] annual aggregate.

3. For value received from [owner or operator], guarantor guarantees to any and all third parties who have sustained or may sustain bodily injury or property damage caused by [sudden and/or nonsudden] accidental occurrences arising from operations of the facility(ies) covered by this guarantee that in the event that [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by [sudden and/or nonsudden] accidental occurrences, arising from the operation of the above-named facilities, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor will satisfy such judgment(s), award(s) or settlement agreement(s) up to the limits of coverage identified above.

4. Such obligation does not apply to any of the following:

(a) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert owner or operator] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator]; or

(2) The spouse, child, parent, brother, or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert owner or operator]. This exclusion applies:

(A) Whether [insert owner or operator] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert owner or operator];

(2) Premises that are sold, given away or abandoned by [insert owner or operator] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert owner or operator];

(4) Personal property in the care, custody or control of [insert owner or operator];

(5) That particular part of real property on which [insert owner or operator] or any contractors or subcontractors working directly or indirectly on behalf of [insert owner or operator] are performing operations, if the property damage arises out of these operations.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator[s] for the Region[s] in which the facility[ies] is[are] located and to [owner or operator] that he intends to provide alternate liability coverage as specified in 40 CFR 261.147, as applicable, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the guarantor shall establish such liability coverage unless [owner or operator] has done so.

6. The guarantor agrees to notify the EPA Regional Administrator by certified mail of a voluntary or involuntary proceeding under title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding. Guarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor, he shall establish alternate liability coverage as specified in 40 CFR 261.147 in the name of [owner or operator], unless [owner or operator] has done so.

7. Guarantor reserves the right to modify this agreement to take into account amendment or modification of the liability requirements set by 40 CFR 261.147, provided that such modification shall become effective only if a Regional Administrator does not disapprove the modification within 30 days of receipt of notification of the modification.

8. Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable requirements of 40 CFR 261.147 for the above-listed facility(ies), except as provided in paragraph 10 of this agreement.

9. [Insert the following language if the guarantor is (a) a direct or higher-tier corporate parent, or (b) a firm whose parent corporation is also the parent corporation of the owner or operator]:

10. Guarantor may terminate this guarantee by sending notice by certified mail to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and to [owner or operator], provided that this guarantee may not be terminated unless and until [the owner or operator] obtains, and the EPA Regional Administrator(s) approve(s), alternate liability coverage complying with 40 CFR 261.147.

[Insert the following language if the guarantor is a firm qualifying as a guarantor due to its ''substantial business relationship'' with the owner or operator]:

Guarantor may terminate this guarantee 120 days following receipt of notification, through certified mail, by the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and by [the owner or operator].

11. Guarantor hereby expressly waives notice of acceptance of this guarantee by any party.

12. Guarantor agrees that this guarantee is in addition to and does not affect any other responsibility or liability of the guarantor with respect to the covered facilities.

13. The Guarantor shall satisfy a third-party liability claim only on receipt of one of the following documents:

(a) Certification from the Principal and the third-party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert Principal] and [insert name and address of third-party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Principal's] facility should be paid in the amount of $.

[Signatures] _____

Principal _____

(Notary) Date _____

[Signatures] _____

Claimant(s) _____

(Notary) Date _____

(b) A valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Principal's facility or group of facilities.

14. In the event of combination of this guarantee with another mechanism to meet liability requirements, this guarantee will be considered [insert ''primary'' or ''excess''] coverage.

I hereby certify that the wording of the guarantee is identical to the wording specified in 40 CFR 261.151(g)(2) as such regulations were constituted on the date shown immediately below.

Effective date: _____

[Name of guarantor] _____

[Authorized signature for guarantor] _____

[Name of person signing] _____

[Title of person signing] _____

Signature of witness or notary: _____

(h) A hazardous waste facility liability endorsement as required § 261.147 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Hazardous Secondary Material Reclamation/ Intermediate Facility Liability Endorsement

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering bodily injury and property damage in connection with the insured's obligation to demonstrate financial responsibility under 40 CFR 261.147. The coverage applies at [list EPA Identification Number (if any issued), name, and address for each facility] for [insert ''sudden accidental occurrences,'' ''nonsudden accidental occurrences,'' or ''sudden and nonsudden accidental occurrences''; if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both]. The limits of liability are [insert the dollar amount of the ''each occurrence'' and ''annual aggregate'' limits of the Insurer's liability], exclusive of legal defense costs.

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions of the policy inconsistent with subsections (a) through (e) of this Paragraph 2 are hereby amended to conform with subsections (a) through (e):

(a) Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this endorsement is attached.

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 40 CFR 261.147(f).

(c) Whenever requested by a Regional Administrator of the U.S. Environmental Protection Agency (EPA), the Insurer agrees to furnish to the Regional Administrator a signed duplicate original of the policy and all endorsements.

(d) Cancellation of this endorsement, whether by the Insurer, the insured, a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is(are) located.

(e) Any other termination of this endorsement will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

Attached to and forming part of policy No. —— issued by [name of Insurer], herein called the Insurer, of [address of Insurer] to [name of insured] of [address] this _____ day of _____, 19____. The effective date of said policy is _____ day of _____, 19____.

I hereby certify that the wording of this endorsement is identical to the wording specified in 40 CFR 261.151(h) as such

regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

[Signature of Authorized Representative of Insurer]

[Type name]

[Title], Authorized Representative of [name of Insurer]

[Address of Representative]

(i) A certificate of liability insurance as required in § 261.147 must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Hazardous Secondary Material Reclamation/ Intermediate Facility Certificate of Liability Insurance

1. [Name of Insurer], (the ''Insurer''), of [address of Insurer] hereby certifies that it has issued liability insurance covering bodily injury and property damage to [name of insured], (the ''insured''), of [address of insured] in connection with the insured's obligation to demonstrate financial responsibility under 40 CFR parts 264, 265, and the financial assurance condition of 40 CFR 261.4(a)(24)(vi)(F). The coverage applies at [list EPA Identification Number (if any issued), name, and address for each facility] for [insert ''sudden accidental occurrences,'' ''nonsudden accidental occurrences,'' or ''sudden and nonsudden accidental occurrences''; if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both]. The limits of liability are [insert the dollar amount of the ''each occurrence'' and ''annual aggregate'' limits of the Insurer's liability], exclusive of legal defense costs. The coverage is provided under policy number, issued on [date]. The effective date of said policy is [date].

2. The Insurer further certifies the following with respect to the insurance described in Paragraph 1:

(a) Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy.

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 40 CFR 261.147.

(c) Whenever requested by a Regional Administrator of the U.S. Environmental Protection Agency (EPA), the Insurer agrees to furnish to the Regional Administrator a signed duplicate original of the policy and all endorsements.

(d) Cancellation of the insurance, whether by the insurer, the insured, a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the hazardous waste management facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is(are) located.

(e) Any other termination of the insurance will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

I hereby certify that the wording of this instrument is identical to the wording specified in 40 CFR 261.151(i) as such regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

[Signature of authorized representative of Insurer]

[Type name]

[Title], Authorized Representative of [name of Insurer]

[Address of Representative]

(j) A letter of credit, as specified in § 261.147(h) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

Name and Address of Issuing Institution ____

Regional Administrator(s) _____

Region(s) _____

U.S. Environmental Protection Agency ____

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____----- in the favor of [''any and all third-party liability claimants'' or insert name of trustee of the standby trust fund], at the request and for the account of [owner or operator's name and address] for third-party liability awards or settlements up to [in words] U.S. dollars $_____----- per occurrence and the annual aggregate amount of [in words] U.S. dollars $_—, for sudden accidental occurrences and/or for third-party liability awards or settlements up to the amount of [in words] U.S. dollars $_____----- per occurrence, and the annual aggregate amount of [in words] U.S. dollars $_____-----, for nonsudden accidental occurrences available upon presentation of a sight draft bearing reference to this letter of credit No. _____----, and [insert the following language if the letter of credit is being used without a standby trust fund: (1) a signed certificate reading as follows:

Certificate of Valid Claim

The undersigned, as parties [insert principal] and [insert name and address of third party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operations of [principal's] facility should be paid in the amount of $[ ]. We hereby certify that the claim does not apply to any of the following:

(a) Bodily injury or property damage for which [insert principal] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert principal] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert principal] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert principal] arising from, and in the course of, employment by [insert principal]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert principal].

This exclusion applies:

(A) Whether [insert principal] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert principal];

(2) Premises that are sold, given away or abandoned by [insert principal] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert principal];

(4) Personal property in the care, custody or control of [insert principal];

(5) That particular part of real property on which [insert principal] or any contractors or subcontractors working directly or indirectly on behalf of [insert principal] are performing operations, if the property damage arises out of these operations.

[Signatures] _____

Grantor _____

[Signatures] _____

Claimant(s) _____

or (2) a valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.]

This letter of credit is effective as of [date] and shall expire on [date at least one year later], but such expiration date shall be automatically extended for a period of [at least one year] on [date and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify you, the USEPA Regional Administrator for Region [Region], and [owner's or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us.

[Insert the following language if a standby trust fund is not being used: ''In the event that this letter of credit is used in combination with another mechanism for

liability coverage, this letter of credit shall be considered [insert ''primary'' or ''excess'' coverage].''

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 261.151(j) as such regulations were constituted on the date shown immediately below. [Signature(s) and title(s) of official(s) of issuing institution] [Date].

This credit is subject to [insert ''the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce,'' or ''the Uniform Commercial Code'']. (k) A surety bond, as specified in Sec. 261.147(i) of this chapter, must be worded as follows: except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Payment Bond

Surety Bond No. [Insert number]

Parties [Insert name and address of owner or operator], Principal, incorporated in [Insert State of incorporation] of [Insert city and State of principal place of business] and [Insert name and address of surety company(ies)], Surety Company(ies), of [Insert surety(ies) place of business].

EPA Identification Number (if any issued), name, and address for each facility guaranteed by this bond: ____

_____

_____

Nonsudden

Sudden accidental

accidental

occurrences

occurrences

_____

_____

Penal Sum Per Occurrence	[insert amount]	[insert amount]
Annual Aggregate	[insert amount]	[insert amount]

_____

_____

Purpose: This is an agreement between the Surety(ies) and the Principal under which the Surety(ies), its(their) successors and assignees, agree to be responsible for the payment of claims against the Principal for bodily injury and/or property damage to third parties caused by [''sudden'' and/or ''nonsudden''] accidental occurrences arising from operations of the facility or group of facilities in the sums prescribed herein; subject to the governing provisions and the following conditions.

Governing Provisions:

(1) Section 3004 of the Resource Conservation and Recovery Act of 1976, as amended.

(2) Rules and regulations of the U.S. Environmental Protection Agency (EPA), particularly 40 CFR parts 264, 265, and Subpart H of 40 CFR part 261 (if applicable).

(3) Rules and regulations of the governing State agency (if applicable) [insert citation].

Conditions:

(1) The Principal is subject to the applicable governing provisions that require the Principal to have and maintain liability coverage for bodily injury and property damage to third parties caused by [''sudden'' and/or ''nonsudden''] accidental occurrences arising from operations of the facility or group of facilities. Such obligation does not apply to any of the following:

(a) Bodily injury or property damage for which [insert Principal] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert Principal] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert Principal] under a workers' compensation, disability benefits, or unemployment compensation law or similar law.

(c) Bodily injury to:

(1) An employee of [insert Principal] arising from, and in the course of, employment by [insert principal]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert Principal]. This exclusion applies:

(A) Whether [insert Principal] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert Principal];

(2) Premises that are sold, given away or abandoned by [insert Principal] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert Principal];

(4) Personal property in the care, custody or control of [insert Principal];

(5) That particular part of real property on which [insert Principal] or any contractors or subcontractors working directly or indirectly on behalf of [insert Principal] are performing operations, if the property damage arises out of these operations.

(2) This bond assures that the Principal will satisfy valid third party liability claims, as described in condition 1.

(3) If the Principal fails to satisfy a valid third party liability claim, as described above, the Surety(ies) becomes liable on this bond obligation.

(4) The Surety(ies) shall satisfy a third party liability claim only upon the receipt of one of the following documents:

(a) Certification from the Principal and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert name of Principal] and [insert name and address of third party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Principal's] facility should be paid in the amount of $[ ].

[Signature]

Principal

[Notary] Date

[Signature(s)]

Claimant(s)

[Notary] Date

or (b) A valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Principal's facility or group of facilities.

(5) In the event of combination of this bond with another mechanism for liability coverage, this bond will be considered [insert ''primary'' or ''excess''] coverage.

(6) The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond. In no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum, provided that the Surety(ies) furnish(es) notice to the Regional Administrator forthwith of all claims filed and payments made by the Surety(ies) under this bond.

(7) The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and the USEPA Regional Administrator for Region [Region], provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal and the Regional Administrator, as evidenced by the return receipt.

(8) The Principal may terminate this bond by sending written notice to the Surety(ies) and to the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

(9) The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules and regulations and agree(s) that no such amendment shall in any way alleviate its (their) obligation on this bond.

(10) This bond is effective from [insert date] (12:01 a.m., standard time, at the address of the Principal as stated herein) and shall continue in force until terminated as described above.

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized

to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 261.151(k), as such regulations were constituted on the date this bond was executed.

PRINCIPAL

[Signature(s)]
[Name(s)]
[Title(s)]
[Corporate Seal]

CORPORATE SURETY[IES]

[Name and address]
State of incorporation: _____
Liability Limit: $ _____
[Signature(s)]
[Name(s) and title(s)]
[Corporate seal]
[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]
Bond premium: $ _____

(l)(1) A trust agreement, as specified in § 261.147(j) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Trust Agreement

Trust Agreement, the ''Agreement,'' entered into as of [date] by and between [name of the owner or operator] a [name of State] [insert ''corporation,'' ''partnership,'' ''association,'' or ''proprietorship''], the ''Grantor,'' and [name of corporate trustee], [insert, ''incorporated in the State of _____'' or ''a national bank''], the ''trustee.''

Whereas, the United States Environmental Protection Agency, ''EPA,'' an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental and/or nonsudden accidental occurrences arising from operations of the facility or group of facilities.

Whereas, the Grantor has elected to establish a trust to assure all or part of such financial responsibility for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term ''Grantor'' means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term ''Trustee'' means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities. This agreement pertains to the facilities identified on attached schedule A [on schedule A, for each facility list the EPA Identification Number (if any issued), name, and address of the facility(ies) and the amount of liability coverage, or portions thereof, if more than one instrument affords combined coverage as demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, hereinafter the ''Fund,'' for the benefit of any and all third parties injured or damaged by [sudden and/or nonsudden] accidental occurrences arising from operation of the facility(ies) covered by this guarantee, in the amounts of _____-[up to $1 million] per occurrence and [up to $2 million] annual aggregate for sudden accidental occurrences and _____ [up to $3 million] per occurrence and _____-[up to $6 million] annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

(a) Bodily injury or property damage for which [insert Grantor] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert Grantor] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert Grantor] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert Grantor] arising from, and in the course of, employment by [insert Grantor]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert Grantor]. This exclusion applies:

(A) Whether [insert Grantor] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert Grantor];

(2) Premises that are sold, given away or abandoned by [insert Grantor] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert Grantor];

(4) Personal property in the care, custody or control of [insert Grantor];

(5) That particular part of real property on which [insert Grantor] or any contractors or subcontractors working directly or indirectly on behalf of [insert Grantor] are performing operations, if the property damage arises out of these operations.

In the event of combination with another mechanism for liability coverage, the Fund shall be considered [insert ''primary'' or ''excess''] coverage.

The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Bodily Injury or Property Damage. The Trustee shall satisfy a third party liability claim by making payments from the Fund only upon receipt of one of the following documents;

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert Grantor] and [insert name and address of third party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Grantor's] facility or group of facilities should be paid in the amount of $[ ].

[Signatures]

Grantor

[Signatures]

Claimant(s)

(b) A valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstance then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–2.(a), shall not be acquired or held unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common commingled, or collective trust fund created by the Trustee in which the fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 81a–1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuations. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Regional Administrator a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendments to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Regional Administrator to the Trustee shall be in writing, signed by the EPA Regional Administrators of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notice of Nonpayment. If a payment for bodily injury or property damage is made under Section 4 of this trust, the Trustee shall notify the Grantor of such payment and the amount(s) thereof within five (5) working days. The Grantor shall, on or before the anniversary date of the establishment of the Fund following such notice, either make payments to the Trustee in amounts sufficient to cause the trust to return to its value immediately prior to the payment of claims under Section 4, or shall provide written proof to the Trustee that other financial assurance for liability coverage has been obtained equaling the amount necessary to return the trust to its value prior to the payment of claims. If the Grantor does not either make payments to the Trustee or provide the Trustee with such proof, the Trustee shall within 10 working days after the anniversary date of the establishment of the Fund provide a written notice of nonpayment to the EPA Regional Administrator.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate EPA Regional Administrator, or by the Trustee and the appropriate EPA Regional Administrator if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

The Regional Administrator will agree to termination of the Trust when the owner or operator substitutes alternate financial assurance as specified in this section.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity,

including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of [enter name of State].

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 261.151(l) as such regulations were constituted on the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

(2) The following is an example of the certification of acknowledgement which must accompany the trust agreement for a trust fund as specified in Sec. 261.147(j) of this chapter. State requirements may differ on the proper

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/ his name thereto by like order.

[Signature of Notary Public]

(m)(1) A standby trust agreement, as specified in § 261.147(h) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Standby Trust Agreement

Trust Agreement, the ''Agreement,'' entered into as of [date] by and between [name of the owner or operator] a [name of a State] [insert ''corporation,'' ''partnership,'' ''association,'' or ''proprietorship''], the ''Grantor,'' and [name of corporate trustee], [insert, ''incorporated in the State of _____'' or ''a national bank''], the ''trustee.''

Whereas the United States Environmental Protection Agency, ''EPA,'' an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental and/or nonsudden accidental occurrences arising from operations of the facility or group of facilities.

Whereas, the Grantor has elected to establish a standby trust into which the proceeds from a letter of credit may be deposited to assure all or part of such financial responsibility for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term Grantor means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term Trustee means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities. This Agreement pertains to the facilities identified on attached schedule A [on schedule A, for each facility list the EPA Identification Number (if any issued), name, and address of the facility(ies) and the amount of liability coverage, or portions thereof, if more than one instrument affords combined coverage as demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a standby trust fund, hereafter the ''Fund,'' for the benefit of any and all third parties injured or damaged by [sudden and/or nonsudden] accidental occurrences arising from operation of the facility(ies) covered by this guarantee, in the amounts of _____-[up to $1 million] per occurrence and _____-[up to $2 million] annual aggregate for sudden accidental occurrences and _____-[up to $3 million] per occurrence and _____-[up to $6 million] annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

(a) Bodily injury or property damage for which [insert Grantor] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert Grantor] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert Grantor] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert Grantor] arising from, and in the course of, employment by [insert Grantor]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert Grantor].

This exclusion applies:

(A) Whether [insert Grantor] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert Grantor];

(2) Premises that are sold, given away or abandoned by [insert Grantor] if the property damage arises out of any part of those premises;

(3) Property loaned by [insert Grantor];

(4) Personal property in the care, custody or control of [insert Grantor];

(5) That particular part of real property on which [insert Grantor] or any contractors or subcontractors working directly or indirectly on behalf of [insert Grantor] are performing operations, if the property damage arises out of these operations.

In the event of combination with another mechanism for liability coverage, the Fund shall be considered [insert ''primary'' or ''excess''] coverage.

The Fund is established initially as consisting of the proceeds of the letter of credit deposited into the Fund. Such proceeds and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Bodily Injury or Property Damage. The Trustee shall satisfy a third party liability claim by drawing on the letter of credit described in Schedule B and by making payments from the Fund only upon receipt of one of the following documents:

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert Grantor] and [insert name and address of third party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Grantor's] facility should be paid in the amount of $[ ]

[Signature] _____

Grantor _____

[Signatures] _____

Claimant(s) _____

(b) A valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of the proceeds from the letter of credit drawn upon by the Trustee in accordance with the requirements of 40 CFR 261.151(k) and Section 4 of this Agreement.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or a State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depositary with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve Bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements to the Trustee shall be paid from the Fund.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, certifications of valid claims, and instructions to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendments to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the EPA Regional Administrator hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be paid to the Grantor.

The Regional Administrator will agree to termination of the Trust when the owner or operator substitutes alternative financial assurance as specified in this section.

Section 16. Immunity and indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor and the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of [enter name of State].

Section 18. Interpretation. As used in this Agreement, words in the singular include the

plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation of the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 261.151(m) as such regulations were constituted on the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

(2) The following is an example of the certification of acknowledgement which must accompany the trust agreement for a standby trust fund as specified in section 261.147(h) of this chapter. State requirements may differ on the proper content of this acknowledgement.

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/ his name thereto by like order.

[Signature of Notary Public]

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

■ 13. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939 and 6974.

Subpart D—Changes to Permits

■ 14. In § 270.42, Appendix I is amended to add a new A. 9 and A. 10 to read as follows:

§ 270.42 Permit modification at the request of the permittee.

* * * * *

Appendix I to § 270.42—Classification of permit modification

Modifications	Class
A. General Permit Provisions.	
* * * * * * *	
9. Changes to remove permit conditions applicable to a unit excluded under the provisions of § 261.4.	[1] 1
10. Changes in the expiration date of a permit issued to a facility at which all units are excluded under the provisions of § 261.4.	[1] 1
* * * * * * *	

[1] Class 1 modifications requiring prior Agency approval.

[FR Doc. E8–24399 Filed 10–29–08; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Thursday,
October 30, 2008

Part III

Department of Homeland Security

Transportation Security Administration

49 CFR Parts 1515, 1520, et al.

Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1515, 1520, 1522, 1540, 1542, 1544, and 1550

[Docket No. TSA–2008–0021]

RIN 1652–AA53

Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Transportation Security Administration (TSA) proposes to amend current aviation transportation security regulations to enhance the security of general aviation by expanding the scope of current requirements and by adding new requirements for certain large aircraft operators and airports serving those aircraft. TSA is proposing to require that all aircraft operations, including corporate and private operations, with aircraft with a maximum certificated takeoff weight (MTOW) above 12,500 pounds (''large aircraft'') adopt a large aircraft security program (LASP). This security program would be based on the current security program that applies to operators providing scheduled or charter services.

TSA also proposes to require large aircraft operators to contract with TSA-approved auditors to conduct audits of the operators' compliance with their security programs and with TSA-approved watch-list service providers to verify that their passengers are not on the No Fly and/or Selectee portions of the consolidated terrorist watch-list maintained by the Federal Government. This proposed rule describes the process and criteria under which auditors and companies that perform watch-list matching would obtain TSA approval.

TSA also proposes further security measures for large aircraft operators in all-cargo operations and for operators of passenger aircraft with a MTOW of over 45,500 kilograms (100,309.3 pounds), operated for compensation or hire. TSA also proposes to require that certain airports that serve large aircraft adopt security programs and amend the security program for full program and full all-cargo operators.

DATES: Submit comments by December 29, 2008.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, In Person, or Fax: Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; Fax 202–493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: *For program questions:* Erik Jensen, Branch Chief—Policy, Plans & Stakeholder Affairs, Office of General Aviation, TSNM, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–2401; facsimile (571) 227–2920; e-mail *LASP@dhs.gov.*

For questions regarding Sensitive Security Information (SSI): Andrew Colsky, Director, SSI Office, Office of the Special Counselor (OSC), TSA–31, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3513; facsimile (571) 227–2945; e-mail *SSI@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file in the public docket all comments received by TSA, except for comments containing confidential information and Sensitive Security Information (SSI).[1] TSA will consider all comments received on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial, or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

Upon receipt of such comments, TSA will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold them in a separate file to which the public does not have access, and place a note in the public docket that TSA has received such materials from the commenter. If TSA receives a request to examine or copy this information, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Department of Homeland Security's (DHS) FOIA regulation found in 6 CFR part 5.

Reviewing Comments in the Docket

Please be aware that anyone is able to search the electronic form of all comments received into any of our

[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://docketinfo.gov.*

You may review TSA's electronic public docket on the Internet at *http://www.regulations.gov.* In addition, DOT's Docket Management Facility provides a physical facility, staff, equipment, and assistance to the public. To obtain assistance or to review comments in TSA's public docket, you may visit this facility between 9 a.m. 5 p.m., Monday through Friday, excluding legal holidays, or call (202) 366–9826. This docket operations facility is located in the West Building Ground Floor, Room W12–140 at 1200 New Jersey Avenue, SE., Washington, DC 20590.

Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) Web page at *http://www.regulations.gov*;

(2) Accessing the Government Printing Office's web page at *http://www.gpoaccess.gov/fr/index.html;* or

(3) Visiting TSA's Security Regulations web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Abbreviations and Terms Used in This Document

AICPA—American Institute of Certified Public Accountants
ALJ—Administrative Law Judge
AOSC—Aircraft Operator Security Coordinator
AOSSP—Aircraft Operator Standard Security Program
ATSA—Aviation and Transportation Security Act
CFR—Code of Federal Regulations
CHRC—Criminal History Records Check
CJIS—Criminal Justice Information Services
CBP—U.S. Customs and Border Protection
DHS—U.S. Department of Homeland Security
FAMs—Federal Air Marshals
FAA—Federal Aviation Administration
FACAOSSP—Full All-Cargo Aircraft Operator Standard Security Program
FBI—Federal Bureau of Investigation
FISMA—Federal Information Security Management Act
GA—General Aviation
HME—Hazardous Materials Endorsement
IPA—Independent Public Accounting firm
IT—Information Technology
LASP—Large Aircraft Security Program
LEO—Law Enforcement Officer
MTOW—Maximum Certificated Take-Off Weight
NIST—National Institute of Standards and Technology
PPSSP—Partial Program Standard Security Program
PCSSP—Private Charter Standard Security Program
SSI—Sensitive Security Information
STA—Security Threat Assessment
TSC—Terrorist Screening Center
TSA—Transportation Security Administration
TWIC—Transportation Worker Identification Credential
TFSSP—Twelve-Five Standard Security Program

Outline of the Notice of Proposed Rulemaking

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I. Introduction

The aviation industry is composed of thousands of operators that conduct different types of operations in numerous different types of aircraft. Many aircraft operators are air carriers or commercial operators that offer transportation to the public for compensation or hire. Others are general aviation (GA) operators that do not offer transportation to the public. These operators often are corporate or private owners of aircraft that operate their aircraft for their own use or provide transportation for compensation or hire only to certain customers without offering transportation to the public in general.[2]

To date, the Federal Government's primary focus with regard to aviation security has been on air carriers and commercial operators that offer transportation for compensation or hire to the public. TSA requires these carriers and operators to develop and operate under a particular security program depending on the precise nature of their operations. A security program is a set of security procedures that will meet the requirements of applicable TSA regulations. For example, a security program would include specific measures to screen cargo, to transport Federal Air Marshals, to use personnel identification systems, and to provide training to employees, if the operator were subject to those requirements in TSA's regulation.

With few exceptions, TSA does not currently require security programs for GA aircraft operators. As vulnerabilities and risks associated with air carriers and commercial operators have been reduced or mitigated, terrorists may view general aviation aircraft as more vulnerable and thus attractive targets. If hijacked and used as a missile, these aircraft would be capable of inflicting significant damage.

The Federal Aviation Administration's (FAA) long-standing definition of ''large aircraft'' is an aircraft with a maximum certificated takeoff weight (MTOW) of over 12,500 pounds. See 14 CFR 1.1. Based on the aviation industry's familiarity with this definition and TSA's belief that aircraft of this size pose a potential risk, TSA is proposing to require security programs for all operators of aircraft—GA or otherwise—that have a MTOW of over 12,500 pounds, excluding certain governmental operations (collectively, ''large aircraft operators'').[3]

Currently, TSA requires many large aircraft operators that are air carriers or commercial operators to implement security programs such as the Twelve-Five Security Program or the Private Charter Security Program.[4] TSA is

[2] There is no statutory or regulatory definition of ''general aviation.'' For the purposes of this NPRM, we use the term to refer to aircraft operations that are not air carriers or commercial, governmental or military operators.

[3] In general, aircraft that weigh over 12,500 pounds MTOW are those aircraft equipped with twin turboprop or turbojet engines. Typically corporate and charter aircraft have a seating configuration for 6–8 passengers, while similar aircraft used in scheduled passenger service would likely have 18 or more seats.

[4] Although aircraft operators that are subject to the full program under 49 CFR 1544.101(a), or the full all-cargo program under § 1544.101(h), operate large aircraft, TSA does not include them in

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proposing to expand this requirement to include previously unregulated large aircraft operators—namely, GA with a MTOW of over 12,500 pounds. Doing so will expand the large aircraft operator population required to have a TSA-approved security program to approximately 10,000 operators from the approximately 650 operators today. In addition, TSA is proposing to establish a single large aircraft security program (LASP) to replace the various security programs used by currently regulated large aircraft operators, such as air carriers and commercial operators. It is TSA's view that the proposed rule would enhance security significantly.

TSA recognizes that this would greatly increase the number and type of operators subject to a TSA-approved security program. TSA invites comments on the weight threshold of aircraft covered by this proposed rule. For instance, parties may choose to comment on whether the security goals discussed herein would be met if security programs were required for GA aircraft only over some greater weight threshold. For example, we explain below that aircraft over 45,500 kg (100,309.3 pounds) MTOW are currently covered by the ''private charter'' security program, which includes security measures in addition to those outlined in the ''twelve-five'' security program. Since incidents involving heavier aircraft have the potential to lead to greater damages and loss of life under one of the scenarios studied in our regulatory impact analysis, we specifically solicit comment on whether this would be a logical alternative weight threshold to consider for the increased security requirements for general aviation. Although TSA has concluded in this NPRM that the security benefits of the lower weight threshold of 12,500 lbs are justified by the risk and therefore justify the additional cost of the lower threshold, we welcome commenters' views on that topic, as well as on the cost-benefit impact of alternate weight thresholds.

Below is a list of the major requirements GA aircraft operators would be required to adopt under the LASP; a more detailed discussion of the LASP and the individual requirements is in sections II and III of this preamble:

- Ensure that their flight crew members have undergone a fingerprint-based criminal history records check (CHRC).
- Conduct watch-list matching of their passengers through TSA-approved watch-list matching service providers.
- Undergo a biennial audit of their compliance by a TSA-approved third party auditor.
- Comply with the current cargo requirements for the twelve-five all-cargo program if conducting an all-cargo operation.
- For aircraft with a MTOW of over 45,500 kilograms operated for compensation or hire, screen passengers and their accessible property.
- Check property on board for unauthorized persons.

In addition, TSA is proposing amendments to its regulations regarding airport security programs.[5] TSA is proposing to require additional airports to adopt security programs, because these airports serve aircraft operators that either currently must carry out a security program or would be required to have a security program under the proposed rule. TSA proposes to require the following airports to adopt a security program:

- Reliever airports, which perform the function of relieving congestion at commercial service airports and provide more GA access to the overall community.
- Airports that regularly serve large aircraft with scheduled or public charter service.

A. Current Aircraft Operator Security Programs

TSA requires security programs for air carriers and commercial operators that require security measures for individuals, property, and cargo aboard aircraft. Currently TSA requires security programs for full program, full all-cargo, partial, private charter, and twelve-five program operators. For full program operators,[6] the standard security program[7] is called an aircraft operator standard security program (AOSSP). For the full all-cargo program operators[8] operating all-cargo aircraft over 45,500 kg MTOW, the standard security program is the full all-cargo aircraft operator standard security program (FACAOSSP). The partial program[9] applies to scheduled passenger or public charter operations in an aircraft with 31 or more, but 60 or fewer passenger seats that does not enplane from or deplane into a sterile area. The standard security program for private charters is the private charter standard security program.[10] For other scheduled or charter flights, or all-cargo operations, in an aircraft with a MTOW of over 12,500 pounds, the standard security program is the twelve-five standard security program.[11]

The full program, the full all-cargo program, the partial program, the private charter program, and the twelve-five program aircraft operators all are covered under TSA regulations in 49 CFR part 1544. They all must hold FAA air carrier operating certificates or FAA operating certificates in accordance with the Federal Aviation Administration (FAA) regulations in 14 CFR part 119.[12] They all engage in interstate common carriage or intrastate common carriage.[13] TSA has also required certain operators not engaged in common carriage to hold and carry out security programs. Operators of aircraft with a MTOW of over 12,500 pounds must conduct operations in accordance with the FAA rules in 14 CFR part 125 (part 125 operators).[14] By notice published in the **Federal Register**, TSA required these operators to carry out the twelve-five standard security program for operations in aircraft over 12,500 pounds but not over 45,500 kg, and to carry out the private charter standard security program for operations in aircraft over 45,500 kg.[15] These part 125 operators conduct operations when common carriage is not involved. They may conduct operations for compensation or hire, however, and they may also conduct operations not for compensation or hire.[16]

Finally, all civil aircraft must operate under FAA regulations 14 CFR part 91, Air Traffic and General Operating Rules. These operators, when not also subject to another FAA regulation, such as part 119 or part 125, are often referred to in the industry as part 91 operators. TSA generally has not required such operators to carry out security measures.

The main objectives of the proposed rule are: (1) To merge the partial, private charter and twelve-five programs into a large aircraft security program and to

references to operators of large aircraft and large aircraft operators for purposes of this NPRM. Full program operators are generally known as the commercial airlines.

[5] The regulations are in 49 CFR 1542.101.

[6] 49 CFR 1544.101(a).

[7] A standard security program is a security program issued by TSA that serves as the baseline for a particular type of operator. An aircraft operator's security program consists of the appropriate standard security program, together with any amendments and alternative procedures to the security program, if approved by TSA.

[8] 49 CFR 1544.101(h).

[9] 49 CFR 1544.101(b).

[10] 49 CFR 1544.101(f).

[11] 49 CFR 1544.101(d).

[12] 49 CFR 1544.1.

[13] 49 U.S.C. 40102 and 14 CFR 119.21.

[14] 14 CFR 119.23.

[15] 69 FR 61516 (Oct. 19, 2004).

[16] 14 CFR 119.3 and 119.23. After TSA adopted the full all-cargo program, it required part 125 operators in all-cargo operations using aircraft over 45,500 kg to have and carry out a full all-cargo program. See 71 FR 30478 (May 26, 2006).

expand its scope to include general aviation operators using aircraft with a MTOW of over 12,500 pounds; and (2) to enhance the security of these operations.

B. Current Security Programs for Large Aircraft

Large aircraft are operated by a diverse group of air carriers, commercial operators, and GA operators. As stated above, to date, TSA has mandated security programs for the air carrier and commercial operator segments of the aviation industry including scheduled passenger operations, private charters, public charters, and all-cargo operations in large aircraft through the twelve-five program, the partial program, and the private charter program. With limited exceptions, TSA has not required security programs for large aircraft in general aviation.

Large GA aircraft are most often operated by corporate entities, though some large GA aircraft are operated by individuals. Corporate aviation, with a population of approximately 10,000 operators flying 15,000 aircraft, is largely unregulated for security purposes. Yet many of these aircraft are of the same size and weight of the air carriers and commercial operators that TSA regulates, and they could be used effectively to commit a terrorist act. Complicating the situation is the fact that many GA operators have the authorization to function under several different FAA regulations and operating certificates, which may require different TSA security programs or no TSA security program at all.

TSA considered developing a new regulatory program to be used solely on GA aircraft and their potential security risks. This decision would have created yet another security program applicable to large aircraft operators. Instead of five separate security programs that would apply to large aircraft operators depending on the type of service they provide, TSA is proposing one security program that would apply to all large aircraft operators (except certain government operations) and would replace the current security programs for partial program operators, twelve-five program operators, and private charter operators. The LASP would establish a consistent set of regulations for air carriers and commercial operators, as well as GA operators using large aircraft. Indeed, LASP would provide large aircraft operators not covered under the full program, or the full all-cargo security program, with one set of regulations that would form the core of their security programs distinct to their operational and security needs.

Table 1 below identifies the different types of large aircraft operators that currently are required to have a security program and the major security requirements for these operators. It also identifies the types of operators that would be subject to the new proposed LASP.

TABLE 1—STANDARD SECURITY PROGRAMS APPLICABLE TO AIRCRAFT OPERATORS

An aircraft operator that operates this type of service, other than all-cargo	In this size aircraft	And	Must have this program #	Currently using this standard security program	Would be using this standard security program under the NPRM
Scheduled passenger or public charter passenger*.	61 or more passenger seats.	.....	Full Program § 1544.101(a)(1).	AOSSP	No change.
Scheduled passenger or public charter passenger*.	60 or fewer passenger seats.	It enplanes from, or deplanes into, an existing sterile area.	Full Program § 1544.101(a)(2).	AOSSP	No change.
Scheduled passenger or public charter passenger*.	31 or more but 60 or fewer passenger seats.	It does not enplane from, or deplane into, an existing sterile area.	Partial Program § 1544.101(b)(1).	Partial Program Standard Security Program (PPSSP).	Proposed LASSP**** with component for aircraft greater than 45,500 kg (if applicable).
Scheduled, public charter, or private charter; passenger*.	More than 12,500 pounds MTOW.	It does not enplane from, or deplane into, an existing sterile area, and it is not under a Full Program or a Partial Program.	Twelve-Five Program § 1544.101(d).	Twelve-Five Standard Security Program (TFSSP).	Proposed LASSP.
Private charter*	Any size	It enplanes from, or deplanes into, an existing sterile area.	Private Charter Program § 1544.101(f)(1)(i).	Private Charter Standard Security Program (PCSSP).	Proposed LASSP with component for aircraft greater than 45,500 kg (if applicable) and alternative procedures for enplaning from or deplaning into an existing sterile area.
Private charter*	More than 45,500 kg, OR 61 or more passenger seats.	It does not enplane from, or deplane into, an existing sterile area, and it is not a government charter.	Private Charter Program § 1544.101(f)(1)(ii).	PCSSP	Proposed LASSP with component for aircraft greater than 45,500 kg.
Under an FAA certificate issued under 14 CFR part 125**.	More than 45,500 kg MTOW.	It is carrying passengers or property for compensation or hire and is not under another TSA security program.	§ 1550.7; (69 FR 61516, 10/19/2004).	PCSSP	Proposed LASSP with component for aircraft greater than 45,500 kg or 61 or more seats.

TABLE 1—STANDARD SECURITY PROGRAMS APPLICABLE TO AIRCRAFT OPERATORS—Continued

An aircraft operator that operates this type of service, other than all-cargo	In this size aircraft	And	Must have this program #	Currently using this standard security program	Would be using this standard security program under the NPRM
Under an FAA certificate issued under 14 CFR part 125 **.	61 or more passenger seats.	It is carrying passengers or property for compensation or hire and is not under another TSA security program.	§ 1550.7; (69 FR 61516, 10/19/2004).	PCSSP	Proposed LASSP with component for aircraft greater than 45,500 kg or 61 or more seats.
Under an FAA certificate issued under 14 CFR part 125 **.	More than 45,500 kg MTOW.	It is not carrying passengers or property for compensation or hire and not under another TSA security program.	§ 1550.7; (69 FR 61516, 10/19/2004).	PCSSP	Proposed LASSP.
Under an FAA certificate issued under 14 CFR part 125 **.	61 or more passenger seats.	It is not carrying passengers or property for compensation or hire and not under another TSA security program.	§ 1550.7; (69 FR 61516, 10/19/2004).	PCSSP	Proposed LASSP.
Under an FAA certificate issued under 14 CFR part 125 **.	More than 12,500 pounds MTOW.	It is not under another TSA security program.	§ 1550.7	TFSSP	Proposed LASSP.
Operating under 14 CFR part 91 only **.	More than 12,500 pounds.	It enplanes from, or deplanes into, an existing sterile area.	General Aviation Operations using a sterile area § 1550.5.	No standard program.	Proposed LASSP with alternative procedures for enplaning from or deplaning into an existing sterile area.
Operating under 14 CFR part 91 only **.	12,500 pounds or less.	It enplanes from, or deplanes into, an existing sterile area.	General Aviation Operations using a sterile area § 1550.5.	No standard program.	No change.
Operating under 14 CFR part 91 only **.	More than 12,500 pounds.	It is not under another TSA security program, and does not enplane from or deplane to an existing sterile area.	Not required to have a security program.	Not required to have a security program.	Proposed LASSP.
Operating under 14 CFR part 91 only **.	12,500 pounds or less.	It is not under another TSA security program, and does not enplane from or deplane to an existing sterile area.	Not required to have a security program.	Not required to have a security program.	No change.
Passenger operations into and out of Ronald Reagan Washington National Airport (DCA) ***.	Any size	It is not under a Full Program	DCA Access Program part 1562.	DCA Access Standard Security Program (DASSP).	No change.
Other operations **	Any size	Is not under any other required program but aircraft operator requests a security program.	Limited program § 1544.101(g).	No standard program.	No change.

* These aircraft operators are considered air carriers or commercial operators.
** These aircraft operators are considered general aviation.
*** May be air carriers, commercial operators, or general aviation operators.
**** After issuing the LASP final rule, TSA would develop and issue a standard security program to implement the LASP called the Large Aircraft Standard Security Program (LASSP).
# Cites in this column are to 49 CFR.

An all-cargo aircraft operator that operates this type of service: ##	In this size aircraft	And	Must have this program #	Currently using this standard security program	Would be using this standard security program under the NPRM
All-cargo	Greater than 45,500 kg, OR 61 or more passenger seats.	Operating under a FAA certificate issued under 14 CFR part 119 or 125.	Full All-Cargo Program. § 1544.101(h)	Full All-Cargo Aircraft Operator Standard Security Program (FACAOSSP).	No change.
All-cargo	Over 12,500 lbs but not over 45,500 kg.		Twelve-Five Program in all-cargo operations. § 1544.101(d)	TFSSP in all-cargo operations.	LASSP with all-cargo component.

An all-cargo aircraft operator that operates this type of service: ##	In this size aircraft	And	Must have this program #	Currently using this standard security program	Would be using this standard security program under the NPRM
All-cargo under an FAA certificate issued under 14 CFR part 125.	More than 45,500 kg	.....	FACAOSSP	FACAOSSP + ...	No change.

Cites in this column are to 49 CFR.
All-cargo operations carry cargo and authorized persons, but no passengers.

In developing the proposed rule, TSA analyzed the existing security programs to determine which security measures have been effective and would be appropriate for inclusion in the proposed LASP. The LASP would combine the essential elements of some of the current security programs into one consolidated and comprehensive program.

In this rulemaking, TSA is also proposing to reorganize certain existing regulations in 49 CFR part 1544. Specifically, TSA has clarified the meaning of the rule, simplified the text, and harmonized regulations between the different industry populations. This reorganization may affect the currently regulated population in addition to the proposed newly regulated population. TSA is also proposing to reorganize certain sections in 49 CFR part 1544 to account for the proposed addition of the LASP. The reorganization would not make any substantive changes to the regulations.

C. Implementation and Compliance Schedule

Based on industry data, TSA anticipates that this proposed rule would require approximately 10,000 aircraft operators and 315 airport operators, most of whom are not currently required to do so, to implement security programs. Due to the large number of aircraft operators and airport operators that would be required to implement security programs, TSA proposes using a phased approach in the implementation of the proposed rule. The proposed compliance schedule would allow for proper and adequate support and staffing within TSA and also would allow sufficient time for compliance on the part of the newly regulated aircraft operators and airport operators. Following issuance of a final rule, TSA would implement a communication plan commencing with a wide distribution of press releases, web-site postings, and industry association briefings and meetings. These briefings and meetings would communicate, educate, and confirm which operators would be affected by the final rule, what actions the aircraft operators and airport operators would be required to take to comply with the rule, and the time period within which the aircraft operator and airport operators would be required to submit their applications and other supporting documents. At that time, TSA would provide the process, procedures, and necessary forms to the aircraft operators and airport operators to enable the operators to apply for the large aircraft program, or the airport partial program, via a secure web-board.

TSA's implementation schedule would divide the country into five areas, taking into account which areas of the country contain the largest affected populations of aircraft operators and airport operators. TSA anticipates six phases of compliance, targeting approximately 20 percent of the large aircraft operator and airport operators population that currently do not hold security programs in each of the first five phases. The sixth and final phase would include aircraft operators that currently hold a security program.[17] The following timeline for compliance would start upon the effective date of the final rule, which would be 60 days after publication of the final rule in the **Federal Register**:

Phase 1, Mid-Atlantic region—months 1–4 after the effective date of the final rule.

Phase 2, North-East region—months 5–8 after the effective date of the final rule.

Phase 3, Southern region—months 9–12 after the effective date of the final rule.

Phase 4, Mid-West region—months 13–16 after the effective date of the final rule.

Phase 5, Western region—months 17–20 after the effective date of the final rule.

Phase 6, Existing security program holders—months 21–24 after the effective date of the final rule.

The phase in which a large aircraft operator would fall would be determined by where the aircraft is based. For large aircraft operators that have multiple bases for their aircraft, the phase would be determined by the location of the large aircraft operator's headquarters. We seek comment on this phased approach and on determining which phase would be applicable to each large aircraft operator based on the location of the aircraft or headquarters.

[17] There are no airport operators that currently hold a partial program.

II. Major Elements in This NPRM

A. Major Requirements in the Proposed Large Aircraft Security Program

To provide greater consistency across all large aircraft operations, the proposed regulation would create the Large Aircraft Standard Security Program (LASSP) to replace the current security programs for partial program operators, twelve-five program operators, and private charter program operators. The major requirements in this proposed rule are based on the requirements in the Twelve-Five and the Private Charter Security Programs.

The proposed LASP provides a core security program for all large aircraft, irrespective of the FAA regulations under which they operate, whether they are air carriers, commercial operators, or GA. Beyond the core requirements for large aircraft with a MTOW of over 12,500 pounds, the proposed LASP would include a component for large aircraft with a MTOW of over 45,500 kilograms operated for compensation or hire. The following is a summary of the major security measures in the proposed LASP.

1. Proposed Core Requirements of the Large Aircraft Security Program in § 1544.103(e)

In TSA's experience, the current Twelve-Five Security Program has proven to be effective in safeguarding the operations of scheduled and charter operations in aircraft with MTOW of over 12,500 pounds without unduly burdening the aircraft operators. Accordingly, TSA would base the core requirements of the LASP on the Twelve-Five Security Program. The LASP, however, would include additional requirements that would

strengthen the existing security measures. Below is a discussion of the major requirements of the LASP.

Security Threat Assessment With Criminal History Records Check for Flight Crew Members

Under the current security programs that apply to large aircraft operators, TSA requires aircraft operators to ensure that their flight crew members have undergone a fingerprint-based criminal history records check (CHRC). TSA views this as an important security measure that should apply to flight crew members of all large aircraft. Pilots are in control of the aircraft and other flight crew members are in the cockpit and could obtain control of the aircraft. Consequently, TSA proposes to require that large aircraft operators ensure that all of their flight crew members undergo a security threat assessment (STA) that includes a CHRC and other analyses, including checks of appropriate terrorist watch-lists and other databases. The list of disqualifying crimes of the CHRC would be the same as for the full and full all-cargo operations. 49 CFR 1544.229 and 1544.230.

After TSA adopted the Twelve-Five Security Program requirements, it became clear that most operators of that size were not well-prepared to conduct adjudication of the CHRCs. Accordingly, while the twelve-five operators have been ensuring that their flight crew members submit their fingerprints, TSA has been adjudicating the criminal histories; that is, TSA reviews the history to determine whether the flight crew member has a disqualifying criminal offense. TSA is proposing to codify that practice and to charge a fee for the services. See the section-by-section analysis for proposed part 1544, subpart G.

TSA recognizes that a flight crew member may be contracted to work for more than one large aircraft operator. We seek comment on whether the STA should be transferable so that the flight crew member would need to undergo only one STA every five years, regardless of the number of employers the flight crew members may have within the five-year period. Potential employers would check the status of the flight crew member's STA through a mechanism required by TSA.

TSA also is considering ways to positively identify pilots conducting both domestic and international flight operations and effectively link them to the aircraft they are operating. We seek comment and recommended methods for positively identifying pilots and effectively linking them to the aircraft they are operating.

Watch-List Matching of Passengers

The Federal Government maintains a terrorist watch-list. The watch-list, which includes the No Fly List and the Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center (TSC), is the basis for the pre-flight passenger watch-list matching currently conducted by certain aircraft operators. Watch-list matching of passengers on large aircraft is an important security measure, because it can prevent individuals who are believed to pose a risk from boarding a large aircraft and, potentially, gaining control of the aircraft, to use it as a weapon. TSA studies have shown that significant loss of lives and other damage could result from such an incident. Matching passenger information against the No Fly List component of the terrorist watch-list would identify individuals who, if permitted to board aircraft, may pose a threat to the aircraft and/or persons on board. Matching passenger information against the Selectee List component of the terrorist watch-list also would identify individuals who may be potential threats and would allow TSA and/or the aircraft operators to take appropriate action, if necessary.

Under the current watch-list matching process, TSA provides the No Fly and Selectee List to twelve-five, partial program, and private charter aircraft operators to enable them to conduct the watch-list matching. When an aircraft operator receives passenger information that is similar to, or the same as, a name on the No Fly or Selectee List, the aircraft operator is required to notify law enforcement personnel and TSA in order to determine whether that passenger is in fact the individual listed on the No Fly or Selectee List. The aircraft operator may not board a passenger until TSA has instructed the aircraft operator that the passenger is clear to board the aircraft.

a. *Removing watch-list from aircraft operators.* Per Homeland Security Presidential Directive-16/National Security Presidential Directive-47, section 4012(a) of the Intelligence Reform and Terrorism Prevention Act,[18] and in support of 9/11 commission recommendations, the U.S. government is in the process of assuming control over watch-list matching in the aviation environment. TSA is concerned that providing the watch-list to approximately 10,000 large aircraft operators as part of the LASP program would increase the risk that the watch-list would be disseminated to unauthorized persons and that the watch-list would be misused and/or compromised. Since it is not possible to bring the watch-list matching function into the federal government in one step, TSA is considering ways to provide this list to a more limited set of holders while TSA considers the most effective method to assume the watch-list matching responsibility from all aircraft operators required to conduct watch-list matching through the Secure Flight program.

TSA recognizes that the Secure Flight program has not yet achieved the operational capability to conduct watch-list matching for general aviation, nor is such capability anticipated by the time TSA would require large general aviation and charter aircraft operators to implement the LASP. Therefore, TSA is proposing a solution for watch-list matching in this NPRM for the time period in which the Secure Flight program does not have the capability to conduct watch-list matching for large aircraft passengers. If TSA is able to develop the capability for the Secure Flight program to conduct watch-list matching for large aircraft passengers, TSA may amend the scope of the Secure Flight program to include large aircraft operators in the final rule for this NPRM.[19]

b. *Watch-list Service Providers.* Under the proposed rule, TSA would not provide the No Fly List to large aircraft operators, which means that TSA would no longer provide the watch-list to the approximately 800 aircraft operators now receiving it under the twelve-five program, partial program and private charter operators and would not begin providing it to the additional approximately 9,300 general aviation operators that would be under the LASP. Instead, TSA would provide the watch-list to watch-list service providers approved by TSA. Large aircraft operators would transmit their passenger information to these watch-list service providers, who would conduct the automated watch-list matching function and transmit the results back to the large aircraft operators.

TSA is proposing this approach for two reasons. First, this would greatly reduce the number of entities receiving the watch-list, thus reducing the risk that it would be disseminated to unauthorized persons or misused. Second, having a small number of watch-list service providers conduct watch-list matching in accordance with

[18] Public Law 108-458, 118 Stat. 3638, Dec. 17, 2004; 49 U.S.C. 44903 (j)(2).

[19] For example, proposed § 1560.1(a) may be amended to include large aircraft operators. See Secure Flight NPRM, 72 FR at 48387.

TSA standards would result in greater consistency in the application of the watch-list matching function. These watch-list service providers will have been determined to have appropriate security, including Information Technology (IT) security and performance capabilities, to perform this important function in the interim. TSA invites comments on the role that watch-list service providers may continue to have if the responsibility for watch-list matching shifts to the U.S. Government in the future. For example, would watch-list service providers offer their services to consolidate passenger information from large aircraft operators and to transmit the passenger information to Secure Flight?

While the watch-list service providers would perform the watch-list matching function, large aircraft operators would have several responsibilities under the proposed rule. Large aircraft operators would be responsible for all costs associated with watch-list matching, including any fee charged by the watch-list service providers.

c. *Compliance with CBP programs.* Large aircraft operators would not be required to transmit passenger information to their watch-list service providers for any flight for which the large aircraft operator has submitted advance passenger information to U.S. Customs and Border Protection (CBP) under 19 CFR part 122. For passengers on flights in commercial aircraft, as defined in 19 CFR 122.1, the large aircraft operator are required to submit advance passenger information under 19 CFR 122.49a and 122.75a and comply with the CBP boarding instruction regarding each passenger.

TSA notes that CBP published a notice of proposed rulemaking, ''Advance Information on Private Aircraft Arriving in and Departing from the United States,'' proposing to implement certain passenger manifest and advance passenger screening requirements for private aircraft departing foreign ports for U.S. destinations or departing the United States for foreign ports. Under the CBP proposed rule, a private aircraft, in contrast to a commercial aircraft,[20] is generally any aircraft engaged in a personal or business flight to or from the United States that is not carrying passengers and/or cargo for commercial purposes.[21] See 19 CFR 122.1(h). CBP's Advance Passenger Information System (APIS) requirements and proposed eAPIS requirements apply to both U.S.-operated and foreign-operated aircraft.

To avoid process redundancies, DHS would require operators and pilots of private large aircraft that would be subject to this TSA proposed rule and CBP's eAPIS private aircraft regulations to submit their passenger manifest to CBP only and not to watch-list service providers. TSA would deem U.S. operators of private large aircraft to be in compliance with the proposed rule's requirements to submit passenger information for watch-list matching for international flights if the pilot submits passenger information required under the proposed eAPIS regulations. See proposed 19 CFR 122.22.

The TSA and CBP screening processes work in tandem for flights departing foreign ports destined for the United States and flights departing the United States for foreign destinations. If CBP grants the pilot landing rights under 19 CFR 122.49a, 122.75a, or 122.22, TSA would allow the large aircraft operator to permit all passengers, for whom the aircraft operator submitted advance passenger information to CBP, to board the aircraft. If CBP identifies a passenger as a selectee under 19 CFR 122.49a, 122.75a, or 122.22, TSA would allow the large aircraft operator to permit the passenger to board the aircraft, and TSA would require the large aircraft operator to comply with the procedures in its security program pertaining to passengers that are identified as selectees, as discussed in further detail below. If CBP identifies a passenger as ''not cleared'' under 19 CFR 122.49a, 122.75a, or 122.22, TSA would not allow the large aircraft operator to permit the passenger to board the aircraft. CBP would instruct the large aircraft operator to contact TSA regarding the passenger who has been identified as ''not cleared'' for further resolution.

d. *Passenger information.* This proposed rule would require large aircraft operators to request full name, gender, date of birth, and redress number[22] (if available) from all passengers. TSA has determined that an individual's full name, gender, and date of birth are critically important for effective automated watch-list matching of that individual against those individuals on the watch-list.[23] The full name is the primary attribute used to conduct watch-list matching and would be required for all passengers. Partial names would increase the likelihood of false positive matches, because partial names are more likely to match a number of different entries on the watch-list. As a result, this proposed rule would require individuals to provide their full names and would prohibit aircraft operators from boarding a passenger who does not provide a full name. Date of birth and gender would be optional for the passenger. This proposed requirement on passengers to provide the full name is consistent with TSA's proposal in the Secure Flight NPRM. In the Secure Flight NPRM, TSA proposes to require passengers on commercial flights operated by full program operators and foreign air carriers to provide their full name when they make a reservation for a flight. See proposed § 1540.107(b) in the Secure Flight NPRM, 72 FR at 48386.

Many names do not indicate gender, because they can be used by either gender. Additionally, names not derived from the Latin alphabet, when transliterated into English, often do not denote gender. Providing information on gender will reduce the number of false positive watch-list matches, because the information will distinguish persons who have the same or similar names but who are of a different gender. The date of birth is also helpful in distinguishing a passenger from an individual on a watch-list with the same or similar name, thereby reducing the number of false positive watch-list matches.

This proposed rule would also require aircraft operators to request an individual's redress number, if available. DHS will assign this unique number to individuals who use the DHS Traveler Redress Inquiry Program (DHS TRIP), because they believe they have been incorrectly delayed or denied boarding. Individuals may be less likely to be delayed by false positive matches to the watch-list if they provide their redress number, if available.

Under the proposed rule, individuals would not be compelled to provide their gender, date of birth, or redress number when requested by the aircraft operators. However, without this information, the watch-list service provider may be unable to perform effective automated watch-list matching and, as a result, the individuals may be more likely to be denied boarding, or under certain circumstances, be subject

[20] 19 CFR 122.1(d) defines ''commercial aircraft'' as any aircraft transporting passengers and/or cargo for some payment or other consideration, including money or services rendered.

[21] 19 CFR 122.1(h) also defines a private aircraft as any aircraft leaving the United States carrying neither passengers nor cargo in order to lade passengers and/or cargo in a foreign area for commercial purposes; or returning to the United States carrying neither passengers nor cargo in ballast after leaving with passengers and/or cargo for commercial purposes.

[22] The redress number is the number assigned by DHS to an individual processed through the redress procedures described in 49 CFR part 1560, subpart C, as proposed in the Secure Flight NPRM.

[23] *See* Secure Flight NPRM, 72 FR at 48364.

to additional screening. TSA is considering whether to require all individuals to provide their gender and date of birth to assist in the watch-list matching and resolution process.

The proposed rule would require large aircraft operators to transmit to the watch-list service provider the passengers' full names and also transmit the passengers' genders, dates of birth, and redress numbers, to the extent they are available. In addition, the proposed rule would require large aircraft operators to transmit certain information from an individual's passport (full name, passport number, country of issuance, expiration date, gender, and date of birth), if it is available and was provided to the aircraft operator. Based on TSA's experience in conducting security threat assessments that include watch-list matching, TSA has determined that passport information would help resolve possible false positive matches and make the watch-list matching process more accurate.

TSA is not proposing a minimum time in advance of the flight that large aircraft operators would be required to submit passenger information to the watch-list service provider. TSA anticipates that the large aircraft operators would work with their service providers to establish a minimum time that the service provider would need to complete watch-list matching in advance of a flight. Nevertheless, TSA seeks comment on whether it should establish a minimum time for submission of passenger information to the service providers, what that minimum time should be, and the reasons supporting the suggested minimum time.

Upon submission of the passenger information by the aircraft operator to the watch-list service provider, the service provider would conduct the automated vetting of the passenger information provided against the watch-list which is comprised of the No Fly and Selectee List components of the Terrorist Screening Database. The watch-list service provider would inform the aircraft operator of the results of the watch-list matching by transmitting instructions to the large aircraft operator for each passenger. The large aircraft operator would not be able to permit a passenger aboard an aircraft until the large aircraft operator receives the instructions from the watch-list service provider that would allow the aircraft operator to board the passenger. The large aircraft operator would be required to comply with the instructions.

Upon submission of the passenger information by the aircraft operator to the watch-list service provider, the service provider would conduct the automated comparison using the passenger information provided. If an automated comparison indicates that the passenger is not a match to the watch-list, the service provider would instruct the aircraft operator that the passenger is cleared to board the aircraft. If the automated comparison using the passenger information identifies a potential match to the watch-list, the watch-list service provider would contact TSA for resolution of the potential match. TSA would coordinate with the TSC for resolution if necessary and would provide further instructions concerning the passenger to the service provider.

If TSA cannot determine from the information provided by the watch-list service provider whether the individual is a match to the watch-list, it may be necessary for the passenger to provide additional information to resolve the possible match. In these instances, TSA would inform the watch-list service provider to instruct the large aircraft operator to contact TSA directly to resolve the possible match between the passenger and the watch-list record, and TSA would provide final instructions concerning the possible match and the passenger's status to the large aircraft operator.

e. *Aircraft operator procedures.* TSA believes that it is important for large aircraft operators and their pilots, as the in-flight security coordinators, to know whether a passenger is identified as a selectee so they can make appropriate security decisions. If the passenger is identified as a selectee, TSA would allow the large aircraft operator to permit the passenger to board the aircraft. However, TSA would require the aircraft operator to comply with the procedures described in its security program pertaining to passengers identified as selectees. Although TSA would not require large aircraft operators to conduct screening of selectees and their accessible property on a normal basis, if warranted by security considerations, TSA may require some or all large aircraft operators to screen selectees and their accessible property. In this circumstance, TSA would coordinate with the large aircraft operators on the appropriate screening protocols.

If the watch-list service provider instructs the large aircraft operator that a passenger must be denied boarding, the large aircraft operator would not be able to permit the passenger to board unless explicitly authorized by TSA.

Additionally, if the aircraft operator becomes aware that any data element in the passenger information has changed, the large aircraft operator would be required to transmit to the watch-list service provider updated passenger information, which includes the full name, and if available, gender, date of birth, redress number, and passport information. If the large aircraft operator sends updated passenger information to the watch-list service provider for a passenger for whom the service provider has already transmitted instruction, the large aircraft operator would not be able to permit the passenger on board until the large aircraft operator receives updated instructions from the watch-list service provider. Any previous instruction regarding the passenger would be void; the large aircraft operator would be required to comply with any updated instruction from the service provider.

f. *Master passenger list.* TSA recognizes that many large aircraft operators carry the same passengers on most or all of their flights and that it would be burdensome for the large aircraft operators to send the required information for the same individuals on each flight. Consequently, the proposed rule includes a provision for a master passenger list. Under this optional proposed provision, individuals on a master passenger list would be subject to continuous vetting of their names against the watch-list.[24] TSA would not require large aircraft operators to transmit information on these passengers every time they are on a flight operated by the large aircraft operator. This master list would be applied for domestic flights only; CBP would require aircraft operators and their pilots to transmit advance passenger information to CBP for international flights departing from or arriving in the United States under CBP's eAPIS NPRM, and passengers would need to present their passports pursuant to CBP regulations.

Prior to collecting passenger information from an individual to place that individual on a master passenger list, the large aircraft operator would be required to inform the individual that he or she would have the option of being placed on the master passenger list, to provide the individual with notice of the purpose and procedures related to a master passenger list, and to obtain from the individual a signed, written statement affirmatively

[24] The proposed rule would define ''continuous vetting'' as the process in which the passenger's information is continuously matched against the most current watch-list.

requesting that he or she be placed on a master passenger list. These requirements would ensure that individuals would be informed that their inclusion in a master passenger list would be voluntary and contingent upon their providing written consent and that a watch-list service provider would continuously maintain their passenger information and compare the information against the watch-list.

In order to place an individual on the master passenger list, the large aircraft operator would be required to comply with the following: (1) Request and obtain the full name, gender, date of birth, redress number, and passport information of the individual; (2) transmit the passenger information and any updated passenger information to a watch-list service provider and designate the individual for continuous vetting; (3) ensure that the watch-list service provider is responsible for continuous vetting for that individual at the time the individual boards an aircraft; (4) receive an instruction that the individual is cleared in response to the initial transmission of passenger information or transmission of updated passenger information; and (5) receive any instruction to prohibit the individual from boarding an aircraft.

g. *Aircraft operators under a full program.* Under 49 CFR 1544.101(a), TSA requires full program aircraft operators to conduct watch-list matching of their passengers under their security program. Some of the full program aircraft operators also operate flights under the other security programs in 49 CFR 1544.101. Many of these aircraft operators use the same system or process to conduct watch-list matching for their flights operated under their full security program, as well as flights operated under their other security programs. Under the proposed rule, TSA would require full program aircraft operators to transmit the passenger information for passengers on their flights operated under the LASP to watch-list service providers approved by TSA to conduct the watch-list matching on their behalf. TSA requests comment on whether full program aircraft operators should be permitted to conduct watch-list matching for passengers on flights operated under their LASP using the system or process that they use for flights operated under their full security program, including TSA's Secure Flight Program when it is available.

h. *Privacy notice and data retention.* TSA would only receive passenger information if the watch-list service provider's automated vetting system identifies an individual as a potential match to the watch-list; this is much like the current practice where aircraft operators conduct watch-list matching pursuant to their security programs. TSA is considering requiring aircraft operators to provide a privacy notice to passengers in the LASP. Most LASP aircraft operators do not have a reservation system and are on-demand operations, such as charter, corporate, fractional, and recreational (friends and family) operations. LASP aircraft operators may find it challenging and burdensome to provide a privacy notice to their passengers when collecting the information. TSA is seeking comments on how a privacy notice could be provided during the collection of information while considering the feasibility, costs, and effectiveness of providing such notice. Should TSA require large aircraft operators to provide a privacy notice on web sites through which passenger service is offered, either on their own web site or through an internet travel web site that offers seats on charter flights, or via other means that would provide notice to passengers on aircraft operated by LASP operators?

TSA is considering data and record retention requirements for records for watch-list service providers and large aircraft operators. TSA seeks comment on whether the proposed record retention for the Secure Flight Program should be applied to large aircraft operators and watch-list service providers to ensure that personally identifiable information is not retained for longer than necessary. As explained in the Secure Flight NPRM, TSA would retain passenger information for seven days for passengers that are cleared, seven years for passengers that have been identified as potential matches to the watch-list, and 99 years for passengers who are confirmed matches to the watch-list under the Secure Flight Program.[25] If TSA were to require a similar record retention schedule for records collected, transmitted, and received under proposed § 1544.245 and part 1544, subpart F, large aircraft operators' watch-list service providers would retain and destroy passenger information and watch-list matching results in accordance to this schedule. TSA is also considering requiring large aircraft operators and watch-list service providers to retain passenger information for passengers who are cleared, for three years, to facilitate the audit that large aircraft operators would undergo every two years under proposed § 1544.243 and compliance oversight.

i. Secure Flight. As noted above, the long-term plan is for TSA to assume the watch-list matching responsibility from all aircraft operators required to conduct watch-list matching and to conduct the watch-list matching through the Secure Flight Program. Under the current stage of Secure Flight development, Secure Flight will not have the capability to conduct watch-list matching for large aircraft operators for several years.

Under the Secure Flight NPRM, TSA would assume the watch-list matching only for full program operators and certain foreign air carriers. If the Secure Flight Program is capable of assuming the watch-list matching responsibility from large aircraft operators when TSA would require implementation of the LASP, TSA may amend the scope of the Secure Flight regulations to include large aircraft operators in the final rule for this NPRM.

Under the Secure Flight Program, TSA may require large aircraft operators to collect and transmit the same data elements, called Secure Flight Passenger Data (SFPD), to TSA for all passengers that full program operators must collect and transmit for their passengers. Although, in the Secure Flight NPRM, TSA did not propose to cover the large aircraft population in the Secure Flight Program, TSA is proposing, in this LASP NPRM, to align the LASP passenger information requirements with those of the Secure Flight Program. Consequently, the passenger information requirement in proposed § 1544.245 of this LASP NPRM is similar to proposed § 1560.101 in the Secure Flight NPRM.[26] TSA's intent is to align the data requirements of LASP and the Secure Flight Program, so that they match when the final rules are implemented.

The methods for transmitting SFPD to TSA would be described in the standard security program for large aircraft operators. Possible methods of transmission may include a direct connection to TSA, similar to the connection that some full program operators will establish, and an internet-based application. Similar to the requirements proposed for the watch-list service provider, large aircraft operators would not be able to board passengers until they received boarding instructions from TSA. TSA would also require large aircraft operators to comply with the boarding instructions. TSA would transmit the boarding instructions after conducting the watch-list matching of the passengers.

[25] See Secure Flight NPRM, 72 FR at 48363.

[26] 72 FR at 48388.

TSA has determined that watch-list matching of passengers on large aircraft is an important security measure, because it can prevent individuals who are believed to pose a risk from boarding a large aircraft and, potentially, gaining control of the aircraft, to use it as a weapon or to cause harm to aviation or national security. Such considerations extend beyond the simple use of aircraft as missiles, but also include aircraft as delivery vectors for other catastrophic payloads (e.g., chemical, biological, radiological or nuclear materials). Given the security concerns, TSA believes a reliable mechanism for watch-list matching for large aircraft must be operational without undue delay. The watch-list matching service providers would provide the needed security and do so in a timely fashion. While the Secure Flight Program would also provide a reliable mechanism, its ability to absorb the watch-list matching function for the large aircraft population is likely to be several years away, and it is likely that it would not be available to address this important security need when TSA would be ready to implement the LASP. Thus, TSA believes that the using the watch-list service providers will be the more viable security solution for watch-list matching when TSA is ready to implement the LASP.

While TSA anticipates that Secure Flight would be the long-term mechanism for conducting watch-list matching of passengers, TSA seeks comments on whether the watch-list matching service providers should serve as part of the long-term solution to large aircraft watch-list matching, such as by gathering the passenger information from the aircraft operators and submitting it to TSA for watch-list matching, then receiving the results from TSA. One possible advantage of the watch-list service providers may be that the master passenger list system developed by these providers would remain undisturbed, a convenience for passengers on those lists and the large aircraft operators. Additionally, TSA seeks comment on whether maintaining the watch-list matching service providers may reduce the costs associated with a transition to the Secure Flight Program. There may also be benefit to TSA in limiting the number of different entities to which the Secure Flight program would maintain direct links, requiring only links with the watch-list service providers, not all large aircraft operators.

Audit Requirement

Due to the large size and widely-dispersed geographical locations of the aircraft operator population that would be subject to this proposed rule, TSA would need an effective mechanism to verify large aircraft operators' compliance with the large aircraft program. While TSA intends to develop a compliance program for, and conduct inspections of, large aircraft operators, it is not possible for TSA to visit approximately 10,000 large aircraft operators on a regular basis.

TSA proposes the use of TSA-approved third-party auditors. These TSA-approved third-party auditors would support existing TSA resources and would enhance compliance with TSA regulations and the aircraft operator's security program. Auditors would conduct audits of large aircraft operators for their compliance with their security program and TSA regulations. The auditors would submit their findings in the manner and form prescribed by TSA. Auditors' reports would assist TSA inspectors in the conduct of compliance inspections as necessary. TSA would use the third-party auditors' reports as one tool in establishing inspection priorities. The audits would also assist large aircraft operators in assessing the security measures in place for their own aircraft.

TSA proposes to require large aircraft operators to contract with TSA-approved auditors to conduct a biennial audit of their compliance with TSA regulations and their security programs. Large aircraft operators would initially undergo an audit within 60 days of TSA's approval of the large aircraft operators' security program and then every two years thereafter. Large aircraft operators would also be required to provide auditors access to their records, equipment, and facilities necessary for the auditor to conduct an audit. The aircraft operators would receive a copy of the audit report and would be provided an opportunity to submit comments on the audit report to TSA.

In this NPRM, TSA is proposing that large aircraft operators may select any TSA-approved auditor to perform the audit function. However, TSA is considering instituting a system that would assign auditors to large aircraft operators on a random basis in order to assure overall consistency of the auditing program, thereby enhancing security. TSA seeks comment on whether to include a system of assigning auditors in the final rule and on methods of doing so.

As stated above, many full program aircraft operators also operate flights under the private charter program. TSA routinely conducts inspections of full program aircraft operators, and these inspections include any private charter operations the aircraft operators may have. Given these TSA inspections, TSA requests comment on whether it is necessary to require full program aircraft operators that also operate flights under a LASP to contract with a third party auditor to conduct a biennial audit of their operations for compliance with their security program and TSA regulations.

Unauthorized Persons and Accessible Weapons on Board Large Aircraft

TSA would require large aircraft operators to apply security measures in their security program to prevent or deter the carriage of unauthorized persons and unauthorized weapons, explosives, incendiaries, and other destructive substances or items on board a large aircraft. This proposed security measure is designed to prevent unauthorized persons, such as a stowaway, or accessible weapons, from being placed in a large aircraft. Under the proposed security measure, the large aircraft operator would check for weapons and check any container, cargo, or company material that may be used to hide a stowaway, or explosives, incendiaries, or other destructive substances or items. The security program would describe the method for conducting the checks, such as visual inspection of the exterior of the persons or containers of certain sizes and weights, with further evaluation if necessary. This proposed rule would only apply to property that may be accessible to the cabin of the aircraft. For example, if the property is stowed in a cargo hold that would not allow access to the cabin of the aircraft, then that property would be exempt from inspection.

For purposes of screening passengers on air carrier flights under a full program, TSA considers weapons to include items on its prohibited items list, which is posted on TSA's Web site at *http://www.tsa.gov.* This list includes, among other things, guns, firearms, and certain sharp objects or tools such as knives, including steak knives and pocket knives. TSA is proposing to require large aircraft operators to adopt and carry out procedures to prevent passengers from carrying prohibited items onto the aircraft. We understand, however, that large aircraft operators currently not subject to a TSA security program [27] may have special circumstances that should be considered. TSA seeks comment on the following issues: First, for large aircraft

[27] Private charters and twelve-five operators currently must ensure there are no prohibited items accessible in the cabin.

operators that are not carrying persons or property for compensation or hire, should ''weapons'' be limited to guns and firearms? Further, should there be a different requirement depending on whether the aircraft has a MTOW of 45,500 kg or less or more than 45,500 kg?

TSA understands that a significant portion of the large aircraft population may not have inaccessible cargo hold compartments, but may have a need to transport weapons, such as when transporting hunters. Therefore, TSA proposes that weapons may be stored in a cargo hold, if the aircraft has such a cargo hold, or may be stored in a locked box in the cabin under the direct control of the in-flight security coordinator. In these instances, the weapons would be considered inaccessible to the persons on board.

Additional Requirements

The LASP would also include the following requirements: designation of Aircraft Operator Security Coordinators, Ground Security Coordinators, and In-Flight Security Coordinators; regulations concerning law enforcement personnel; the carriage of TSA Federal Air Marshals (FAMs) onboard an aircraft; the aviation security contingency plan; and procedures for handling bomb and air piracy threats. These proposed requirements are discussed in further detail in the Section-by-Section Analysis portion of the preamble.

The economic analysis for this NPRM suggests that the aircraft operator security coordinator requirement is the highest-cost measure in this proposed rule, and TSA invites comment on whether there is a more cost-effective means of meeting the same or substantially similar security goals as detailed herein. Although our preliminary view is that the benefits of the security coordinator requirements as proposed justify their costs, we are interested in comment on alternatives. Is there a current industry practice that could provide a suitable alternative? Should certain general aviation operators be exempted from the requirements or portions of the requirements? Are there operational limitations that prevent aircraft operators from designating security coordinators for multiple flight segments? TSA also invites comments on the use of a single individual for multiple security coordinator roles. Comments that specifically address the costs and benefits of alternatives to the security coordinator requirements would be welcome.

2. Aircraft of MTOW Over 45,500 kg or With a Passenger Seating Configuration of 61 Seats or More Operated for Compensation or Hire

TSA has determined that aircraft over 45,500 kilograms or with a passenger seating configuration of 61 seats or more operated for compensation or hire should be subject to increased security requirements. The current private charter program, which applies to aircraft of this size and weight, includes more security measures than the current twelve-five program. Part 125 (14 CFR) operators using this size aircraft also currently must comply with the private charter program. This approach is supported by the International Civil Aviation Organization (ICAO), which requires that aircraft of more than 60 passengers, or with a MTOW of over 45,500 kilograms, be regulated and protected from intrusion and ballistic threats.

Although the private charter program would be merged into the large aircraft program, TSA believes that maintaining a higher level of security for aircraft over 45,500 kilograms, or with a passenger seating configuration of 61 seats or more, operated for compensation or hire would be an important security measure. Thus, for these aircraft, the proposed rule would continue the requirements now in the Private Charter Program for the operators to inspect passengers and their property and to perform CHRCs on their employees who conduct screening.

3. All-Cargo Operations

TSA recently issued a final rule regarding air cargo security, including all-cargo operations in an aircraft with a MTOW over 12,500 pounds. See Final Rule for Air Cargo Security Requirements, 71 FR 30478 (May 26, 2006).[28] Because cargo security remains an important part of aviation security, TSA proposes to retain the requirements for all-cargo operations in the LASP. Consequently, large aircraft all-cargo operations would be required to comply with the cargo requirements in 49 CFR 1544.202 and 1544.205(a), (b), (d), and (f) in addition to the core requirements of the LASP.

The large aircraft all-cargo program would replace the existing Twelve-Five All-Cargo Program. Current aircraft operators that are subject to the Twelve-Five All-Cargo Program would be subject to the proposed requirements for large aircraft in all-cargo operations. Additionally, 14 CFR part 125 operators in all-cargo operations, which currently are required to comply with the Twelve-Five All-Cargo Program, would also be subject to § 1544.202.

All-cargo operations with an aircraft with an MTOW of over 45,500 kilograms currently must use the full all-cargo program and this would be reflected in the rule.

4. Sensitive Security Information

Protection of Sensitive Security Information (SSI), as codified at 49 CFR part 1520, would apply to each aircraft operator operating under the large aircraft program. Airport and aircraft operator security programs and related amendments, Security Directives and Information Circulars, technical specifications of security screening and detection systems and devices, among other types of information, constitute SSI under current 1520.5 and are prohibited from public disclosure. Watch-list service providers' instructions to the large aircraft operators would also be SSI. The SSI regulations would apply to LASPs as well.

Access to SSI is strictly limited to those covered persons with a need to know, as defined in 49 CFR 1520.7 and 1520.11. In general, a person has a need to know specific SSI when he or she requires access to the information to carry out transportation security activities that are government-approved, -accepted, -funded, -recommended, or -directed, including for purposes of training on, and supervision of, such activities or to provide legal or technical advice to airport operators, aircraft operators or their employees regarding security-related requirements. Accordingly, the protection of SSI would apply to each large aircraft operator operating under a security program pursuant to 1544.101(b).

5. Existing and Proposed Requirements for Large Aircraft

Table 2 below illustrates the requirements for large aircraft operators and whether these requirements would be new or modified for current holders of security programs. The table indicates how the proposed rule would affect the current large aircraft operators. The first column describes the proposed content requirements for the LASP. The remaining five columns list five types of aircraft operators that would be required to adopt and implement the large aircraft security program under the proposed rule. The table indicates whether each type of aircraft operator is currently required to comply with each content requirement of the proposed LASP or whether the proposed content requirement is a new requirement for

[28] The effective date of the final rule was Oct. 23, 2006.

the aircraft operator. Additionally, as part of this rule, TSA would modify some of the content requirements for the current Twelve-Five Security Program and the Private Charter Security Program. The table also indicates existing requirements that would be modified under the proposed rule.

Table 3 compares the proposed large aircraft program with the Full Program and the Full All-Cargo Program.

TABLE 2—REGULATORY REQUIREMENTS FOR LARGE AIRCRAFT

Description of proposed LASP requirement	Scheduled or charter operations required to have a twelve-five program	All-cargo operations required to have a twelve-five program	Private charters required to have a private charter program	Scheduled or charter operations in aircraft with 31–60 seats required to have a partial program	Large aircraft operators not currently required to have a security program
Acceptance & screening of individuals and accessible property (§ 1544.201).	Does not apply	Does not apply	Currently applies and would continue.	Does not apply	Does not apply.
Acceptance and screening of cargo (§ 1544.205).	Does not apply	Currently applies and would continue.	Does not apply	Does not apply	Does not apply.
Persons and property on board a large aircraft (§ 1544.206).	New requirement ..	Does not apply	New requirement ..	New requirement ..	New requirement.
Screening of individuals and property (§ 1544.207).	Does not apply	Does not apply	Currently applies and would continue.	Does not apply	Does not apply.
Required to have security coordinators (§ 1544.215).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Provision of law enforcement personnel at airports serving the aircraft operators (§ 1544.217).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Carriage of accessible weapons on board aircraft (§ 1544.219).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Requirement to transport FAMs (§ 1544.223).	Currently applies; would be modified.	Currently applies; would be modified.	New requirement ..	Currently applies; would be modified.	New requirement.
Provide for security of aircraft and facilities (§ 1544.225).	New requirement ..	New requirement ..	Currently applies and would continue.	New requirement ..	New requirement.
Security training for security coordinators and crew (§ 1544.233).	New requirement ..	New requirement ..	Currently applies and would continue.	New requirement ..	New requirement.
Training Program—Individual security-related duties (§ 1544.235).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Program to permit passengers to provide volunteer emergency services (§ 1544.241).	New requirement ..	New requirement ..	New requirement ..	New requirement ..	New requirement.
Required to undergo third-party audits (§ 1544.243).	New requirement ..	New requirement ..	New requirement ..	New requirement ..	New requirement.
Required to send flight manifest to approved vendor for watch-list matching of passengers (§ 1544.245).	New requirement ..	New requirement ..	New requirement ..	New requirement ..	New requirement.
Security threat assessment with criminal history records check for flight crew (part 1544, subpart G).	New requirement ..	New requirement ..	New requirement ..	New requirement ..	New requirement.
Develop and implement contingency plan in response to threats (§§ 1544.301(a) & (b)).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Bomb and hijacking threats (§ 1544.303).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.
Comply with security directives and information circulars (§ 1544.305).	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	Currently applies and would continue.	New requirement.

TABLE 3—COMPARISON OF AIRCRAFT OPERATOR SECURITY PROGRAMS

Description of security requirement	Full program operators	Full all-cargo program operators	Proposed large aircraft program operators
Acceptance & screening of individuals and accessible property (§ 1544.201)	X		X
Screening of individuals and property (watch-list & accessible weapons) (§ 1544.202)		X	X
Acceptance and screening of checked baggage (§ 1544.203)	X		
Acceptance and screening of cargo and accessible property (§ 1544.205)	X	X	X
Check property on board (§ 1544.206)			X
Screening of individuals and property (§ 1544.207)	X	X	X
Use of metal detection devices (§ 1544.209)	X	X	
Use of X-ray systems (§ 1544.211)	X	X	
Use of explosives detection systems (§ 1544.213)	X		
Required to have security coordinators (§ 1544.215)	X	X	X
Provision for law enforcement personnel at airports serving the aircraft operators (§ 1544.217)	X	X	X
Carriage of accessible weapons on board aircraft (§ 1544.219)	X	X	X
Carriage of prisoners under the control of armed law enforcement officers (§ 1544.221)	X		
Requirement to transport FAMs (§ 1544.223)	X	X	X
Provide for security of aircraft and facilities (§ 1544.225)	X	X	X
Exclusive area agreements (§ 1544.227)	X	X	
Access to cargo and security threat assessments for cargo personnel in the United States (§ 1544.228)	X	X	
CHRC: Unescorted access to SIDA, screening, baggage/cargo checks (§ 1544.229)	X	X	
CHRC: Flight crew members (§ 1544.230)	X	X	
Airport-approved and exclusive area personnel identification systems (§ 1544.231)	X	X	
Security training for security coordinators and crew (§ 1544.233)	X	X	X
Training Program—Individual security-related duties (§ 1544.235)	X	X	X
Flight deck privileges (§ 1544.237)	X	X	
Program to permit passengers to provide volunteer emergency services (§ 1544.241)	X		X
Required to undergo third-party audits (§ 1544.243)			X
Required to send flight manifest to approved vendor for watch-list matching of passengers (§ 1544.245)			X
Security threat assessment with criminal history records check for flight crew, individuals authorized to perform screening functions, applicants to become TSA-approved auditors, and watch-list service provider cover personnel (Part 1544, subpart G)			X
Develop and implement contingency plan in response to threats (§ 1544.301)	X	X	X
Bomb and hijacking threats (§ 1544.303)	X	X	X
Comply with security directives and information circulars (§ 1544.305)	X	X	X

B. Proposed Requirements for Certain Airports

Currently, the regulations extend airport security program requirements to airports that regularly serve aircraft operations using full programs, partial programs, private charter programs, and corresponding foreign air carriers.[29] These regulations for airport operators provide for the safety and security of persons and property on an aircraft operating in air transportation against an act of criminal violence and aircraft piracy. An enhanced security environment at the airports where large aircraft operate would support enhanced security for the large aircraft. Thus, as part of the proposal to provide security for large aircraft through a large aircraft program for aircraft operators, TSA also proposes to require certain airports that serve large aircraft to adopt a security program.

There are thousands of GA airports that serve large aircraft. TSA considered the heavy burden involved for all these airports to adopt a security program. Many are very small and may have limited resources and limited large aircraft activity. TSA proposes to require two types of airports to hold a security program because of the type of service they provide.

The first type of airport that would be required to hold a partial program is a GA airport that is designated as a ''reliever'' airport by the Secretary of Transportation, as defined in 49 U.S.C. 47102(22). These airports perform the function of relieving congestion at a commercial service airport by diverting GA from the commercial services airport to the reliever airport and provide more GA access to the overall community. Reliever airports are generally near metropolitan areas and thus serve and are close to large populations—thus the need for greater security at these airports.

The second type of airport is an airport that regularly serves scheduled or public charter operations in large aircraft. These operations have fare-paying passengers on a regular basis. TSA proposes to require these airports to adopt the partial program. This program would provide a basic level of security enhancement to compliment and support the security measures that TSA would require large aircraft operators to adopt and implement.

Table 4 below illustrates how the proposed rule would affect the various types of airports. Table 5 compares the three types of airport security programs—complete program, supporting program, and partial program. TSA believes that the requirements of the partial program for airport operators would not be burdensome for reliever airports, and airports that regularly serve scheduled or public charter operations, to adopt and carry out. TSA also believes that the requirement for these airports to implement security programs will not place a significant burden on local law

[29] 49 CFR 1544.101(a), (b), and (f), and 1546.101(a), (b), (c), and (d). However, there are no airports that currently hold a security program because they regularly serve an aircraft operator holding a partial program or a private charter program, or their foreign air carrier equivalent.

enforcement agencies, because TSA expects that there will be few incidents requiring law enforcement response at these airports.

TABLE 4—AIRPORT OPERATOR SECURITY PROGRAMS

An airport operator must have this program	Current: If it regularly serves aircraft operations under these security programs in 49 CFR	Proposed: If it meets the following criteria:
Complete program § 1542.101(a)	full program under § 1544.101(a)(1); or foreign air carrier program under § 1546.101(a).	No change.
Supporting program § 1542.101(b)	full program under § 1544.101(a)(2); or	Regularly serves full program aircraft operator under § 1544.101(a)(2) (no change); or
	private charter program under § 1544.101(f); or	Regularly serves foreign air carrier aircraft operator program under § 1546.101(b) (no change); or
	foreign air carrier program under § 1546.101(c)	Regularly serves foreign air carrier under § 1546.101(c) (no change).
Partial program § 1542.101(c)	partial program under § 1544.101(b); or	Regularly serves large aircraft operator in scheduled or public charter passenger operations under § 1544.101(b); or
	foreign air carrier program under § 1546.101(d)	Is a reliever airport.
None required *	twelve-five program under § 1544.101(d)	Large aircraft not described above.
None required *	limited program under § 1544.101(g)	No change.
None required *	full all-cargo program under § 1544.101(h)	No change.

* TSA may enter airports to inspect an aircraft operator that is operating under a part 1544 or 1546 security program. 49 CFR 1542.5(e).

TABLE 5—COMPARISON OF AIRPORT SECURITY PROGRAMS

Description of security requirement	Complete program	Supporting program	Partial program
Designate Airport Security Coordinator (§ 1542.3)	X	X	X
Description of secured areas of the airport	X		
Description of the Airport Operations Area	X		
Description of the Security Identification Display Area (SIDA)	X		
Description of the sterile area	X		
Criminal history records check of airport operator, airport user, individuals with unescorted access to a SIDA, and individuals seeking unescorted access authority	X		
Description of personnel identification systems (§ 1542.211)	X		
Escort procedures (§ 1542.211(e))	X		
Challenge procedures (§ 1542.211(d))	X		
Training program for individuals performing security-related functions for the airport operator (§ 1542.213)	X		
Training program for law enforcement personnel (§ 1542.217(c)(2)	X	X	X
Description of law enforcement support	X	X	X
System for maintaining records (§ 1542.221)	X	X	X
Procedures and description of facilities and equipment used to support TSA inspection of individuals, property, and aircraft operator and foreign air carrier screening functions	X		
Contingency plan (§ 1542.301)	X	X	
Procedures for the distribution, storage, and disposal of Sensitive Security Information (including security program, Security Directives, Information Circulars, and implementing instructions), and, as appropriate, classified information	X	X	X
Procedures for posting of public advisories (§ 1542.305))	X	X	X
Incident management procedures (§ 1542.307)	X	X	X
Alternate security procedures, if any, that the airport intends to use in the event of natural disasters, and other emergency and unusual conditions.	X		
Exclusive area agreement (§ 1542.111)	X		
Airport tenant security program (§ 1542.113)	X		

In addition to the two types of airports in the proposed rule text, TSA requests comments on whether other types of airports should also be required to adopt a security program, such as the partial program. For example, should TSA require airports that regularly serve aircraft used in private charter operations-aircraft with MTOW of over 45,500 kilograms or a passenger seating configuration of 61 or more seats—to adopt a partial program? If TSA were to adopt such an approach, how should TSA determine whether an airport ''regularly serves'' a large aircraft with MTOW of over 45,500 kilograms or a passenger seat configuration of 61 or more seats? Should TSA require airports that serve any large aircraft with MTOW of over 45,500 kilograms or a passenger seat configuration of 61 or more seats to adopt a partial program, regardless of frequency?

In addition to the proposed amendments to § 1542.101(b) and (c), TSA is seeking comments on whether the content requirements of the partial program and the supporting program should be amended. For example, TSA is considering whether it should require airport security coordinators at locations with partial programs to undergo the same security training that airport security coordinators at locations with a supporting or complete program under § 1542.3 undergo or whether a shorter training program would be appropriate.

TSA is also considering whether airport operators should be required to

undertake a risk-based self assessment of their security programs. The ''TSA Information Publication (A–001), Security Guidelines for General Aviation,'' includes the Airport Characteristic Measurement Tool, which lists the most significant airport characteristics that can potentially affect a facility's security posture.

TSA may develop a computer based training, available online or in a DVD format, which incorporates GA security awareness, elements of the existing ''TSA Information Publication (A–001), Security Guidelines for General Aviation Airports,'' and industry best practices. Airport operators may be able to use this training and accompanying self-assessment tool to fulfill a risk-based self assessment should TSA decide to include it as part of the partial program.

C. Passenger Checking Against the Watch-List

As discussed above in section II.A of the preamble, the proposed rule would require large aircraft operators to transmit passenger information to third-party entities called watch-list service providers to conduct watch-list matching of their passengers. Because watch-list service providers would perform an important security function, TSA is proposing to require potential watch-list service providers to obtain approval from TSA prior to conducting watch-list matching for any large aircraft operator. The proposed approval process would ensure that the watch-list service provider has the appropriate personnel and systems to process and keep secure sensitive and personally identifiable information.

The following are the major requirements that potential watch-list matching service providers would have to satisfy to obtain approval from TSA. The individual requirements are described and discussed in further detail in the section-by-section analysis of proposed § 1544.503.

- Demonstrate ability to conduct automated watch-list matching and continuous vetting.
- Adopt and implement a system security plan for the system that contains personally identifiable information or is used to conduct watch-list matching.
- Demonstrate ability to receive passenger information from large aircraft operators and transmit watch-list matching results back to large aircraft operators.
- Successfully undergo a suitability assessment by TSA.
- Watch-list service provider's covered personnel would be required to successfully complete security threat assessments.
- Adopt a security program that complies with TSA requirements.

The proposed rule describes the approval process that would apply and includes a provision allowing prospective watch-list service providers to seek reconsideration of an initial disapproval.

Once TSA approves a watch-list service provider, the provider would have several responsibilities. TSA lists the major responsibilities below and then describes them in greater detail in the section-by-section analysis of proposed §§ 1544.513 and 1544.515.

- Carry out its security program, which details the requirements for conducting watch-list matching, security of the systems and physical property used to conduct watch-list matching, and training of personnel.
- Develop and execute procedures to identify, handle, and protect Sensitive Security Information and maintain the confidentiality of other information provided by TSA and aircraft operators.
- Submit to inspection by TSA.

Under the proposed rule, TSA would retain the authority to withdraw a watch-list service provider's approval to conduct watch-list matching if the watch-list service provider failed to meet the qualification requirements or its responsibilities under the rule or if it were in the interest of transportation or national security. Watch-list service providers would be able to seek reconsideration of the withdrawal of approval to conduct watch-list matching from the Assistant Secretary or designee.

D. Third-Party Audits for Large Aircraft Operators

As described in section II.A of this NPRM, TSA would require large aircraft operators to contract with TSA-approved auditors to conduct audits of their compliance with TSA regulations and their security programs. To ensure that auditors have the qualification and responsibilities to produce audits that would be useful to TSA and the large aircraft operators and to identify, handle, and protect Sensitive Security Information and other sensitive information, TSA proposes the following major qualifications and responsibilities that would apply to auditors. These qualifications and responsibilities, as well as other requirements, are described and discussed in further detail in the section-by-section analysis of proposed part 1522.

- Successfully undergo a TSA security threat assessment.
- Currently hold or be able to obtain a certification or accreditation from an organization recognized by TSA.
- Have sufficient knowledge and skills to conduct a security audit of an aircraft operator.
- Receive initial and biennial training.
- Conduct independent and impartial audits, submit audit reports to TSA, and retain audit reports for 36 months.
- Identify, handle, and protect Sensitive Security Information and keep confidential other information provided by TSA and large aircraft operators.
- Submit to inspection by TSA.

The proposed rule describes the approval process that would apply to auditors. Auditors would be able to seek reconsideration of the disapproval to be a TSA-approved auditor from the Assistant Secretary or designee.

Under the proposed rule, TSA would be able to withdraw approval of an auditor or responsibilities under the proposed rule or in the interest of transportation or national security. Auditors would be able to seek reconsideration of the withdrawal of approval to conduct audits from the Assistant Secretary or designee.

E. Proposed Amendments to the Full Program and the Full All-Cargo Program

As part of this NPRM, TSA is also proposing a few minor amendments to the full program and the full all-cargo program. TSA proposes to require these aircraft operators to provide the following information when they submit their security program for approval under § 1544.105: business name; other names including ''doing business as''; state of incorporation; tax identification number; and the address of the aircraft operator's primary place of business or headquarters. This information would provide TSA the means to identify the aircraft operators and to obtain basic information about the aircraft operator in the course of reviewing a new security program for approval.

Additionally, TSA proposes to add a provision of voluntary services to the full program and the full all-cargo program, as explained in further detail in the section-by-section analysis of proposed § 1544.241. Finally, as explained in the section-by-section analysis of § 1544.101, TSA proposes to clarify that the full program applies to operators holding FAA operating certificates under 14 CFR part 119 and that the full all-cargo program applies to operators holding FAA operating certificates under 14 CFR part 119 or part 125.

III. Section-By-Section Analysis

The proposed rule sets forth the security regulations that would apply to large aircraft operators, including the requirements for the security program. TSA is also proposing to amend several other sections of part 1544 and adding new subparts F and G to set forth the procedures for watch-list service providers to obtain TSA approval and for large aircraft flight crews, auditors, and watch-list service providers' covered personnel to obtain security threat assessments, respectively. TSA is proposing to add a new provision in part 1540 to govern withdrawals of approved security programs. In addition, TSA is proposing to add a new part 1522, which establishes procedures for accrediting third-party auditors and for prescribing their functions in the LASP program. With respect to airports serving large aircraft, TSA is proposing to amend portions of part 1542 by regulating reliever airports, as designated by the Secretary of Transportation. TSA is also proposing changes to part 1520 to include the proposed LASP in the coverage of the regulations regarding Sensitive Security Information and minor changes to part 1550 to maintain consistency between regulations.

Part 1520—Protection of Sensitive Security Information

Section 1520.5 Sensitive Security Information

TSA proposes to amend § 1520.5(b)(1)(i) to protect watch-list service provider security programs as Sensitive Security Information. The watch-list service provider would have access to, and handle information on, the No Fly and Selectee Lists, which are SSI. The proposed change to this section would protect this SSI from unauthorized disclosure by the TSA-approved auditor, the watch-list service provider, the aircraft operator, or any other covered person.

Section 1520.7—Covered Persons

As explained in the section-by-section analysis of proposed part 1522 and § 1544.243, TSA would require large aircraft operators to engage independent TSA-approved auditors to audit their compliance with their security programs and TSA regulations. TSA-approved auditors would have access to and handle SSI regarding the aircraft operator and TSA security standards as they relate to large aircraft operators. Similarly, the watch-list service provider would have access to and handle the No Fly and Selectee Lists, which are SSI. Accordingly, TSA would amend § 1520.7(a) to include TSA-approved auditors and watch-list service providers as covered persons that are subject to the requirements of part 1520 as they apply to SSI.

Part 1522—TSA Approved Auditors

As described in section II.D, aircraft operators subject to this rule would need to engage independent TSA-approved auditors to audit their compliance with their security programs. TSA is proposing a new part 1522 to establish a framework for this new third-party auditor program. This third-party auditor program would initially apply only to aircraft operators under the LASP. TSA may expand its use to other programs in the future. The broad scope of part 1522 would allow TSA to use the process set forth in part 1522 for other programs that it may determine may benefit from an audit program.

Part 1522 would have two components: (1) qualifications and procedures for individuals who seek TSA's approval for conducting audits; and (2) specific qualifications and required content of audit reports for the LASP. The first of these components would apply to all programs in which TSA would require third-party auditors. The second component would apply to the LASP.

Subpart A—General

Section 1522.1 Scope and Terms Used in This Part

Proposed § 1522.1 explains that individuals who wish to conduct audits of operators' compliance with security programs must obtain TSA's approval in accordance with part 1522. Section 1522.1 also defines terms used in the subpart. Proposed § 1522.1 defines ''applicant'' to mean the individual who is seeking to become a TSA-approved auditor.

Section 1522.1 defines ''conflict of interest'' as a situation when the TSA-approved auditor has a personal impairment that might affect their ability to do their work and report their findings impartially. This definition is derived from the Government Auditing Standards established by the Government Accountability Office (GAO) for ensuring that auditors do not have personal impairments that would interfere with their ability to maintain their independence. The proposed definition includes examples of conflict of interest situations, such as family or employment relationships. Relationships with family members that may be a conflict of interest would include relationships with parents, children, and siblings.

Other proposed examples of conflict of interest include financial relationships and business relationships between the auditor and the operators to be audited. Financial interest would include, for example, the auditor owning stocks or bonds of the operator or the auditor having an employment, rather than a contractual, relationship with the operator. Examples of business relationships that would give rise to a conflict of interest would be where the auditor had previous decision-making or managerial authority that would affect current operations or program being audited. Additionally, an auditor or the company that employs the auditor would not be able to provide non-audit services to the operator if the non-audit services relate to the operator's security program. TSA seeks comments on these examples as well as suggestions for other examples that TSA should consider. TSA is also considering expressing the conflict of interest concept as auditor independence. Rather than defining and prohibiting conflicts of interest, TSA would define independence and would require an auditor to have independence from the entity the auditor would audit. If TSA were to adopt a definition of ''independence'' in the final rule, the definition of ''independence'' would describe circumstances similar to those described in the proposed definition of ''conflict of interest.'' This approach would be consistent with the GAO's Government Auditing Standards and the Securities and Exchange Commissions regulations at 17 CFR 210.2–01 concerning audits by certified public accountants.

The final definition in proposed § 1522.1 is ''TSA-approved auditor'' or ''auditor.'' These terms would mean an individual who has been approved under proposed part 1522 to conduct an audit under 49 CFR chapter XII.

Section 1522.3 Qualifications

Section 1522.3 would establish qualifications for third-party auditors that would apply to such auditors in any program in which TSA would require their use. These qualifications are designed to ensure that auditors have the resources and expertise required to conduct an audit and to prepare the required reports. With respect to qualifications, TSA is proposing that auditors have experience with Federal statutes and regulations and have a certification or accreditation from a highly-regarded organization in the appropriate field. Such an organization might include, for

example, the International Standards Organization. For auditors that would be involved with the large aircraft program, the International Civil Aviation Organization or the International Business Aviation Council would also be acceptable. TSA would make publicly available a list of acceptable accreditation or certification organizations. TSA requests comments on whether this qualification is appropriate and on other organizations that might have the stature to provide the necessary certification or accreditation.

Finally, applicants would be required to undergo a successful security threat assessment that includes a criminal history records check.

The proposed rule text does not require auditors to be U.S. citizens, U.S. nationals, or lawful permanent residents of the United States. We invite comments on whether individuals with these important duties should be subject to such a qualification.

Section 1522.5 Application

Proposed § 1522.5 describes the information and documentation that applicants would be required to submit to TSA. The information would include the applicant's name, business address, business phone number, and business e-mail address. TSA would also require the applicant to submit a copy of his or her accreditation or certification from one of the organizations TSA determines are acceptable for this purpose and a statement of how he or she meets the requirements in proposed § 1522.3.

Section 1522.7 TSA Review and Approval

Proposed § 1522.7 describes the review and approval process which TSA would carry out upon receipt of the auditor's application. The procedures by which TSA would review applications for the third-party auditor program may involve several steps. After TSA receives an application, TSA would decide whether to approve or disapprove the application and would send a written notice of approval or disapproval to the applicant. If the application is disapproved, the applicant would be able to seek reconsideration under proposed § 1522.9.

Section 1522.9 Reconsideration of Disapproval of an Application

Proposed § 1522.9 describes the review and petition process for reconsideration of disapproval of the auditor's application. If an applicant seeks to challenge the disapproval of his or her application, the applicant would be required to submit a written petition for reconsideration within 30 days of receipt of the notice of disapproval. The petition would include a statement explaining why the applicant believes he or she meets the criteria in § 1522.3 with any supporting documentation. Reconsideration may result in confirmation of the disapproval or in a determination that the application should be approved.

Section 1522.11 Withdrawal of Approval

Under proposed § 1522.11, TSA would be able to withdraw the approval of an auditor if the auditor ceased to meet the qualification standards, the auditor failed to meet his or her responsibilities, or it is in the interest of security or the public. If TSA withdraws an auditor's approval, the auditor would no longer be able to perform an audit under TSA regulations.

Under proposed § 1522.11, before revoking an auditor's authority, TSA would provide the auditor with a proposed notice of withdrawal of approval that would include the basis for the withdrawal of approval. The auditor would be able to file a written petition for reconsideration to challenge the proposed notice. To challenge the proposed notice of withdrawal of approval, an auditor would be required to submit the petition for reconsideration within 30 days of receipt of the proposed notice. Reconsideration may result in confirmation of the disapproval or in a determination that the application should be approved. If the auditor does not file a petition for reconsideration, the proposed notice of withdrawal of approval would become a final notice 31 days after the auditor receives the proposed notice.

In emergency situations, proposed § 1522.11 would allow TSA to issue an emergency notice of withdrawal of approval that would be effective upon receipt by the auditor. The auditor would be able to challenge the emergency notice of withdrawal of approval by submitting a written petition for reconsideration but submission of the petition would not stay the withdrawal of approval.

Section 1522.13 Responsibilities of TSA-Approved Auditors

Proposed § 1522.13 prescribes the responsibilities of TSA-approved auditors. Auditors would not be allowed to undertake an audit where the auditor had a conflict of interest as defined in proposed § 1522.1. Auditors would be required to submit reports to TSA that meet TSA standards for the particular program. Auditors would be required to comply with TSA's regulations for identifying, handling, and protecting SSI. Under this section, auditors would also be prohibited from disclosure of any proprietary information. Importantly, if an auditor conducting an audit believes that there is an instance of noncompliance that presents an imminent threat to transportation security or public safety, the auditor would be required to notify TSA immediately. The auditor would not be authorized to require any remedial action.

Section 1522.15 Fraud and Intentional Falsification of Records

Proposed § 1522.15 includes provisions that would prohibit any person from making or providing any fraudulent statements, reports, records, access mediums, or identification. Any falsification of records or fraudulent actions would be a violation of the regulations and 18 U.S.C. 1001, and it would be a basis for TSA to withdraw the auditor's approval under proposed § 1522.13.

Section 1522.17 Inspections

Under proposed § 1522.17, auditors would be required to permit TSA to inspect their facilities and copy records. This section would allow TSA to evaluate the auditor's performance and an operator's compliance with TSA regulations and its security program.

Subpart C—Auditors for the Large Aircraft Security Program

Section 1522.201 Applicability

Proposed § 1522.201 states that subpart C would apply to auditors seeking to obtain TSA's approval to conduct audits for the large aircraft program.

Section 1522.203 Additional Qualification Requirements

Proposed § 1522.203 describes the additional requirements that auditors for the LASP would be required to meet to be considered for approval. These requirements would include:

- At least five years of experience in inspection or auditing relating to governmental programs in security or aviation;
- Three professional references;
- Accreditation from an outside organization within the last ten years; and
- Knowledge and ability to assess compliance with Federal statutes and regulations.

These additional requirements would demonstrate that the auditor possesses

sufficient experience and knowledge in auditing compliance with governmental programs and that the auditor has credentials that reflect knowledge of the aviation industry. Auditors would be able to satisfy the five-year experience requirement as a government employee or private consultant or contractor. TSA requests comments on these requirements as well as other requirements that TSA should consider for auditors of LASPs.

Section 1522.205 Audit Report

Section 1522.205 would require an auditor to prepare an audit report that would include information about the audit process and the auditor's findings and conclusions of the audit. TSA would require the auditor to submit the audit report within 30 days after the audit was conducted. TSA would also require the auditor to sign an attestation that the audit was performed professionally and impartially. The audit report would be an important tool in TSA's compliance program by enabling TSA to evaluate a large aircraft operator's compliance with TSA regulations and the operator's security program and to ascertain if additional TSA action is required.

Section 1522.207 Training

Under proposed § 1522.207, TSA would require auditors to undergo initial and recurrent training. Through the initial training, auditors would acquire the necessary information on the process, procedures, and forms associated with the TSA-required audit. Recurrent TSA prescribed training would provide auditors with up-to-date information and would ensure that the auditor has maintained the necessary expertise to continue to perform audits. Recurrent training would be required every 24 months.

Section 1522.209 Biennial Review

To ensure that a TSA-approved auditor continues to possess the requisite qualification and expertise to conduct audits, TSA would require the auditor to submit to a biennial review. The review would consist of submitting evidence that an auditor's training has been successfully completed and is current and that an auditor continues to hold the necessary accreditation or certification.

Part 1540—Civil Aviation Security: General Rules

Section 1540.107 Submission to Screening and Inspection

As discussed in section II.A, TSA would require large aircraft operators to contract with a watch-list service provider to determine whether their passengers may board the aircraft. Watch-list service providers, who must be approved by TSA, would compare passenger names against the watch-list.

Under proposed § 1544.245(b), large aircraft operators would be required to request and obtain the full name of their passengers to transmit their passengers' information to a watch-list service provider to conduct watch-list matching prior to the passengers boarding the aircraft. Because full name is essential in conducting effective watch-list matching, TSA proposes to require passengers to provide their full name when the large aircraft operator requests their full name.

TSA has published the Secure Flight NPRM, which also includes a proposal to require individuals who make reservations for a covered flight to provide their full names.[30] Under the proposed Secure Flight Program, full name would be the full name that appears on the individual's verifying identity document. A verifying identity document would be an unexpired photo identification issued by a government (Federal, State, or tribal) bearing the individual's full name and date of birth or an unexpired foreign passport. Examples of verifying identity documents are driver's licenses and passports. Accordingly, proposed § 1540.107(c) would apply the same requirements to passengers of large aircraft operators.

Section 1540.301 Withdrawal of Approval of a Security Program

Various entities, such as airport operators and aircraft operators, must submit their security programs to TSA for approval. Once TSA approves a security program, the operator must implement and operate under its approved security program. The regulations, however, do not specifically address the process through which TSA may withdraw its approval of a security program, when appropriate.

TSA currently has withdrawal procedures only for indirect air carriers in 49 CFR 1548.7(f). To standardize the regulations, TSA proposes a new § 1540.301 to codify procedures for TSA to withdraw approval of any operator's security program held under subchapter C. The proposed standard for withdrawal would be a TSA determination that the operation is contrary to security and the public interest. Proposed § 1540.301 provides procedures for notice, response, and appeal of a TSA decision to withdraw approval. The affected airport operator, aircraft operator, or large aircraft operator would also be able to request a stay of the withdrawal pending appeal of the notice.

TSA further proposes the codification of emergency withdrawal procedures. This proposal would create procedural guidelines to implement withdrawal of a security program and affords due process to the airport operator, aircraft operator, and large aircraft operator. The emergency procedures would allow the operator to appeal the withdrawal, but the filing of the appeal would not stay the effective date of withdrawal because of the extant circumstances giving rise to the emergency.

Part 1542—Airport Security

Section 1542.103 Content

Section 1542.103 describes the airports that TSA requires to adopt a security program. TSA requires airports that regularly serve full program aircraft operators described in § 1544.101(a)(1) or foreign air carriers described in § 1546.101(a) to adopt a complete program. 49 CFR 1542.103(a). TSA also requires airports that regularly serve full program aircraft operators described in § 1544.101(a)(2), private charter aircraft operators described in § 1544.101(f), or a foreign air carrier described in § 1546.101(b) or (c) to adopt a supporting program. 49 CFR 1542.103(b). Additionally, TSA requires airports regularly serving operations of an aircraft operator or foreign air carrier described in § 1544.101(b) or § 1546.101(d) to adopt a partial program. 49 CFR 1542.103(c).

As explained in section II.B of this NPRM, TSA proposes to expand the types of airports that would be required to adopt a partial program to include reliever airports and airports that regularly serve large aircraft with scheduled or public charter service. Furthermore, TSA would amend § 1542.103(b) to remove airports regularly serving aircraft operators that are subject to the private charter program under § 1544.101(f) from among the airport operators that are subject to the supporting program.

An airport that would not be required to adopt a security program under § 1542.101(a), (b), or (c) may nevertheless seek TSA approval for its security program. To address this situation, TSA proposes to adopt § 1542.101(e), which would allow TSA to approve a security program for this type of airport, if the airport makes a request to TSA.

[30] "Covered flight" is defined as a flight operated by an aircraft operator subject to a full program under 49 CFR 1544.101(a) or by a foreign air carrier subject to 49 CFR 1546.101(a) or (b). Proposed § 1560.3, 72 FR at 48387.

Part 1544—Aircraft Operator Security

Section 1544.1 Applicability of This Part

Currently, § 1544.1(a)(1) limits part 1544 to aircraft operators that hold a FAA operating certificate under 14 CFR part 119. Because part 1544 would apply to other aircraft operators under this NPRM, TSA would amend § 1544.1(a)(1) to clarify that part 1544 applies to all aircraft operators engaged in civil aviation in an aircraft with a MTOW of more than 12,500 pounds, not just those that hold a operating certificate under 14 CFR part 119.

Section 1544.101 Adoption and Implementation

TSA is proposing this rulemaking to regulate any civil aviation operations. To ensure consistent treatment of similar aircraft operators, TSA proposes, in § 1544.101(b), to apply the same threshold by requiring that the existing partial program, twelve-five program, and private charter program operations be consolidated and covered under a single LASP. Note that the LASP would replace the above stated programs in §§ 1544.101(b) through (f).

Operations under the LASP would include civil operations of aircraft, including passenger and all-cargo operations, and scheduled, charter, or other service, with a MTOW over 12,500 pounds, that do not operate under the full program (§ 1544.101(a)) or the full all-cargo program (§ 1544.101(h)), and do not operate as a public aircraft as described in 49 U.S.C. § 40102 or as a government charter under the definition of private charter in § 1540.5 of this chapter. ''Public aircraft'' is defined in 49 U.S.C. 40102(37) as follows:

''public aircraft'' means any of the following:

(A) Except with respect to an aircraft described in subparagraph (E), an aircraft used only for the United States Government, except as provided in section 40125(b).

(B) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in section 40125(b).

(C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).

(D) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).

(E) An aircraft owned or operated by the armed forces or chartered to provide transportation to the armed forces under the conditions specified by section 40125(c).

The government maintains direct responsibility for the operation of public aircraft. Public aircraft are not subject to many of the safety regulations that cover other aircraft operations.[31] They are not included in the statutory definition of ''civil aircraft'' and thus are not subject to many of the same requirements that apply to civil aircraft. See 49 U.S.C. 40102(16). There are strict limitations on how such aircraft may be used. See 49 U.S.C. 40124. Many of the operations are highly specialized and require unique procedures, including security procedures. TSA is proposing to make clear that public aircraft would not be subject to the LASP.

A government private charter under TSA regulations means any aircraft operator flight—

(2) For which the total passenger capacity of the aircraft is used for the purpose of civilian or military air movement conducted under contract with the Government of the United States or the government of a foreign country.

See 49 CFR 1540.5. Currently TSA regulations exempt most such operations from the Private Charter Security Program. *See* 49 CFR 1544.101(f)(1)(ii). The rationale has been that such charters can, and do, carry out procedures on a regular basis to address the security concerns at issue. The U.S. Department of Defense (DOD) and Federal agencies use private charter operations to transport persons and property in furtherance of their government missions. *See* 67 FR 41635 (June 19, 2002). TSA is concerned, however, that the chartering government agency may not always understand that it would be responsible for security of the operation. Unlike with public aircraft discussed above, a government charter may be for a short duration, even one flight at a time, and thus normal safety regulations continue to apply. Accordingly, the rule would make clear that TSA would exempt government charter operations from complying with the LASP, only if the government takes security responsibility for the following:

(A) The aircraft;

(B) Persons onboard; and

(C) Property onboard.

See proposed § 1544.101(b)(3)(iv). If the chartering government agency does not take responsibility for the security of the operation, the normal TSA requirements would apply.

[31] FAA limits many of its regulations to operation of civil aircraft, which do not include public aircraft. For example, see 14 CFR part 91, subpart E—Maintenance, Preventive Maintenance, and Alterations.

Note, however, that under the current rule, government charters must comply with the Private Charter Program if the charter enplanes passengers from, or deplanes passengers into, a sterile area at an airport. This minimizes the risk that any weapon or other prohibited item the government personnel may be carrying could inadvertently or purposefully be used to taint the sterile area. This requirement would continue under the proposed rule. TSA would require government charters that deplane into, or enplane from, sterile areas to comply with the LASP, including obtaining an alternate procedure for deplaning into, or enplaning from, a sterile area.

The full program, the limited program, and the full all-cargo program would not be included in the large aircraft regulations. However, because TSA proposes to amend § 1544.1(a) to make part 1544 applicable to operators of aircraft with MTOW of over 12,500 pounds, TSA would also need to amend §§ 1544.101(a) and (h) to maintain the status quo as to which aircraft operators are subject to the full program. Consequently, TSA would amend § 1544.101(a) to state that aircraft operators that hold a FAA certificate under 14 CFR part 119 would have to adopt and carry out a full program if they meet the conditions described in § 1544.101(a)(1) or (a)(2). Similarly, TSA would amend § 1544.101(h) to state that the full all-cargo program applies to aircraft operators that hold a FAA certificate under 14 CFR part 119 or part 125. The limited program is for aircraft operators that have unique operations that do not fall within any other category of operations requiring a security program under other sections of part 1544. Nevertheless, the aircraft operator adopts a security program for its operations and TSA approves the security program and classifies it as a limited program.

Section 1544.103 Form, Content, and Availability

Proposed § 1544.103 sets forth the form, content, and availability requirements for the security programs required under § 1544.101. There have been standard security programs for certain aircraft operators since 1976. TSA is proposing to recognize the use of standard security programs by TSA and aircraft operators in current requirements for aircraft operators and proposed under part 1544. This proposed rule would clarify that each particular operator's security program would be the standard security program issued by TSA, together with any amendments and alternate procedures

approved or accepted by TSA for that aircraft operator.

Currently, § 1544.103(c) lists the content requirements of a security program for a full program aircraft operator. The specific security regulations are set forth in part 1544, subpart C—Operations. TSA proposes to add new paragraphs (d), (e), and (f) to describe the content requirements for full all-cargo and LASPs, respectively. Also, TSA would amend paragraph (c) to add the new requirements of proposed § 1544.241 regarding volunteer emergency services for full program operators.

The content requirements for the full all-cargo security programs in proposed paragraph (d) are essentially the same requirements in the current § 1544.101(i), except for the addition of proposed § 1544.241 concerning volunteer emergency services. The content requirements for the LASP are described in section II.A of the preamble. The individual elements, not discussed in this section of the preamble, are discussed in further detail in the section-by-section analysis of §§ 1544.202, 1544.205, 1544.206, 1544.207, 1544.215, 1544.217, 1544.223, 1544.225, 1544.233, 1544.235, 1544.241, 1544.245, and subpart G.

The existing partial program and private charter program include a few security measures that would not be part of the LASP, because these measures would be unnecessary under the LASP. First, the partial program requires that aircraft operators under that program participate in any airport-sponsored exercise of the airport contingency plan in § 1544.301(c). Currently, there are very few aircraft operators that hold a partial program and are subject to § 1544.301(c). Also, most large aircraft operators operate out of GA airports that are not required to have a contingency plan, including those that TSA proposed to require to adopt and carry out a partial program under proposed § 1542.103(c). Thus it would be unnecessary to require large aircraft operators to participate in an airport-sponsored exercise of the airport contingency plan and to include this security measure in the LASP.

TSA is also proposing not to include the requirements in §§ 1544.209 and 1544.211 regarding the use of metal detection devices and X-ray systems that are in the current private charter program. Because private charter operators currently do not use these devices or systems in their screening processes, it would be unnecessary to include those requirements in the LASP. If a large aircraft operator plans to use a metal detection device or an X-ray system, the operator would apply for an amendment or alternate procedure to its security program, which would describe the requirements and procedures for using such devices or systems.

Section 1544.105 Approval and Amendments to the Security Program

Aircraft operators that are required to adopt a security program under § 1544.101 must apply for a security program from TSA. TSA provides the standard security program and may amend the program on its own initiative, or as requested by the aircraft operator and approved by TSA. Similarly, TSA would provide large aircraft operators with a standard security program. At that time, the aircraft operator would be able to submit any amendment to their security program to TSA for approval. If the aircraft operator fully accepts the standard TSA security program, they would not be required to submit any amendments to TSA. Accordingly, TSA proposes to amend § 1544.105 to apply to large aircraft operators.

Unlike the full program and full all-cargo program operators, a large aircraft operator would need to submit additional information, such as the names, addresses, and phone numbers of the owners and aircraft operator security coordinator of the large aircraft, and the FAA certificate number if the aircraft operator holds an FAA certificate, when it submits its application for approval of its security program. Full program and full all-cargo program operators hold certificates from the FAA and DOT, and the Federal Government has reviewed the operators, including their key personnel, in connection with the certification processes; thus the operators are known to the Federal Government. Large aircraft operators, however, are a diverse group of operators that range from individuals who own and operate their aircraft to large corporations that operate aircraft using owned and/or leased aircraft. As a result, TSA would need the additional information to identify the owners and operators of large aircraft and to evaluate their security programs for approval.

TSA believes that aviation security will be enhanced if TSA conducts an analysis to determine whether operators of aircraft subject to this proposed regulation are legitimate business entities and whether their owners are individuals who appear to pose a risk to aviation security. Accordingly, TSA is considering various options to achieve the objective. For checking on whether the aircraft operator is a legitimate business entity, TSA may rely on a check against Dun & Bradstreet or a similar commercial database and/or governmental databases, such as the FAA's Aircraft Registration Database. For individuals who would be identified as a proprietor, general partner, officer, director, or owner in proposed section 1544.105(a)(1)(ii)(B), TSA does not intend to use commercial or publicly available data to determine whether the individuals pose or may pose a threat to transportation or national security. For these individuals, TSA seeks comment on whether it should require these individuals to undergo the security threat assessment (STA) described in proposed part 1544, subpart G. TSA requests public comment on these options and on other approaches that would achieve the desired result.

TSA would also use the information to identify and contact aircraft and their respective operators for operational or security reasons.

The proposed rule would not change the process for amending a security program, either by the aircraft operator or TSA. Proposed § 1544.105(f) would provide TSA with a mechanism to withdraw its approval of an aircraft operator's security program pursuant to the procedures set forth in proposed § 1540.301.

Section 1544.107 Fractional Ownership of Large Aircraft

Proposed § 1544.107 addresses situations in which a large aircraft is under fractional ownership program under the FAA rules in 14 CFR part 91, subpart K, for purposes of determining who would be the aircraft operator under proposed § 1544.101(b). We propose to use essentially the same requirements that apply in the FAA rules for this purpose. *See* 14 CFR 91.1011. Each owner in operational control of a program flight would be ultimately responsible for safe operations and for complying with all applicable requirements, including those related to security issues. An owner would be considered in operational control when the owner has the legal rights to the aircraft, has directed that the aircraft carry passengers or property designated by the owner, and the aircraft is carrying those passengers or property.

Although TSA would consider each owner as the aircraft operator, the owner would be able to delegate some or all of the performance of the tasks associated with carrying out this security responsibility to the program manager. For operations where the owner in operational control delegates performance of security tasks to the

program manager, the TSA would consider the owner and the program manager to be holding the security program jointly, and the owner and the program manager would be jointly and individually responsible for compliance. In the event that a program manager manages multiple aircraft, the program manager would have one large aircraft program that applies to all its operations.

An owner would be considered not in operational control when an aircraft is used for a flight for administrative purposes, such as demonstration, positioning, ferrying, maintenance, or crew training, and no passengers or property that were designated by the owner are being carried. Further, if the aircraft is operated under 14 CFR part 121 or 135, then the owner would be considered not to be in operational control.

This approach to determining the party that would be considered the aircraft operator for purposes of the LASP is based on the FAA regulations found in 14 CFR part 91, subpart K, regarding fractional ownership operations. TSA invites comments on whether we should provide additional features of subpart K in these regulations, such as the requirement in 14 CFR 91.1013 that the program manager brief the fractional owner.

Section 1544.202 Persons and Property Onboard All-Cargo Aircraft

Current § 1544.202 requires each aircraft operator operating under the full all-cargo program and the twelve-five program in all-cargo operations to apply the security measures in their security programs to persons who board the aircraft and their property. ''Cargo'' is defined as property tendered for air transportation accounted for on an air waybill. Company materials and other property not under an air waybill are not cargo; Rather, they are property that would be subject to proposed § 1544.206, as discussed in section II.A of this preamble and below.

Section 1544.202 is intended to prevent persons who may pose a security threat from boarding and to prevent or deter the carriage of any unauthorized persons and unauthorized explosives, incendiaries, and other destructive substances or items. This provides the opportunity for aircraft operators to conduct an on-site check of persons and property for compliance, and provides TSA with the means to perform security database checks. Section 1544.202 remains an important security measure for aircraft with MTOW of over 12,500 pounds in all-cargo operation. Consequently, we propose to revise § 1544.202 to apply to aircraft operated under the LASP in an all-cargo operation and to remove the references to the twelve-five program in all-cargo operations.

Section 1544.205 Acceptance and Screening of Cargo

Section 1544.205 sets forth the requirements for screening cargo on full program operations that carry cargo, full all-cargo operations, and twelve-five all-cargo operations. As with § 1544.202, cargo under § 1544.205 is property tendered for air transportation accounted for on an air waybill. As discussed above, TSA would require operators of large aircraft that are all-cargo operations to screen persons, accessible property, and cargo onboard the aircraft to prevent and deter the carriage of any unauthorized persons or the unauthorized carriage of weapons or explosives. Sections 1544.205(a), (b), (d), and (f) would apply to all large aircraft with an MTOW of over 12,500 pounds in all-cargo operations.

Section 1544.206 Persons and Property on Board a Large Aircraft

As discussed in section II.A of the preamble, TSA proposes § 1544.206, which would require aircraft operators operating under a large aircraft program under § 1544.101(b) to apply security measures in its security program to prevent or deter the carriage of unauthorized persons or unauthorized weapons, explosives, incendiaries, and other destructive substances or items. TSA also notes that 18 U.S.C. 922(e) and (f) impose criminal penalties for the unlawful transport or delivery of firearms or ammunition by any person or by common or contract carriers, respectively.

Section 1544.207 Inspection of Individuals and Property

Current § 1544.207 describes which entities conduct screening under which circumstances: TSA, a foreign government, or the aircraft operator. TSA is proposing to amend § 1544.207 to clarify which aircraft operator is subject to this section and which entity is responsible for conducting the required screening.

TSA would amend § 1544.207(a) to state clearly that this section applies to full program operators, full all-cargo program operators, and operations in a large aircraft with a MTOW over 45,500 kilograms operated for compensation or hire, as described in proposed § 1544.103(f)(1).

Proposed § 1544.207(b) applies to full program operators and is substantively the same as the current requirements for these operators. This section originally was written before TSA assumed the responsibility for all passenger and checked baggage screening in the United States and does not currently clearly state where TSA conducts the screening. TSA proposes to clarify this section. For locations in the United States, each full program operator must not board a passenger, or load his or her accessible or checked property, unless TSA or a TSA contractor has conducted the necessary inspection. In locations outside of the United States where the foreign country conducts the screening, each full program operator must not board a passenger, or load his or her accessible or checked property, unless the foreign country has conducted the necessary screening. TSA may require supplemental screening of some passengers. In locations outside of the United States where the foreign country does not conduct part or all of the required screening, each full program operator must not board a passenger, or load his or her accessible or checked property, unless the operator or its authorized representative has conducted the required screening.

Proposed § 1544.207(c) applies to full all-cargo programs and to operations in a large aircraft with a MTOW over 45,500 kilograms operated for compensation or hire, which currently are referred to as private charters. These aircraft operators are generally required to conduct their own screening. They would be required to follow the security procedures in their security programs and the requirements in 49 CFR part 1544, subpart E, regarding screener qualifications when the aircraft operator conducts the screening.

In the event that the aircraft enplanes or deplanes from a sterile area, the large aircraft operator would be required to obtain an alternate procedure for its security program.

Section 1544.217 Law Enforcement Personnel

Section 1544.217 currently requires aircraft operators under the partial program, the twelve-five program, the private charter program, and the full all-cargo program to provide for law enforcement personnel that meet TSA's requirements. TSA proposes to replace the referenced partial program, the twelve-five program, and the private charter program, with the LASP, requiring large aircraft operators to perform the same duties required under § 1544.217. TSA proposes that large aircraft operators must provide their employees, including crewmembers, current information regarding procedures for obtaining law

enforcement assistance, to enable them to contact local law enforcement personnel expeditiously in the event of a security need.

Section 1544.223 Transportation of Federal Air Marshals

Current § 1544.223 requires that full program operators and large aircraft over 45,500 kilograms that operate for compensation or hire under § 1544.103(f) carry Federal Air Marshals (FAMs). In this NPRM, TSA proposes to add § 1544.223(g) to require other large aircraft operators not covered by § 1544.103(f)(1) to carry FAMs only upon notification by TSA. This would affect mostly private/corporate aircraft owners. The regulation change would provide TSA with the ability to require these operators to put a FAM on board a large aircraft, pursuant to prior notification, if the need arises. TSA understands that maintaining the confidentiality of the FAM onboard a large aircraft may not be possible, and therefore TSA proposes to limit § 1544.223(g) to those operating under a full program or a LASP in an aircraft with MTOW over 45,500 kilograms.

Section 1544.237 Flight Deck Privileges

Section 1544.237(b) currently allows for access to the flight deck by FAA air carrier inspectors, authorized representatives of the National Transportation Safety Board, and U.S. Secret Service agents. This NPRM proposes to amend § 1544.237(b) to include Department of Defense (DOD) commercial air carrier evaluators who may seek admittance to the aircraft flight deck. TSA proposes to amend § 1544.237 to harmonize with FAA regulations at 14 CFR 121.547. DOD commercial air carrier evaluators will assess the effectiveness of a carrier's operations department, including crew coordination and safety awareness. DOD evaluators are required to pre-arrange all flight deck evaluations.

Section 1544.241 Voluntary Provision of Emergency Services

Congress has enacted statutory provisions that provide certain exemptions from liability for qualified law enforcement officers, firefighters, and emergency medical technicians who provide emergency services during emergencies; and that directs TSA to establish a program to allow such individuals to volunteer to provide such emergency services. 49 U.S.C. 44944. TSA has already incorporated this program into the AOSSP for full program operators and now proposes to codify the provisions in new § 1544.241. Because the statute limits these provisions to air carriers, TSA proposes to limit the application of § 1544.241 to aircraft operators that hold an air carrier operating certificate under 14 CFR part 119.

The statute provides that a qualified individual shall not be liable for damages in any action brought in Federal or State court which arises from the act or omission of that individual in providing or attempting to provide assistance in an in-flight emergency, absent gross negligence or willful misconduct. TSA must establish the requirements for qualifications of these individuals. Consistent with the statute, TSA's proposed regulation requires air carriers operating under a full program to implement a method or a program for qualified individuals who are law enforcement officers, firefighters, or emergency medical technicians to present their credentials to the carrier and to give their consent to be called upon during an in-flight emergency.

As required in the statute, § 1544.241(b) sets out proposed qualifications for the law enforcement officers, firefighters, and emergency medical technicians who would be exempted from liability under the statute and who would be able to volunteer under this section. TSA proposes that an individual is qualified for purposes of this section if the individual is qualified under Federal, State, local, or tribal law, or under the law of a foreign government, has valid standing with the licensing or employing agency that produced the credentials, and is a scheduled, on-call, paid, or volunteer employee, as one of the following:

1. A law enforcement officer who is an employee or authorized by the Federal, state, local or tribal government or under the law of a foreign government, with the primary purpose of the prevention, investigation, apprehension, or detention of individuals suspected or convicted of Government offenses.

2. A firefighter who is an employee, whether paid or a volunteer, of a fire department of any Federal, state, local, or tribe who is certified as a firefighter as a condition of employment and whose duty it is to extinguish fires, to protect life, and to protect property.

3. An emergency medical technician who is trained and certified to appraise and initiate the administration of emergency care for victims of trauma or acute illness. We request comments on whether these are the appropriate qualifications to carry out the purposes of the statute.

This exemption from liability provided in the statute is stated for information in proposed § 1544.241(b)(1). The statutory exemption from liability applies only to the three named groups above. The proposed rule in § 1544.241(b)(2) includes the statutory provision that the exemption shall not apply in any case where an individual provides or attempts to provide assistance in a manner that constitutes gross negligence or willful misconduct. The statute does not require the individual volunteer to identify himself or herself before departure to be subject to this exemption. Proposed § 1544.241(b)(3) states expressly that the exemption would apply regardless of whether the individuals identify themselves in advance of departure. The proposed rule also makes clear that an individual need not have his or her credentials with himself or herself at the time of providing assistance for the exemption from liability to apply. For instance, if a firefighter who did not volunteer before the flight as provided in paragraph (c), and who did not have his credentials with him, were to provide assistance in the case of an in-flight emergency, the statutory exemption from liability would apply. After the incident, to show that the exemption applied, the firefighter may have to establish that he was qualified as provided in paragraph (a), but the lack of credentials present at the time of the emergency would not preclude the application of the exemption.

Proposed § 1544.241(c) contains the requirement for aircraft operators to implement a program for individuals who meet the qualifications in paragraph (a) to volunteer, prior to departure, to be called on by a crewmember or flight attendant to provide emergency services in the event of an in-flight emergency. The required procedures would include a check of the credentials of individuals identifying themselves pre-departure.

Under this program, TSA would not expect FAMs and LEOs who are flying armed under § 1544.219 to volunteer to assist in an emergency situation prior to departure. Since the FAMs and LEOs must identify themselves to the aircraft operator prior to departure and must have taken appropriate training to fly armed, it is not necessary for the aircraft operator or the FAM or LEO to carry out § 1544.241. The flight crew knows where each FAM and armed LEO is seated and is able to request their assistance if the need arises. The statutory exemption from liability would apply if a FAM or LEO were to assist during an emergency.

Proposed § 1544.241 would not preclude passengers from assisting in an emergency, even if they did not meet the qualifications in paragraph (a). We note that any passenger may assist in an emergency, and in the past, physicians, nurses, and others have provided vital help when needed, and they will continue to be able to do so.

Generally, the aircraft operator will determine whether to request assistance and from whom to request it based on all the circumstances and information available to the aircraft operator. For instance, while the statute does not apply to doctors or nurses, if there is a medical emergency and the aircraft operator is aware that a doctor or a nurse is on board, the aircraft operator may request assistance of them instead of other individuals who may have volunteered under this program. However, the statute limits liability protection to qualified law enforcement officers, firefighters, and emergency medical technicians. State Good Samaritan Laws and other protections may apply to other individuals, not mentioned in the statute, who assist in an emergency.

Additionally, in accordance with 49 U.S.C. 44944(a), the aircraft operator must keep all information of the identity or personal information of the qualified individual confidential and must not provide such information to any individual, other than the appropriate aircraft operator personnel.

Section 1544.243 Third Party Audit

As discussed in section II.A of the preamble, proposed § 1544.243 would require a large aircraft operator to contract with a TSA-approved auditor to audit its compliance with the requirements of 49 CFR chapter XXII and its security program. The regulations include procedures for obtaining TSA approval and for conducting audits.

Section 1544.245 Passenger Vetting for Large Aircraft Operators

TSA would require large aircraft operators to contract with watch-list service providers to conduct watch-list matching of their passengers before allowing them to board. Passengers determined to be on the No Fly list would not be able to board an aircraft. Proposed § 1544.245 establishes the procedures that large aircraft operators would be required to follow in order to comply with the requirements for watch-list matching. Section II.A of this preamble provides a detailed discussion of the requirements and process.

Subpart F—Watch-List Service Providers

Under proposed § 1544.245, large aircraft operators would submit passenger information to watch-list service providers approved by TSA to conduct watch-list matching. Proposed part 1544, subpart F, sets forth the proposed requirements and procedures for entities to obtain and maintain TSA approval to conduct watch-list matching. TSA would require watch-list service providers to maintain high IT system security, to develop and implement a robust system capable of conducting automated watch-list matching quickly and continuous vetting of master passenger lists, to protect personally identifiable information and sensitive security information, and to adopt and implement a security program. Because of these requirements, TSA expects that limited number of entities would be approved to be watch-list service providers. TSA is also considering whether to limit in the final rule the number of watch-list service providers that it would approve. This would preserve the security of the watch-list by restricting the distribution of the watch-list to a small number of entities that would have access to the watch-list. TSA seeks comment on limiting the number of entities that would be approved watch-list service providers, including what criteria would be used to determine which applicants would be approved and how many watch-list service providers should be approved. For instance, TSA is considering criteria such as the level of IT system security, the type of watch-list matching system, and the ability of the service provider to quickly conduct the service.

Section 1544.501 Scope and Terms Used in This Subpart

Subpart F would apply to watch-list service providers who conduct watch-list matching on behalf of large aircraft operators. The definition of ''applicant'' would mean the entity that is seeking approval from TSA to conduct watch-list matching for large aircraft operators. ''Large aircraft operators'' are defined as those operators described in §§ 1544.101(b) or 1544.107. The final definition in proposed § 1544.501 is ''covered personnel.'' This term would mean an employee, officer, principal, or program manager of the watch-list service provider who collects, handles or uses passenger information or watch-list matching results or who conducts watch-list matching.

Section 1544.503 Qualification Standards for Approval

Proposed § 1544.503 would establish qualification standards for approval of applicants to conduct watch-list matching. The applicant would need to demonstrate the ability to receive passenger information from large aircraft operators and to conduct automated watch-list matching, including using continuously updated information from TSA, and to transmit the watch-list matching results to the large aircraft operator in a secure manner. The applicant would be required to obtain an attestation from an independent public accounting (IPA) firm that the system that the applicant would use to contain SSI and personally identifiable information collected as part of the watch-list matching process and to perform the necessary transmissions and matching are in compliance with the applicant's approved system security plan and TSA standards. In addition, TSA would require the applicant to successfully undergo a suitability assessment by TSA, and the applicant's covered personnel to successfully undergo a security threat assessment by TSA.

Finally, TSA would require the applicant to be incorporated within the United States, and the applicant's operations and systems for conducting the watch-list matching to be located in the United States. Under this proposal, eligibility to be a watch-list service provider would be limited to U.S. companies and U.S. subsidiaries of foreign corporations that are incorporated and located in the United States. This requirement would lessen the possibility that the SSI and the personally identifiable information that would be part of the watch-list matching process would be exported to a foreign country, which would limit the U.S. Government's ability to protect that information. The requirement would also allow for better TSA oversight and control over this watch-list matching process. Because the watch-list matching process involves personally identifiable information and SSI, TSA seeks comments on whether to require covered personnel to be U.S. citizens, U.S. nationals, or lawful permanent residents of the United States.

Section 1544.505 Application

Proposed § 1544.505 would require every applicant to submit an application in a form and manner prescribed by TSA. The application would include the following: (1) Applicant's full name, business address, business phone, and business email address; (2) a statement

and other supporting documentation providing evidence of the applicants' abilities and satisfaction of the required qualifications; (3) a system security plan that would satisfy standards set forth by TSA; and (4) a security program that meets the requirements set out in § 1544.515.

TSA proposes to require watch-list service providers to adopt a system security plan that satisfies TSA standards to ensure that watch-list service providers protect personally identifiable information and SSI. TSA standards would be based on the National Institute of Standards and Technology (NIST) Special Publication 800–53, ''Recommended Security Control for Federal Information Systems,'' (NIST Special Publication 800–53). The objective of NIST Special Publication 800–53 is to provide security controls that are consistent with and complementary to other established security standards. The catalog of security controls provided in NIST Special Publication 800–53 can be effectively used to demonstrate compliance with a variety of governmental, organizational, or institutional security standards. NIST Special Publication 800–53 is a widely recognized body of security criteria for Federal systems.

TSA standards for the systems security plan would likely be organized into three classes: Management, Operational, and Technical. Management controls would focus on security systems program risk. Operational controls would address security methods of mechanisms that people (as opposed to systems) would implement and execute. Technical controls would manage security controls that the watch-list service provider's systems would execute. These controls would provide automated protection from unauthorized access or misuse, facilitate detection of security violations, and support security requirements for applications and data.

Furthermore, the NIST Federal Information Processing Standards Publication 199, ''Standards for Security Categorization of Federal Information and Information Systems,'' February 2004, establishes security categories for both Federal information and information systems. The security categories are based on potential impact should certain events occur. Based on analysis of potential impacts, TSA believes that security categorization for confidentiality, integrity, and availability would be ''High.'' Consequently, security controls that should be applied are those that are commensurate with a High security category system. NIST Special Publication 800–53 contains implementation requirements for this categorization.

Under proposed §§ 1544.505 and 1544.515, TSA would require watch-list service providers to submit a system security plan as part of their application for TSA approval, and that system security plan would be part of the watch-list service providers' security program. TSA requests comments on which standards and controls in the NIST Special Publication 800–53 should apply to watch-list service providers' systems. TSA would develop the specific standards for the system security by reviewing all of the standards and controls in NIST Special Publication 800–53 and the comments received in response to this NPRM. Based on its review, TSA would issue a system security plan template that would incorporate the standards and controls that TSA determines would be appropriate to require of the watch-list service providers for their systems, similar to the process that TSA used to develop the information systems security standards for the Registered Traveler Interoperability Pilot.[32] Watch-list service providers would have an opportunity to comment on the template including the standards.

Section 1544.507 TSA Review and Approval

Section 1544.507 proposes procedures for TSA's review and approval of applications to perform watch-list matching. Upon receipt of the application, TSA would review the application and might conduct a site visit of the applicant's place of business to determine whether the applicant meets TSA's qualifications. Upon final review of the application by TSA, TSA would notify the applicant of approval or disapproval by written notice. After TSA approves an application and receives an attestation report for an IPA firm opining that the watch-list service provider's system is in compliance with its system security plan and TSA standards, the watch-list service provider would be able to begin passenger vetting pursuant to the regulations.

Section 1544.509 Reconsideration of Disapproval of an Application

Proposed § 1544.509 would allow an applicant whose application has been disapproved to petition for reconsideration of TSA's decision by submitting a written petition to the Assistant Secretary or designee within 30 days of the notice of disapproval. The petition for reconsideration would need to include the applicant's contact information and any documentation that the applicant believes may assist the Assistant Secretary in making a final decision. The Assistant Secretary or designee would also be able to request additional information from the applicant that may assist in disposing of the petition.

Section 1544.511 Withdrawal of Approval

Proposed § 1544.511 would state the procedure for TSA to withdraw the approval of the watch-list service provider if it ceases to meet the standards for approval, fails to fulfill its responsibilities, or if it is in the interest of security or the public. If TSA decides to withdraw the approval of a service provider, TSA would provide the service provider with a written notice of proposed withdrawal of approval, which would include the basis of the withdrawal of approval. The initial notice would become a final notice of withdrawal of approval if TSA does not receive a written petition of reconsideration within 31 days after the service provider's receipt of TSA's notice of proposed withdrawal of approval. Except in an emergency, during the 31 days prior to the TSA's receipt of the written petition, the service provider would be able to continue conducting watch-list matching. Additionally, if the watch-list service provider did file a timely written petition for reconsideration, the service provider would be able to continue conducting watch-list matching, unless and until the service provider receives a final notice of withdrawal of approval. Once the watch-list service provider received a final notice of withdrawal of approval, the service provider would not be able to continue conducting watch-list matching.

If TSA found an emergency situation requiring immediate withdrawal of the service provider's approval, the proposed rule would allow TSA to withdraw the approval without prior notice. The emergency notice would include the basis of the emergency withdrawal of approval and would be effective upon receipt by the watch-list service provider. As above, the service provider would be able to file a written petition for reconsideration within 30 days of receipt of the emergency notice; however, this would not stay the effective date of the emergency notice of withdrawal of approval.

[32] ''The Registered Traveler Security, Privacy and Compliance Standards for Sponsoring Entities and Service Providers,'' including all appendices, is available on TSA's Web site at *www.tsa.gov.*

Section 1544.513 Responsibilities of Watch-List Service Providers

Proposed § 1544.513 describes the responsibilities of watch-list service providers under this part. These responsibilities would ensure that the watch-list service providers are conducting watch-list matching in a manner that is consistent with TSA standards and that protects personally identifiable information and SSI. Under proposed § 1544.513, watch-list service providers would have the following responsibilities: (1) Adopt and carry out a security program that meets the requirements of proposed § 1544.515; (2) comply with the system security plan; (3) contract with an IPA firm to perform periodic attestation of their compliance with their systems security plan and TSA standards, as explained in further detail below; (4) identify, handle, and protect SSI in accordance with 49 CFR part 1520; (5) not disclose information received from or sent to the aircraft operator or to TSA, unless otherwise authorized by TSA; (6) allow TSA to inspect watch-list service providers to determine their compliance with TSA regulations and their security programs; (7) adopt and make public a privacy policy; (8) provide documentation establishing compliance if requested by TSA; and (9) only use the watch-list for watch-list matching under proposed part 1544, subpart F.

Because watch-list matching involves security and privacy issues, TSA proposes to require watch-list service providers to contract with a qualified IPA firm to perform an attestation of their compliance with their system security plan and TSA standards. TSA would consider an IPA firm qualified if their selection is consistent with the American Institute of Certified Public Accountants' (AICPA) guidance regarding independence, and the firm demonstrates the capability to assess information system security and process controls. TSA would reserve the right to reject the IPA firm's attestation if, in TSA's judgment, the IPA firm is not sufficiently qualified to perform these services.

TSA proposes to require that the IPA firm conduct the attestation in accordance with AICPA ''Statement for Standards on Attestation Engagements'' No. 10 and TSA standards. TSA would also require the IPA firm to prepare and submit a report, in a form and manner prescribed by TSA.

As stated above, TSA would require watch-list service providers to obtain an attestation report prior to commencement of operations to conduct watch-list matching. Additionally, TSA would require watch-list service providers to obtain periodic attestation reports for the duration of their watch-list matching. TSA would require watch-list service providers to undergo an attestation every year and the IPA firm would submit an attestation report to TSA approximately 12 months after submission of the previous attestation report.

Section 1544.515 Security Program

Proposed § 1544.515 would set forth the content requirements for a security program. These requirements would ensure that watch-list service providers have the capability and proper procedures to conduct watch-list matching under this subpart. Watch-list service providers would be required to adopt and carry out security programs that include the procedures for receiving passenger information from the aircraft operators, conducting watch-list matching of the passengers, including continuous vetting of passengers, and transmitting the watch-list matching results to the operator. The security program would also contain procedures for the service provider to contact TSA for resolution of passengers who are potential matches to the watch-list.

Because a watch-list service provider's system would contain personally identifiable information about passengers and SSI, the security program would include various security requirements to protect this information. These requirements include procedures for compliance with the watch-list service provider's system security plan, and procedures for the physical security of the system used to conduct watch-list matching.

Under proposed § 1544.515, TSA would require service providers to provide personnel who are available to TSA 24-hours a day, 7-days a week. TSA would operate on a 24-hour basis, and therefore TSA would require the service providers to be available at all times for resolution of potential watch-list matches.

The service provider would also be responsible for training its covered personnel on the requirements in the TSA regulations and the security program. TSA training requirements would also include topics related to identifying, handling, and protecting SSI and personally identifiable information, and the procedures used to perform the watch-list matching and to resolve any potential matches.

Subpart G—Security Threat Assessments for Large Aircraft Flight Crew, Applicants to Become TSA-Approved Auditors, and Watch-List Service Providers Covered Personnel

As stated in section II of the preamble, TSA proposes to require that flight crews for large aircraft operators, individuals authorized to perform screening functions, applicants to become TSA-approved auditors, and key employees to watch-list service providers undergo a TSA security threat assessment (STA). The STA would include fingerprint-based criminal history records checks and other analyses, including checks of appropriate terrorist watch-lists and other databases. The proposed information required and the procedures used for the STA are very similar to the procedures that apply to applicants for a hazardous materials endorsement (HME) on their commercial driver's licenses, or a Transportation Worker Identification Credential (TWIC) under 49 CFR part 1572. The proposed rule would add subpart G to part 1544 to set forth the requirements and procedures that would apply to these individuals.

Section 1544.601 Scope and Expiration

Subpart G would apply to flight crews of large aircraft operators, individuals authorized to perform screening functions, applicants to become TSA-approved auditors, and key employees of watch-list service providers that TSA would require to undergo security threat assessments. The same requirements and procedures would apply to all of these individuals. However, flight crew members or individuals authorized to perform screening functions who have undergone a criminal history records check under § 1544.229 or 1544.230 would be grandfathered on a limited basis, such that they would not be required to undergo a STA until five years after TSA provided the results of their original CHRC.

A Determination of No Security Threat would be valid for five years unless TSA withdraws the determination. Prior to the expiration of the five years, TSA would require flight crew members, applicants to become TSA-approved auditors, and watch-list service providers' key employees to reapply for a new STA to continue with their No Security Threat status.

Section 1544.603 Enrollment for Security Threat Assessments

For TSA to conduct a comprehensive STA, individuals would need to provide

TSA with biographic information and their fingerprints. TSA is proposing § 1544.603 to require individuals to provide biographic and biometric information necessary for TSA to complete the fingerprint-based checks and other analyses. These applicants would provide the information necessary for enrollment, including personal information such as gender and date of birth.

To ensure that correct and accurate information is provided to TSA, the application would include, and the individual would sign, a statement providing that the statements made on the application are true, complete, and correct pursuant to penalty of law. TSA would also require the individual to include a statement that he or she has not been convicted, or found not guilty by reason of insanity, of any of the disqualifying crimes listed in § 1544.229(d) during the 10 years before submission of the individual's application. These are the same disqualifying criminal offenses that currently apply to flight crew members under § 1544.230 and to many persons at airports under § 1542.209. The statement would also include language that the individual understands that he or she must immediately inform TSA of any conviction of a disqualifying offense that occurs while he or she is a TSA-approved auditor or a watch-list service provider.

TSA anticipates that the individuals would provide their information though an enrollment provider under contract with TSA. The enrollment provider would verify the identity of the individual, advise the individual that a copy of the criminal record would be provided if requested, and identify a point of contact for any questions the individual may have, prior to fingerprinting. The enrollment provider would then collect, control, and process the fingerprints of the individual and submit the data and the application to TSA.

Section 1544.605 Content of Security Threat Assessment

TSA proposes that the STA would include a criminal history records check, other analyses, and a final disposition.

Section 1544.607 Criminal History Records Check

As part of the security threat assessment, TSA proposes to perform a CHRC. TSA would submit the fingerprints provided by the individuals as part of the enrollment process to the Federal Bureau of Investigation's (FBI) Criminal Justice Information Services (CJIS) to obtain any criminal history records that correspond to the fingerprints. Upon receipt of the results from FBI/CJIS, TSA would adjudicate the results based on the disqualifying criminal offenses in § 1544.229(d).

At times, a CHRC may result in data that discloses an arrest for a disqualifying offense, but does not provide a disposition for the offense. The individual would be required to provide further documentation that the arrest did not result in a disqualifying offense. A conviction of a disqualifying offense would be reason to disqualify the individual. However, if the disposition did not result in a conviction, or in a finding of not guilty by reason of insanity, of a disqualifying offense, the individual would then not be disqualified under this section, provided that the applicant explains how the arrest was resolved.

If the results received from the FBI provide a reason for disqualifying the individual, TSA would notify the individual of the disqualifying reasons. The individual may request a copy of the record on which TSA's determination is based. The individual would be able to contact the FBI in order to complete or correct his or her record, if the individual contacts TSA within 30 days of being notified that the FBI record disclosed a disqualifying offense. Otherwise, TSA would make a Final Determination of Threat Assessment.

TSA also proposes to require a continuing obligation of individuals who receive a Determination of No Security Threat, by requiring immediate notice (within 24 hours) to TSA of any conviction of a disqualifying offense that occurs while he or she holds a determination of no security threat that has not expired.

Section 1544.609 Other Analyses

TSA proposes to conduct other analyses through domestic and international government databases to confirm the individual's identity and whether he or she poses a security threat. These would include checks against terrorist-related and immigration databases, as well as other governmental information sources such as those that identify open wants and warrants. TSA would adjudicate the results of all searches conducted including searches that reveal extensive foreign or domestic criminal convictions, convictions for a serious crime not listed in 49 CFR 1572.103, or periods of foreign or domestic imprisonment that exceeds 365 consecutive days.

If an individual who has successfully undergone an initial security threat is subsequently found not to meet TSA's criteria, TSA may withdraw its Determination of No Security Threat under proposed § 1544.613.

Section 1544.611 Final Disposition

TSA proposes that after conducting a CHRC and other analyses, it would serve a Determination of No Security Threat if TSA determines that an individual meets the STA standards. TSA also proposes to serve an Initial Determination of Threat Assessment on the individual if TSA determines that the individual does not meet the STA standards. The Initial Determination of Threat Assessment would include the following:

1. A statement that TSA has determined that the individual poses, or is suspected of posing, a security threat warranting disapproval of the application for which a STA is required;
2. The basis for the determination;
3. Information about how the individual may appeal the determination, as described in § 1544.615; and
4. A statement that if the individual chooses not to appeal TSA's Initial Determination within 30 days after receipt of the Initial Determination, or does not request an extension of time within 30 days after receipt of the Initial Determination in order to file an appeal, the Initial Determination becomes a Final Determination of Security Threat Assessment.

TSA also proposes to serve a Withdrawal of the Initial Determination of Threat Assessment or a Withdrawal of Final Determination of Threat Assessment on the individual, if the appeal results in a finding that the individual does not pose a threat to security.

Section 1544.613 Withdrawal of Determination of No Security Threat

TSA would be able to withdraw a Determination of No Security Threat at any time under proposed § 1544.613, if it determines that a TSA-auditor or watch-list service provider poses, or is suspected of posing, a security threat warranting withdrawal of the Determination of No Security Threat. If TSA determines that the individual does not meet the STA standards, TSA would serve a withdrawal of the Determination of No Security Threat on the individual. The notice would include the following:

1. A statement that TSA has determined that the individual poses, or is suspected of posing, a security threat warranting disapproval of the application for which a STA is required;
2. The basis for the determination;

3. Information about how the individual may appeal the determination; and

4. A statement that if the individual chooses not to appeal TSA's Initial Determination within 30 days after receipt of the withdrawal of the Determination of No Security Threat, or does not request an extension of time within 30 days after receipt of the withdrawal of the Determination of No Security Threat to file an appeal, the withdrawal of the Determination of No Security Threat becomes a Final Determination of Security Threat Assessment.

TSA also proposes to serve a Withdrawal of Final Determination of Threat Assessment on the individual, if the appeal results in a finding that the individual does not pose a threat to security.

Section 1544.615 Appeals

If the individual appeals the Initial Determination of Threat Assessment or a Withdrawal of the Determination of No Security Threat as discussed above, the procedures in 49 CFR part 1515 would apply. The section-by-section analysis of part 1515 discusses which provisions of part 1515 would apply.

Section 1544.617 Fees

To comply with the mandates of sec. 520 of the 2004 DHS Appropriations Act, 2004 (Pub. L. 108–90, 117 Stat. 1137, 1156, Oct. 1, 2003), TSA proposes to establish fees for individuals who are required to complete background investigations under this program.

Costs

TSA proposes that individuals required to undergo a STA would be required to pay a fee to cover the following costs:

Operational year	1st year	2nd year	3rd year	4th year	5th year	Total
Estimated Annual Applicants	27,918	21,034	10,074	9,975	10,115	79,116
Cost Components						
Enrollment Costs	$418,776	$315,507	$151,108	$149,626	$151,728	$1,186,745
Security Threat Assessment Cost						
FBI Criminal History Records Check	481,592	362,833	173,774	172,070	174,488	1,364,757
Other analyses	139,592	105,169	50,369	49,875	50,576	395,582
System Costs	0	0	0	0	0	0
Personnel Costs	579,593	579,593	579,593	579,593	579,593	2,897,965
Security Threat Assessment Cost-Subtotal	1,200,777	1,047,594	803,736	801,539	804,657	4,658,303
Grand Totals	1,619,553	1,363,102	954,844	951,164	956,385	5,845,049

1. *Enrollment.* Part of the fee for the STA covers the cost for TSA or its agent to enroll applicants, collect, format, and process the required information and to submit the information accordingly. The STA process would require individuals who apply for a STA to submit their fingerprints and biographic information to TSA or its agent. Based on TSA's research of the costs of both commercial and government fingerprint and information collection services, as well as a prior competitive bidding and acquisition process for similar services, TSA preliminarily estimates that the per applicant cost to collect and transmit fingerprints and other required data electronically is likely to be $15. TSA may adjust this estimated amount upwards or downwards in the final rule based on its final calculations of its costs. This cost would also cover related administrative support, help desk services, quality control, and related logistics.

2. *Security Threat Assessment.* Part of the fee for the STA covers the cost for TSA to conduct a STA. For the STA, each applicant's information would be checked against multiple databases and other information sources so that TSA would be able to determine whether the applicant poses a security threat that warrants denial of approval. The threat assessment would include an appeals process for individuals who believe that the records upon which TSA bases its determination are incorrect.

As part of the STA, TSA would submit fingerprints to the FBI to obtain any criminal history records that correspond to the fingerprints. The FBI is authorized to establish and collect fees to process fingerprint identification records. See Title II of the Judiciary Appropriations Act, 1991 (Pub. L. 101–515, Nov. 5, 1990, 104 Stat. 2112), codified in a note to 28 U.S.C. 534. Pursuant to Criminal Justice Information Services Information Letter 07–3 (Jun. 1, 2007), this fee is currently set at $17.25, effective October 1, 2007. If the FBI increases or decreases its fee to complete the criminal history records check, the increase or decrease would apply to this regulation on the date that the new FBI fee becomes effective.

TSA would need to implement and maintain the appropriate systems, resources, and personnel to ensure that fingerprints and applicant information are appropriately linked and that TSA would be able to receive and act on the results of the STA. TSA would need to have the necessary resources—including labor, equipment, database access, and overhead—to complete the STA process.

TSA estimates that the total cost of threat assessment services will be $4,658,303 over five years. This estimate includes $1,364,757 for FBI criminal history records checks, $395,582 for other analyses, and $2,897,965 for personnel necessary to facilitate the STA processing. These estimates are initial estimates and the final costs may be higher or lower depending on the final calculations which would be discussed in the final rule.

Population

TSA estimates that approximately 79,116 applicants would be required to complete a STA during the first five years of the program. This estimate is derived from the following population figures that have been gathered for specific segments of the regulated population.

Operational year	1st year	2nd year	3rd year	4th year	5th year	Total
Flight Crew Estimate*						
Part 91s	19,440	16,189	5,427	5,503	5,580	52,139
Part 125s	293	244	82	83	84	785
Part 135s	7,886	4,586	4,550	4,374	4,436	25,831
Flight Crew Estimate-Subtotal	27,618	21,018	10,058	9,960	10,100	78,755
Third-Party Auditor Estimate	150	8	8	8	8	180
Watch-list Service Provider Estimate	150	8	8	8	8	182
Grand Total	27,918	21,034	10,074	9,975	10,115	79,116

* Cites are to FAA regulations, 14 CFR.

Total Fee

TSA would charge a fee to recover its STA and other program management and oversight costs associated with the implementation of this rule. TSA estimates that applicant charge would be $74 per applicant. The estimate is based on the following preliminary calculations by TSA: the cost of services provided ($5,845,049) divided by the estimated population (79,116) receiving the service would equal $74 per applicant. As TSA continues to review and develop the STA program for the large aircraft program and to work to minimize all costs, some or all of its preliminary calculations may change resulting in an increase or decrease of the per applicant cost. In the final rule, TSA will publish the fee based on its final calculations, and the fee may remain $74 or it may be more or less.

TSA proposes to establish the $74 fee to recover all enrollment costs and STA costs. As part of the $74 fee, TSA would collect the current FBI Fingerprinting Fee of $17.25 for the criminal history records checks in the STA process and forward the fee to the FBI. If the FBI increases or decreases that fee in the future, TSA would collect the increased or decreased fee.

Additionally, pursuant to the Chief Financial Officers Act of 1990 (Pub. L. 101–576, Nov. 15, 1990, 104 Stat. 2838), DHS is required to review fees no less than every two years. 31 U.S.C. 3512. Upon review, if it is found that the fees are either too high (i.e., total fees exceed the total cost to provide the services) or too low (i.e., total fees do not cover the total costs to provide the services), the fee would be adjusted. Finally, TSA would be able to adjust the fees for inflation following publication of the final rule. If TSA were to adjust the fees for this reason, TSA would publish a Notice in the **Federal Register** notifying the public of the change.

Section 1544.619 Notice to Employers

TSA would notify employers of flight crew members, individuals authorized to perform screening functions, and watch-list service provider covered personnel of the results of the security threat assessment under proposed § 1544.619. This notification would allow aircraft operators or watch-list service providers to know whether an individual may be employed to perform the functions that would require a successful STA. Although TSA would notify an aircraft operator or a watch-list service provider that an individual received a Final Determination of Threat Assessment, TSA would not inform the aircraft operator or watch-list service provider of the basis of that determination to protect the privacy of that individual.

TSA proposes to require aircraft operators and watch-list service providers to retain the notification of the results of the STA for five years. The notification would serve as documentation that an individual has undergone a STA if the aircraft operator or watch-list service provider is asked to produce such documentation as part of an audit or inspection.

Part 1515—Appeals and Waiver Procedures for Security Threat Assessment for Individuals

For individuals who may want to appeal an Initial Determination of Threat Assessment, a Final Determination of Threat Assessment, or a Withdrawal of an Initial or Final Determination of Threat Assessment, TSA proposes to apply the appeals procedures in current part 1515. These are the same procedures that apply to applicants for a hazardous materials endorsement on their commercial driver's license or a Transportation Worker Identification Credential under 49 CFR part 1572, or for certain air cargo workers under 49 CFR part 1540, subpart C.

Section 1515.1 Scope

TSA proposes to add individuals subject to proposed part 1544, subpart G to the scope of part 1515 to provide these individuals with a process to appeal an Initial Determination of Threat Assessment, a Final Determination of Threat Assessment, or a Withdrawal of an Initial or Final Determination of No Security Threat.

Section 1515.5 Appeal of Initial Determination of Threat Assessment Based on Criminal Conviction, Immigration Status, or Mental Capacity

Because the STAs for flight crew members, individuals authorized to perform screening functions, auditors, and watch-list service provider covered personnel involve criminal history records checks, TSA proposes to apply the procedures in § 1515.5 for these individuals to appeal an Initial Determination of Threat Assessment based on a disqualifying criminal offense.

An individual would be able to appeal an Initial Determination of Threat Assessment under § 1515.5 if he asserts that he does not have a disqualifying criminal offense. These procedures would also apply to appeals of a Withdrawal of Determination of No Security Threat based on a disqualifying criminal offense. An individual would initiate an appeal by providing TSA with a written request for the releasable materials upon which the Initial Determination was based, or by serving TSA with a written reply to the Initial Determination. The individual would be required to serve TSA with the written request for the releasable material or the written reply with 60 days after the date of service of the Initial Determination. TSA's response would be due no later than 60 days after the individual is served with a written request or the written reply.

In response, TSA cannot provide any classified information, as defined under 6 CFR part 7 (DHS Classified National Security Information); or under E.O. 12958, Classified National Security Information, as amended by E.O. 13292 (68 FR 15315, Mar. 28, 2003); and E.O. 12968, Access to Classified Information, (60 FR 40245, Aug, 7, 1995); or any other information or material protected from disclosure by law. Classified national security information is

information that the President or another authorized Federal official has determined, pursuant to E.O. 12958, as amended, and E.O. 12968, must be protected against unauthorized disclosure to safeguard the security of American citizens, the country's democratic institutions, and America's participation within the community of nations. *See* 60 FR 19825 (Apr. 20, 1995). E.O. 12958, as amended, and E.O. 12968 prohibit Federal employees from disclosing classified information to individuals who have not been cleared to have access to such information under the requirements of that E.O. *See* also 6 CFR part 7. If TSA determines that an applicant is requesting classified materials, TSA would deny the request for classified information.

In the written reply to the Initial Determination, the individual should explain why he or she is appealing the Initial Determination and provide evidence that the Initial Determination was incorrect. In an applicant's reply, TSA would consider only material that is relevant to whether he or she meets the standards for the STA. If an individual does not dispute or reply to the Initial Determination, the Initial Determination would become a Final Determination of Threat Assessment.

An individual would have the opportunity to correct a record on which an adverse decision is based. As long as the record is not classified or protected by law from release, TSA would notify the applicant of the adverse information and provide a copy of the record. If the individual wishes to correct the inaccurate information, he or she would need to provide written proof that the record is inaccurate. The individual should contact the jurisdiction responsible for the inaccurate information to complete or correct the information contained in the record. The individual would be required to provide TSA with the revised record or a certified true copy of the information from the appropriate entity before TSA can reach a determination that the applicant does not pose a security threat.

In considering an appeal, the Assistant Secretary would review the Initial Determination, the materials upon which the Initial Determination is based, the applicant's reply and other materials or information available to TSA. The Assistant Secretary would be able to affirm the Initial Determination by concluding that an individual poses a security threat. If this occurs, TSA would serve a Final Determination of Threat Assessment on the applicant. The Final Determination would include a statement that the Assistant Secretary has reviewed the Initial Determination, the materials upon which the Initial Determination was based, the reply, if any, and other available information and has determined that the individual has a disqualifying criminal offense. For purposes of judicial review, a Final Determination based on a disqualifying criminal offense is a final TSA order.

If TSA determines that the individual does not have a disqualifying criminal offense, TSA would serve a Withdrawal of the Initial Determination on the individual and a Determination of No Security Threat on the individual's employer if the individual is a flight crew member, an individual authorized to perform screening functions, or a watch-list service provider covered personnel.

As noted above, TSA is proposing to apply to flight crew members, individuals authorized to perform screening functions, auditors, and watch-list service provider covered personnel the same disqualifying criminal offenses that now apply to certain other aviation workers under 49 CFR 1542.209 and 1544.229. These sections are based on a statutory provision, 49 U.S.C. 44936. The appeal process in § 1515.5 addresses whether or not the applicant has a disqualifying criminal offense, that is, whether the applicant has a conviction or a finding of not guilty by reason of insanity of one or more of the crimes listed in the rule within the time specified in the rule. If the individual does have a disqualifying criminal offense, there is no waiver. Accordingly, the waiver provisions that apply to applicants for an HME or a TWIC in § 1515.7 would not apply.

Section 1515.9 Appeal of Security Threat Assessment Based on Other Analyses

The STA for flight crew members, individuals authorized to perform screening functions, auditors, and key employees of watch-list service providers would also include other analyses, including checks of appropriate terrorist watch-lists and related databases under proposed § 1544.609. TSA proposes to use the appeals procedures in § 1515.9 for individuals who wish to appeal an Initial Determination of Threat Assessment or a withdrawal of a Determination of No Security Threat based on the other analyses.

The procedures in § 1515.9 are similar to the procedures in § 1515.5. However, unlike a Final Determination of Security Threat Assessment based on a disqualifying criminal offense, a Final Determination based on other analyses would not be a final TSA order unless the individual fails to file an appeal to an administrative law judge (ALJ) under § 1515.11.

Further, because other analyses are often based on classified and other sensitive information, there would be limits on what TSA would release in response to a request for materials. If TSA determines that an applicant who is appealing the other analyses is requesting classified materials, TSA would deny the request for classified information.

The denial of access to classified information under these circumstances is also consistent with the treatment of classified information under the Freedom of Information Act (FOIA), which specifically exempts such information from the general requirement under FOIA that government documents are subject to public disclosure. 5 U.S.C. 552(b)(1).

Similarly, under 49 U.S.C. 114(s), the Assistant Secretary of TSA shall, notwithstanding the FOIA statute, prescribe regulations prohibiting the public disclosure of information that would be detrimental to the security of transportation. Information that is designated as SSI must only be disclosed to people with a need to know, such as those needing to carry out regulatory security duties. 49 CFR 1520.11. The Assistant Secretary has defined information concerning threats against transportation as SSI by regulation. *See* 49 CFR 1520.5. Thus, information that TSA obtains indicating that an applicant poses a security threat, including the source of such information and the methods through which the information was obtained, will commonly be at least SSI and may be classified information. The purpose of designating such information as SSI is to ensure that persons who seek to harm the transportation system do not obtain access to information that will enable them to evade the government's efforts to detect and prevent their activities. Disclosure of this information, especially to an individual specifically suspected of posing a threat to the transportation system, is precisely the type of harm that Congress sought to avoid by authorizing the Assistant Secretary to define and protect SSI.

Other pieces of information also are protected from disclosure by law due to their sensitivity in law enforcement and intelligence. In some instances, the release of information about a particular individual or his or her supporters or associates could have a substantial adverse impact on security matters. The release by TSA of the identities or other information regarding individuals related to a security threat

determination could jeopardize sources and methods of the intelligence community, the identities of confidential sources, and techniques and procedures for law enforcement investigations or prosecution. *See* 5 U.S.C. 552(b)(7)(D) and (E). Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by Federal law enforcement agencies, by revealing the course and progress of an investigation. In certain instances, release of information could alert co-conspirators to the extent of the Federal investigation and the imminence of their own detection, thus provoking flight.

For the reasons discussed above, TSA would not provide classified information or SSI to an individual, and TSA reserves the right to withhold SSI or other sensitive material protected from disclosure under law. As noted above, TSA expects that information would be withheld only for determinations based on § 1572.107, which list databases that indicate potential terrorist activity or threats.

The procedures for appeals of Initial Determination of Threat Assessment would also apply to appeals of a Withdrawal of Determination of No Security Threat.

Section 1515.11 Review by Administrative Law Judge and TSA Final Decision Maker

An individual who has received an Initial Determination of Threat Assessment or a withdrawal of Determination of No Security Threat based on the other analyses under § 1544.609 would first appeal that determination using the procedures in § 1515.9. If after that appeal TSA continues its determination that the applicant is not qualified, the applicant would be able to seek review by an ALJ under § 1515.11.

The procedures would provide an individual with 30 calendar days from the date of service of the determination to request a review. An ALJ who possesses the appropriate security clearances to review classified information would conduct the review. Section 1515.11 provides detailed requirements for the conduct of the review, such as information that individuals must submit, requests for extension of time, and the duties of the ALJ.

Within 30 calendar days after the conclusion of the hearing, the ALJ would issue an unclassified decision to the parties. The ALJ may issue a classified decision to TSA. The ALJ may decide that the decision was supported by substantial evidence on the record or that the decision was not supported by substantial evidence on the record. If neither party requests a review of the ALJ's decision, TSA would issue a final order either granting or denying the waiver or the appeal.

Either TSA or the individual would be able to petition for review of the ALJ's decision to the TSA Final Decision Maker. The TSA Final Decision Maker would issue a written decision within 60 calendar days after receipt of the petition or within 30 days of receipt of the other party's response, if a response is filed, unless a longer period is required. The TSA Final Decision Maker may issue an unclassified opinion to the parties and a classified opinion to TSA. For purposes of judicial review, the decision of the TSA Final Decision Maker would be a final agency order.

Part 1550—Aircraft Security Under General Operating and Flight Rules

Section 1550.5 Operations Using a Sterile Area

TSA proposes to remove the reference to scheduled passenger operations, public charter passenger operations, and private charter passenger operations, and replace the language with ''aircraft operators that have a security program'' to maintain consistency between regulations. TSA also proposes to delete the compliance date section since the date has passed. Operators that must follow this section should currently be adhering to the applicable regulations.

Section 1550.7 Operations in Aircraft Over 12,500 Pounds

TSA proposes to amend references to ''12,500 pounds or more,'' and replace the language with ''over 12,500 pounds'' to maintain consistency between regulations. The proposed changes would provide that § 1550.7 only applies to aircraft over 12,500 pounds, excluding operations specified in § 1550.5 and operations under a security program under part 1544 and 1546. The aircraft that remain subject to this regulation are the foreign aircraft with an MTOW of over 12,500 pounds that are not an all-cargo operation or are under a security program under part 1546.

IV. Regulatory Requirements

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations.

This proposed rule contains amended information collection activities subject to the PRA. TSA is revising a collection that OMB has previously approved and assigned OMB Control Number 1652–0003 (Aircraft Operator Security). Accordingly, TSA has submitted the following information requirements to OMB for its review.

Title: Large Aircraft Security Program.

Summary: TSA proposes to amend current aviation transportation security regulations (49 CFR part 1544) to enhance and improve the security of GA by issuing this NPRM that would require revisions to a currently approved information collection. Through this NPRM, TSA is proposing the following seven required information collections in addition to those already approved under this OMB control number: (1) Require security programs for all operators of aircraft that have a maximum certificated takeoff weight of over 12,500 pounds, except for aircraft operators under a full program, full all-cargo program, limited program, or certain government aircraft (''large aircraft''); (2) require that aircraft operator flight crews, individuals authorized to perform screening functions, TSA-approved auditors, and TSA-approved watch-list service providers' key personnel undergo STAs that include a fingerprint-based criminal history records check; (3) require large aircraft operators to submit to an independent, third-party audit conducted by TSA-approved auditors (i.e., large aircraft operators would be required to maintain records, and provide auditors access to their records, equipment, and facilities necessary for the auditor to conduct an audit); (4) require TSA oversight of auditors (i.e., TSA-approved auditors would submit to any TSA inspection, include copying of their records, to determine their compliance with TSA regulations); (5) require large aircraft operators to transmit passenger information to TSA-approved watch-list service providers to conduct watch-list matching against the No-Fly and Selectee Lists; (6) require auditors and watch-list service providers to submit applications to become TSA-approved; and (7) require watch-list service providers to submit security programs for approval.

Use of: The LASP requirement would replace some existing security programs for large aircraft operators and would include additional GA operators, such that TSA would apply consistent

security procedures to operators of large aircraft. TSA would use the identifying information and fingerprints collected from flight crew members, auditors, and key employees of TSA-approved watch-list service providers to conduct STAs that include a criminal history records check. The TSA-approved auditors would review and inspect the records aircraft operators would be required to maintain to demonstrate compliance with TSA requirements during their audits. TSA would inspect the records maintained by the auditors to determine their compliance with TSA regulations and to ensure that auditors have the qualification to produce useful audits to TSA and the aircraft operators. The watch-list service providers would use the passenger information transmitted by the aircraft operators to conduct watch-list matching against the No Fly and Selectee Lists. TSA would use the applications submitted by auditors and watch-list service providers to ensure the entities are eligible and qualified. TSA would require watch-list service providers to adopt and carry out a security program to ensure that they are taking appropriate security measures and are consistent and accurate in performance of their duties.

Respondents (including number of): The likely respondents to this proposed information requirement are: operators of aircraft that have a maximum certificated takeoff weight of over 12,500 pounds, except for aircraft operators under a full program, full all-cargo program, limited program, or certain government aircraft (''large aircraft''); individuals authorized to perform screening functions; entities seeking to become TSA-approved auditors; and entities seeking to become TSA-approved watch-list matching service providers and key personnel.

Frequency: The proposed recordkeeping requirements would be ongoing and continuous. The requirement that operators ensure their flight crewmembers, other employees, and individuals authorized to perform screening functions undergo a security threat assessment, which includes a criminal history records check, would be a frequency of every five years. The aircraft operators would be required to transmit passenger information to watch-list service providers to conduct watch-list matching on a per flight basis. The watch-list service providers would be required to report matches to the Federal watch-list as matches occur. Individuals and firms desiring to become TSA-approved auditors as well as firms seeking approval to become watch-list service providers would be required to send TSA an application only once. Watch-list service providers also would be required to submit a security program to TSA once, and would be required to ensure their covered personnel undergo a STA conducted by TSA once every five years. Auditors would be required to submit an audit report to the aircraft operator and to TSA for every audit that they perform.

Annual Burden Estimate: TSA is amending this information collection to reflect the addition of approximately 9,544 new respondents, as well as new collection burdens, for an estimated total 10,374 respondents. Over three years, the new population includes 9,363 new large aircraft operators, 166 TSA-approved auditors, and 15 watch-list service providers. TSA estimates that the large aircraft operators would spend approximately 1 million hours annually establishing and/or maintaining appropriate security programs, completing passenger watch-list matching in the prescribed manner, completing STAs on flight crewmembers, and completing third party audits of established security programs.

TSA estimates that the TSA-approved auditors would spend approximately 19,660 hours annually, with an annual 4,990 responses, submitting application materials and profiles, completing STAs on their employees, and writing up their findings and submitting copies to the aircraft operator and TSA. TSA estimates that the total annual hour burden for watch-list service providers would be approximately 88 hours, which includes submitting application materials (including a security program and profile information) and conducting STAs on their employees in order to receive TSA approval.

TSA is also amending the cost burden for this information collection to reflect an expanded respondent population and new information collection costs. As a result of the LASP, non-AOSSP operators would be required to pay fees to submit passenger information to watch-list service providers, conduct security threat assessments on their flight crew members and individuals authorized to perform screening functions, and contract with TSA-approved auditors. TSA-approved auditors and watch-list service providers would also pay fees to conduct STAs on their employees. In total, these requirements would add $10.5 million to the average annual cost of this information collection, bringing the total annual cost of the information collection (which includes costs to AOSSP aircraft operators) to $12.9 million.

TSA is soliciting comments to—

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

(2) Evaluate the accuracy of the agency's estimate of the burden;

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

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirements by December 29, 2008. Direct the comments to the address listed in the **ADDRESSES** section of this document, and fax a copy of them to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395-5806. A comment to OMB is most effective if OMB receives it within 30 days of publication. TSA will publish the OMB control number for this information collection in the **Federal Register** after OMB approves it.

As protection provided by the Paperwork Reduction Act, as amended, 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.

B. Regulatory Impact Analyses

1. Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, OMB directs agencies to assess the effect of regulatory changes on international trade. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the

expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

TSA has prepared a separate detailed analysis document, which is available to the public in the docket. With respect to these analyses, TSA provides the following conclusions and summary information.

- TSA has determined that this is an economically significant rule within the definition of E.O. 12866, as estimated annual costs or benefits exceed $100 million in any year. The mandatory OMB Circular A–4, Regulatory Analysis, accounting statement is included in the separate complete analysis and is not repeated here.
- As a normal practice, we provide the Initial Regulatory Flexibility Analysis (IRFA) to the public, but withhold the final formal certification of determination as required by the RFA until after we receive public comments and publish the Final Regulatory Flexibility Analysis. The IRFA reflects substantial gaps in data where TSA was unable to identify either impacted entities or revenues for those that are businesses. TSA has provided the analysis based upon available data and requests public comment on all aspects of the analysis. As a result, TSA makes no preliminary finding as to whether there is or is not a significant impact on a substantial number of small businesses.
- The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this notice of proposed rulemaking and has determined this rule would not have an adverse impact on international trade.
- The regulatory evaluation provides the required written assessment of Unfunded Mandates. The proposed rule is not likely to result in the expenditure by State, local, or tribal governments, in the aggregate, of $100 million or more annually (adjusted for inflation). However, because the rule is economically significant as defined by E.O. 12866, it does have an unfunded mandate impact on the economy as a whole.

2. Executive Order 12866 Assessment Benefits

The proposed rule would yield benefits in the areas of security and quality governance. The security and governance benefits are four-fold. First, the rule would enhance security by expanding the mandatory use of security measures to certain operators of large aircraft that are not currently required to have a security plan. These measures would deter malicious individuals from perpetrating acts that might compromise transportation or national security by using large aircraft for these purposes. Second, it would harmonize, as appropriate, security measures used by a single operator in its various operations and between different operators. Third, the new periodic audits of security programs would augment TSA's efforts to ensure that large aircraft operators are in compliance with their security programs. Finally, it would consolidate the regulatory framework for large aircraft operators that currently operate under a variety of security programs, thus simplifying the regulations and allowing for better governance. When taken together, the security-related benefits would act as part of the larger benefits yielded by TSA's layered security approach.

At this time, TSA cannot quantify these benefits; however, TSA conducted a ''break-even'' analysis to determine what reduction of overall risk of a terror attack and resulting reduction in the expected losses for the nation due to a terror attack would be necessary in order for the expected benefits of the rule to exceed the costs. Because the types of attacks that would be prevented by this regulation vary widely in their intensity and effects, depending both on the intent of those undertaking the attack and their effectiveness in completing it, TSA considered three example attack scenarios and the monetized losses associated with each. Similar break-even analyses have been undertaken in support of other DHS rules, and TSA has coordinated the current analysis with these earlier ones, with the aim of maintaining consistency in DHS analyses and results. In the case of the LASP proposed rule, some of the types of terror attacks that might be undertaken using aircraft operated by those covered under the proposed rule are similar to those that were considered by U.S. Customs and Border Protection (CBP), and this similarity has informed the current analysis and examples. For one scenario, however, TSA has relied on DHS research into the effects of successful delivery of a weapon of mass destruction (WMD) by an aircraft of the type affected by the proposed rule. The conclusions of this DHS research are consistent with results from existing academic and think tank research into similar issues.

In order to compare the losses associated with each scenario to the cost of the proposed rule, TSA converted casualties into a monetary total. TSA used the Value of a Statistical Life (VSL) of $5.8 million that is used by the Department of Transportation (DOT), and which was recently revised to reflect current academic and other research into this quantity.[33] The VSL represents an individual's willingness to pay to avoid a fatality onboard an aircraft, based on economic studies of the value individuals place on small changes in risk. Similarly, based on the same DOT guidance, TSA valued moderate injuries at 1.55 percent of the VSL and severe injuries at 18.75 percent of the VSL. *TSA emphasizes that the VSL is a statistical value of a unit decrease in expected fatalities to be used for regulatory comparison, and does not suggest that the actual value of a particular individual's life can be stated in dollar terms.*

The following paragraphs present a description of the four scenarios considered by TSA with corresponding estimates of their monetary consequences. These scenarios make up a wide range of possible consequences, which reflects the varied opportunities for attack and targeting that may exist for those intent on doing the nation harm. In order to compare direct costs to direct benefits, TSA presents only the direct economic losses estimated to result from the attack scenarios and has omitted economic ''ripple effects'' and economic transfers from its calculations.

Scenario 1 contemplates a situation where a large aircraft is used as a missile to attack an unpopulated or lightly populated area, resulting in minimal loss of life, moderate injuries and destruction of the aircraft. Of the scenarios considered, this is the most restrained in its level of envisioned harm. It is assumed that a loss of 3 lives occurs, along with 10 moderate injuries and the complete hull loss of the aircraft. Using the DOT VSL of $5.8 million, the monetary estimate associated with the loss of life is $17.4 million. Again using DOT guidance, moderate injuries to those affected are valued at 1.55% of the VSL, or $89,900. To estimate the value of the lost aircraft,

[33] U.S. Department of Transportation memorandum, *Treatment of the Economic Value of a Statistical Life in Departmental Analyses.* Office of the Secretary of Transportation, February 5, 2008.

TSA used $9.3 million, which is the 2008 average market value of a General Aviation jet aircraft weighing between 12,500 and 65,000 pounds.[34] Taken together, the monetary consequence of this scenario totals $32 million, or $0.032 billion.

Scenario 2 also contemplates a situation where a large aircraft is used as a missile to attack a populated area, resulting in significantly greater loss of life and injuries, and destruction of the aircraft. It is assumed that a loss of 250 lives occurs, along with 250 severe injuries and the complete hull loss of the aircraft. Using the DOT VSL of $5.8 million, the monetary estimate associated with the loss of life is $1.45 billion. Again using DOT guidance, severe injuries to those affected are valued at 18.75% of the VSL, or $1.1 million, the monetary impact of these injuries total $272 million. To estimate the value of the lost aircraft, TSA used $9.3 million, which is the 2008 average market value of a General Aviation jet aircraft weighing between 12,500 and 65,000 pounds. Taken together, the monetary consequence of this scenario totals $1.73 billion. The level of damage in this type of scenario is consistent with the scenarios considered for the CBP APIS Final Rule analysis, although the current analysis also includes a component of severe injuries.[35]

Scenario 3 contemplates a situation where a large aircraft is used as a missile to carry out a direct attack on a building in a densely populated urban area. Because of these locational details, a successful attack would result in much more severe consequences, including significantly increased loss of life and widespread real property damage, compared to Scenario 1. For valuation purposes for this scenario, TSA assumes 3,000 fatalities, valued at $17.4 billion using the DOT VSL of $5.8 million. To maintain consistency with existing DHS analyses, in particular the APIS analysis,[36] TSA assumes property losses totaling $21.8 billion; this total is motivated by comparison to the City of New York Comptroller's estimate of direct losses to the city due to the September 11 attacks.[37] However, TSA also assumes that 9,000 severe injuries would also result from such an attack. These severe injuries, valued at 18.75% of the VSL based on the DOT guidance, have a monetary valuation of $9.79 billion. Finally, based on the FAA estimate of aircraft value, losses in Scenario 3 include $9.3 million due to complete hull loss of the aircraft used in the attack. The scenario elements aggregate to a total consequence of $49.0 billion.

Finally, Scenario 4 contemplates a catastrophic situation in which a large aircraft is used to deliver a nuclear or biohazard device to an urban center. The costs associated with a scenario such as this have been examined by DHS in detail for a nuclear device.[38] This research concludes that the consequences of such an event would be immense, with a wide range of uncertainty. For the present analysis, TSA is using a value of $1 trillion for the direct consequences of an attack of this severity. This value falls in the midrange of the values developed in the DHS research, and is consistent with results obtained from a review of academic and think tank research into the consequences of nuclear and bioterror attacks on urban areas. The value of $1 trillion results from loss of life in an attacked urban area in the hundreds of thousands and enormous loss of property and productive assets.

Figure 1 below displays the impacts and monetary consequences identified for each of these scenarios. TSA compared the monetary consequence from a successful attack with the cost of the proposed LASP. To judge the value or effectiveness of the LASP proposed rule in the context of these scenarios, it is necessary to compare the extent of monetary consequence from a successful attack with the cost of a program like LASP that would be deployed to reduce the risk or likelihood of such an attack being successfully undertaken. The annual risk reductions required for the proposed rule to break even under each of the four scenarios are presented below. In this analysis the comparison is made between the estimated scenario consequence and the LASP discounted annualized cost of $194.1 million, using a discount rate of 7%; the ''required risk reduction'' for breakeven is simply the ratio between this annualized program cost and the scenario consequence total. As shown, depending on the attack scenario, underlying baseline risk of terror attack would have to be reduced less than 1 percent (Scenarios 3 and 4) to 11 percent (Scenario 2) in order for the rule to break even. If only avoidance of quantified direct losses is considered, preventing the impact characterized in Scenario 1 is not sufficient to offset the LASP program's annualized costs, even if a Scenario 1 outcome were a certainty, expressed as a baseline risk of 100%, and the chance of this were eliminated entirely (100 percent risk reduction).

[34] Federal Aviation Administration. 2007. *Economic Values for FAA Investment and Regulatory Decisions, A Guide.* Prepared by GRA, Inc. December 31, 2004 (updated). Table 5–7. This table reports 2003 value estimates, and the 2003 estimate of $7.2 million was brought to the 2008 value of $9.3 million using the FAA recommended method described in the document in Section 9.6 (page 9–9), which relies on the BLS producer price index series for civil aircraft, available in the producer price index values for commodities at *http://stats.bls.gov/ppi/home.htm.*

[35] Regulatory Assessment & Final Regulatory Flexibility Analysis for the Final Rule, *Passenger Manifests for Commercial Aircraft Arriving in and Departing from the United States; Passenger and Crew Manifests for Commercial Vessels Departing from the United States.* Table 12, page 35.

[36] Regulatory Assessment & Final Regulatory Flexibility Analysis for the Final Rule, *Passenger Manifests for commercial Aircraft Arriving in and Departing from the United States; Passenger and Crew Manifests for Commercial Vessels Departing from the United States.* Table 13, page 36.

[37] Thompson, Jr., William C. Comptroller, City of New York. ''One Year Later: The Fiscal Impact of 9/11 on New York City.'' September 4, 2002.

[38] ''Economic Consequences of a Nuclear Detonation in an Urban Area'' undated DHS draft.

FIGURE 1—REQUIRED REDUCTION IN ANNUAL RISK NECESSARY (%) FOR LASP ANNUALIZED DISCOUNTED COSTS ($194.1 M) TO EQUAL EXPECTED BENEFITS, BY ATTACK SCENARIO

Scenario	Scale	Loss of life	Valuation at VSL of $5.8 M ($ B)	Hull loss ($ B)	Property loss ($ B)	Injuries ($ B)	Total ($ B)	Required risk reduction by LASP (%)
1	Minimal	3	$0.02	$0.009	None	$0.005	$0.03	N/A
2	Moderate	250	1.45	0.009	None	0.27	173	11.0
3	Major	3000	17.4	0.009	21.8	9.79	49.0	0.7
4	Catastrophic	Large and Variable across Studies					1,000	0.019

Costs

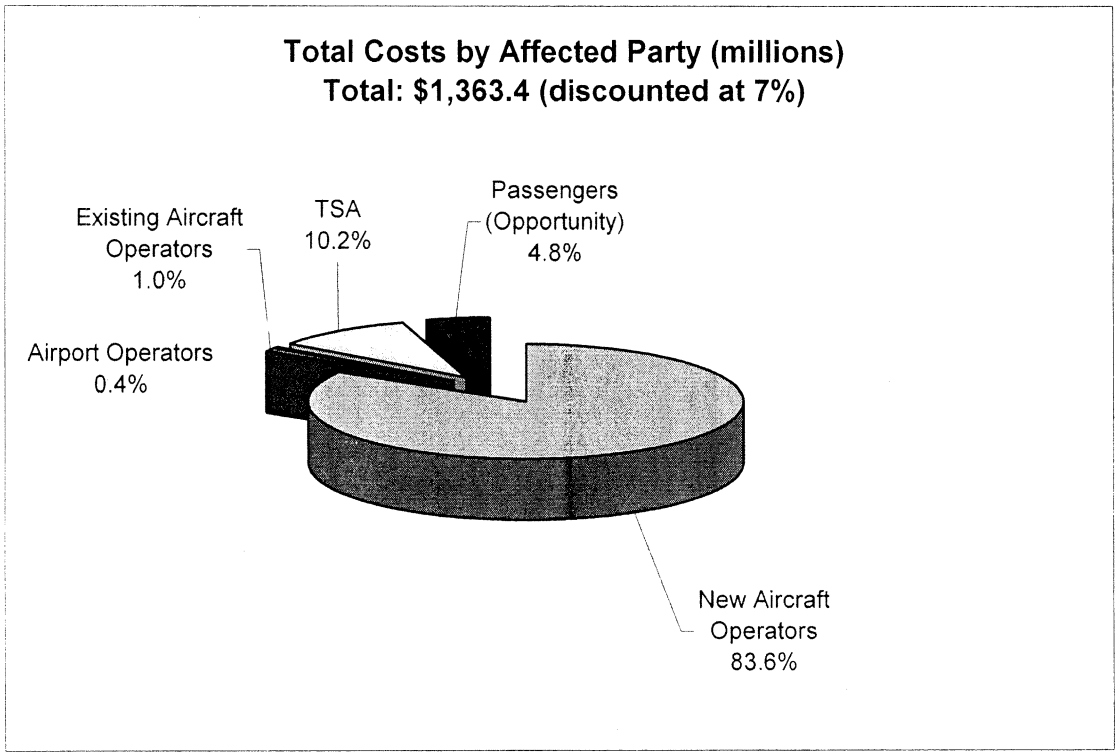
The following summarizes the estimated costs of this rulemaking by general category of who pays. A summary table provides an overview of the cost items and a brief description of cost elements. Both in this summary and the economic evaluation, descriptive language is used to try and relate the consequences of the regulation. Although the regulatory evaluation attempts to mirror the terms and wording of the proposed rule text, no attempt is made to precisely replicate the regulatory language and readers are cautioned that the actual regulatory text, not the text of the evaluation, would be binding. Throughout the evaluation rounding in displayed values may result in minor differences in displayed totals.

Aircraft operators, airport operators, and TSA would incur costs to comply with the requirements of the proposed LASP rule. TSA estimated the total 10-year cost of the program at $1.4 billion, discounted at 7%. At this rate, the annualized total rule cost per flight is estimated at $44. Aircraft operator costs comprise 85 percent of all estimated costs. This is due to the large number of newly regulated aircraft operators and the amount of time security coordinators are anticipated to spend on their duties.

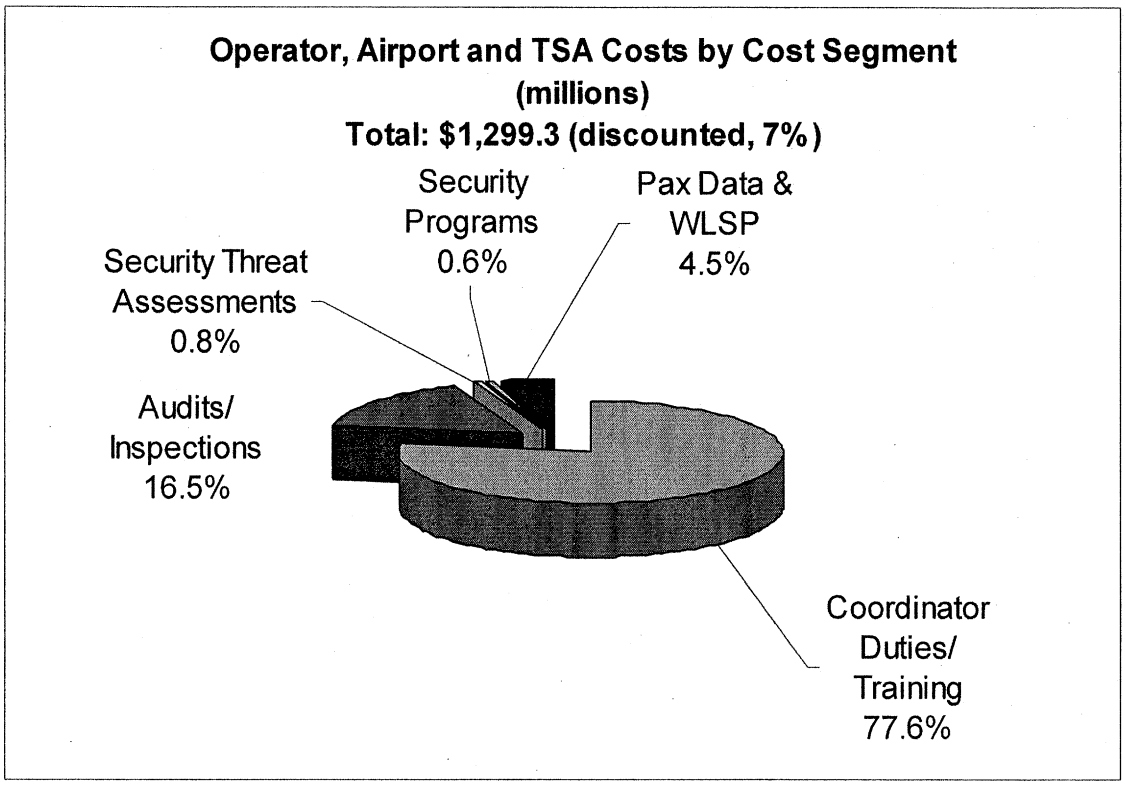
TSA estimated approximately 9,000 GA aircraft operators use aircraft with a maximum takeoff weight exceeding 12,500 pounds and would thus be subject to the proposed rule. These aircraft operators are currently not required to operate under any existing TSA security programs. Costs to these newly regulated aircraft operators represent 84 percent of total estimated costs, with security coordinator duties and training making up 89.5 percent of those new aircraft operator costs. Security coordinator duties and training for these operators are estimated at $1.0 billion over 10 years, discounted at 7 percent. The following figure provides the total 10-year costs as well as annualized costs at the 0, 7, and 3 percent discount rates for the principal populations affected by the proposed rule.

TOTAL AND ANNUALIZED COSTS BY AFFECTED ENTITY

Affected entity	10-year total costs			Annualized costs		
	0%	3%	7%	0%	3%	7%
New Aircraft Operators	$1,655.8	$1,402.3	$1,143.5	$165.6	$164.4	$162.8
Existing Aircraft Operators	19.6	16.7	13.6	2.0	2.0	1.9
Airport Operators	7.5	6.5	5.5	0.8	0.8	0.8
TSA	194.4	165.9	136.6	19.4	19.4	19.5
Passengers (Opportunity)	91.9	78.2	64.1	9.2	9.2	9.1
Total, Primary	1,969.3	1,669.5	1,363.4	196.9	195.7	194.1
Total, High	2,720.7	2,305.9	1,882.3	272.1	270.3	268.0
Total, Low	1,239.1	1,051.2	859.2	123.9	123.2	122.3



Given several areas of uncertainty in the cost estimates, TSA estimates of the total cost of the rule range from $859 million to $1.9 bilion, discounted at 7 percent. TSA was unable to model some requirements, such as aircraft operator expenses to collect and submit passenger information for watch-list matching. TSA is requesting detailed comments to enable quantification of this impact for new and existing operators. The figure below displays the cost segments of the proposed rule grouped into four major cost categories: Security coordinator duties and training; audits and inspections; STAs; and security programs.



TSA estimated covered aircraft operators would expend $1.1 billion over 10 years to comply with the proposed LASP, discounted at 7 percent. All covered aircraft operators would incur costs to develop and submit security programs and profiles. Newly regulated aircraft operators would be required to designate security coordinators who would perform a variety of security-related duties and complete annual security training. These aircraft operators also would be required to ensure that their flight crewmembers successfully undergo STAs conducted by TSA. All aircraft operators would need to control access to any weapons and check property in the cabin for possible stowaways. Further, aircraft operators would be required to submit names of passengers aboard their flights to TSA-approved service providers for purposes of matching names against terrorist watch-lists. Finally aircraft operators would contract with TSA-approved auditors to undergo biennial reviews demonstrating compliance with their security programs.

Since TSA views security programs as a package, this rule would also require a partial airport security program for non-federalized airports regularly serving large aircraft, in scheduled or public charter operations and airports designated by the Secretary of Transportation as ''Reliever Airports.'' TSA has determined these airports frequently serve as a base for aircraft operators covered by the LASP. Covered airports would be required to develop and submit security programs to TSA and comply with program requirements. This would include the designation of airport security coordinators and completion of attendant training. TSA estimated airport operators would expend $5.5 million over 10 years, discounted at 7 percent.

To implement and oversee this new security program regime, TSA would expend monies to conduct outreach to covered aircraft and airport operators and process security programs and profiles, enforce compliance with the proposed requirements, and enroll auditors and watch-list service providers. TSA estimated its 10-year costs to implement the proposed regulation would range from $133.5 million to $139.8 million, discounted at 7 percent, with a primary estimate of $136.6 million.

Entities wishing to participate as auditors or watch-list service providers would incur voluntary costs to apply to TSA for authorization to provide those services. These service entities would likely pass their enrollment expenses to subscribing aircraft operators; thus, in the regulatory evaluation TSA assesses the costs directly to the affected aircraft operators. To avoid double-counting, the analysis does not provide a separate estimate of auditor and watch-list service provider enrollment costs. However, TSA has included a description of the enrollment process and anticipated unit costs within the discussion of TSA's costs to process auditor and watch-list service provider applications.

Passengers on covered aircraft would incur opportunity costs from the time spent providing personal information to aircraft operators, for use in Watch List Matching, and, to a much more modest degree, from time spent delayed when pre-flight Watch List Matching issues need to be resolved in real time. TSA estimated that these passenger opportunity costs total $64 million, discounted at 7 percent.

As previously noted, TSA estimates that the total 10-year cost of the program would be $1.4 billion, discounted at 7 percent; the annualized cost (at a 7 percent discount rate) per flight would be $44.

3. Initial Regulatory Flexibility Assessment (IRFA)

The Regulatory Flexibility Act of 1980 establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

When issuing a rulemaking, agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As part of implementing this NPRM, TSA conducted this Initial Regulatory Flexibility Analysis. The IRFA describes the reasons for and objectives of the proposed rule; includes a description and estimate of the number of small entities that would be impacted by the proposed rule; estimates the cost of complying with requirements for small entities; addresses significant alternatives to the rulemaking considered by TSA; and, identifies duplicative, overlapping, and conflicting rules.

Reason for the Proposed Rule

The Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71, 115 Stat. 597, Nov. 19, 2001) granted TSA broad statutory authority to take measures to increase the security of civil aviation in the United States. Since the passage of ATSA, TSA has used its authority to implement an array of aviation security programs, focusing mainly on the commercial aviation segment of the industry.

TSA is aware that as vulnerabilities within the air carrier and commercial operator segment of the aviation industry are reduced, GA operations may become more attractive targets. With thousands of operators flying over 100,000 aircraft, firms operating in the GA market—including some smaller airports—are largely unregulated with respect to security. Many GA aircraft, however, are of the same size and weight of the commercial operators that TSA regulates, meaning that they potentially and effectively could be used to commit a terrorist act.

Consequently, this portion of the aviation industry may be vulnerable to exploitation by terrorists. Except for limited security requirements for certain classes of GA aircraft, TSA does not currently require security programs for many GA aircraft operators. This situation presents a security risk.

The proposed rule would mitigate this risk by requiring GA aircraft operators and certain airports to enact an assortment of security measures.

Objectives of the Proposed Rule

The objective of the proposed rule is to strengthen the security of civil aviation.

Description and Estimate of the Number of Small Entities

The proposed rule would impact certain firms flying aircraft with a maximum take-off weight greater than 12,500 pounds in the civil aviation market. It would also impact certain

publicly- and privately-owned airports. This section of the IRFA attempts to describe and identify all small entities within the aforementioned industries, including those operating under existing security regulations and those that are currently not regulated.

Currently Regulated Aircraft Operators

The proposed rule would affect aircraft operators currently offering services under existing security regulations. Aircraft operators utilizing TSA-required security programs, including the Twelve-Five Standard Security Program (TFSSP), the All Cargo Twelve-Five Standard Security Program (TFSSP–AC), the Partial Program Standard Security Program (PPSSP), and the Private Charter Standard Security Program (PCSSP) would be covered by the proposed rule.

Aircraft operators offering services under the TFSSP and the TFSSP–AC utilize aircraft with a maximum takeoff weight of more than 12,500 pounds; offer scheduled or charter service; carry passengers or cargo or both; and do not operate under a PPSSP or PCSSP.

The PPSSP is used by scheduled passenger or public charter passenger operations using aircraft with seating configurations of 31 or more, but 60 or fewer seats that do not enplane from or deplane into a sterile area, and by scheduled passenger or public charter passenger operations using aircraft with seating configurations of 60 or fewer seats engaged in operations to, from, or outside the United States that do not enplane from or deplane into a sterile area.

The requirements of the PPSSP are identical to those of the TFSSP, with the exception that the PPSSP requires operators to participate in airport operator-sponsored exercises of airport contingency plans. TSA estimated that approximately 649 operators, utilizing 4,540 large aircraft, were conducting operations either solely or primarily under the TFSSP or PPSSP at the time of writing. (Within the text of this IRFA, Twelve-Five and Partial Program operators may be referred to collectively as TFSSP operators due to the extremely small number of Partial Program operators, the similarities between the two groups, and the fact that they would be merged under the proposed regulation.)

Conversely, aircraft operators using privately chartered aircraft (aircraft hired by, and for, one specific group of people), having a MTOW greater than 45,500 kg (100,309.3 pounds); or, a passenger seating configuration of 61 or more seats, or, that enplane from or deplane into a sterile area, operate under the PCSSP. To be considered a private charter, the charterer must have engaged the total passenger capacity of the aircraft, invited all of the passengers, borne all of the costs of the charter, and must not have advertised to the public, in any way, to solicit passengers.

In conducting research for the Regulatory Evaluation, TSA generated estimates of the number of operators offering services under each security program described above. The estimates are shown in the figure below.

LASP Aircraft Operators Currently Operating Under a TSA Security Program

Existing security program or operating certificate	Number of aircraft operators
Twelve-Five Standard Security Program	649
All Cargo Twelve-Five Standard Security Program	48
Private Charter Standard Security Program	77
Total	774

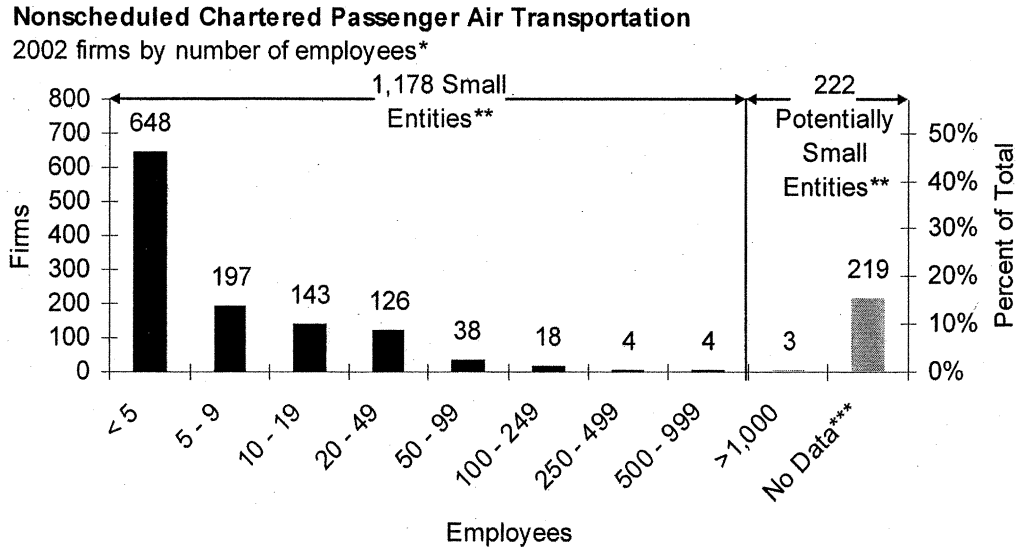
To determine if the firms identified in the figure above qualify as small entities as defined by the RFA and the Small Business Administration (SBA), TSA first attempted to classify each firm using North American Industry Classification System (NAICS) codes maintained by the U.S. Census Bureau. After analyzing the various operators' characteristics and the NAICS codes, TSA determined that the aircraft operators described above would broadly fall into the nonscheduled air transportation market. Firms in NAICS code 481211, Nonscheduled Chartered Passenger Air Transportation, and code 481212, Nonscheduled Charter Freight Air Transportation, are classified as large or small based on employee measures. Firms in these markets with less than 1,500 employees are considered small by the SBA.

Unfortunately, TSA could not obtain current, detailed employee data for the respective firms, making it difficult to discern whether the firms are small or large according to standards set by the SBA. In light of the lack of current employee data on these firms, TSA turned to U.S. Census Bureau information to gauge the number of currently regulated entities affected by the proposed rule that may be considered small.

NAICS 481211—Nonscheduled Chartered Passenger Air Transportation

As stated above, the SBA defines any firm in the Nonscheduled Chartered Passenger Air Transportation industry with less than 1,500 employees as small. Using 2002 data maintained by the U.S. Census Bureau, TSA determined that there are 1,400 firms in the industry, and at least 1,178 of these firms are small entities. The average annual revenue for firms in this industry in 2002 was approximately $3.9 million. The data that TSA accessed from the Census Bureau to make this determination did not have enough detail for the Agency to draw a conclusion on the remaining 222 firms. See the figure below.

NAICS 481211: Estimate of Small Currently Regulated Passenger Aircraft Operators



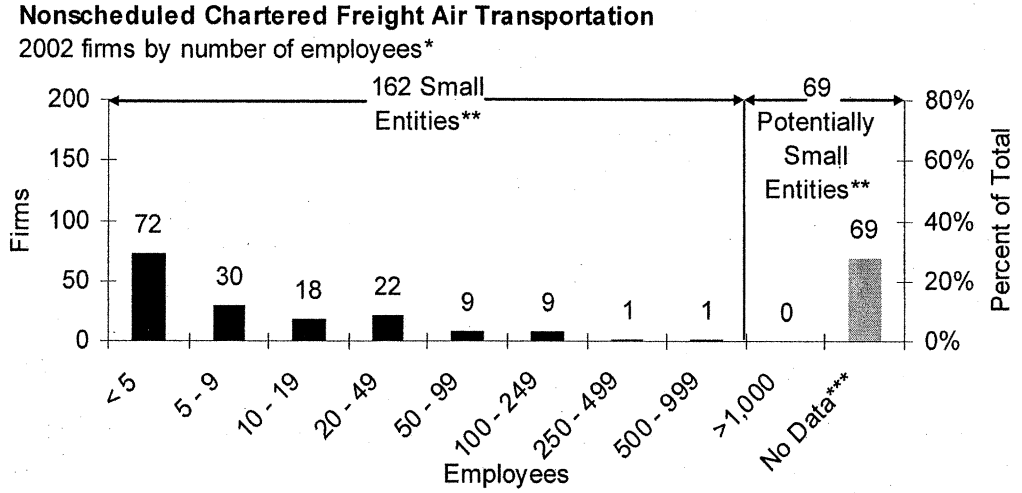
Source: 2002 Economic Census

Notes: *These estimates do not include non-employers. **The SBA defines firms w ith less than 1,500 employees as small. ***The Census Bureau does not maintain employee data for these firms, w hich operate less than 12 months per year.

NAICS 481212—Nonscheduled Chartered Freight Air Transportation

As previously stated, the SBA defines any firm in the Nonscheduled Chartered Freight Air Transportation industry with less than 1,500 employees as small. Again using Census Bureau data, TSA determined that there are 231 firms in the overall industry, and at least 162 of these firms are small entities. The average annual revenue for firms in this industry in 2002 was approximately $5.0 million. The data that TSA accessed from the Census Bureau to make this determination did not have enough detail for the Agency to draw a conclusion on the remaining 69 firms.

NAICS 481212: Estimate of Small Currently Regulated Freight Aircraft Operators



Source: 2002 Economic Census

Notes: *These estimates do not include non-employers. **The SBA defines firms w ith less than 1,500 employees as small. ***The Census Bureau does not maintain employee data for these firms, w hich operate less than 12 months per year.

Firms operating aircraft under the TFSSP and the PCSSP likely fall into NAICS code 481211, Nonscheduled Chartered Passenger Air Transportation, described above. As previously stated, TSA estimated that there are 649 and 77 TFSSP and PCSSP operators, respectively, that would be affected by the NPRM. In all likelihood, these

operators represent a subset of the firms TSA identified using the Census data. So while TSA identified 1,178 small entities (and 222 potentially small entities) in the overall Nonscheduled Chartered Passenger Air Transportation market, it is not likely that all of those firms would be impacted by the proposed rule.

Firms operating under the TFSSP–AC most likely are classified by the Census Bureau by NAICS code 481212, Nonscheduled Chartered Freight Air Transportation. As stated above, TSA estimated that the proposed rule would only affect 48 of these operators. It is likely that the 48 operators represent a subset of the firms TSA identified in the Census data described above.

By adding the estimated number of TFSSP, PCSSP, and TFSSP–AC operators together, TSA was able to conclude that the proposed rule would affect a total of 774 currently regulated operators. In 2003, pursuant to another rulemaking, TSA estimated that of 767 TFSSP, TFSSP–AC, and PCSSP operators, all but 15 were small entities. Typically, these types of operators are independently owned and operated, and rarely employ more than 1,500 employees, making them small entities according to the SBA. Given that TSA has not received any new data on these operators since 2003, and given the lack of detail in the Census Bureau data, the Agency assumed for the purposes of this analysis that all but 15 of the 774 operators that would be affected by this NPRM are small entities. The Agency seeks comment on this preliminary conclusion.

Newly Regulated Aircraft Operators

The proposed rule would also cover any aircraft operator using an aircraft having a MTOW greater than 12,500 pounds. Such operators primarily conduct operations under 14 CFR part 91 and 14 CFR part 125. Currently, these types of operators are generally not covered by existing security regulations.

Part 91 operations, commonly referred to as GA operations, can be undertaken for a wide range of purposes, but a basic distinction is drawn between flight activity used to provide ''common carriage'' and other flight activity. Common carriage means any operation for compensation or hire where the operator holds itself out as willing to furnish transportation to any member of the public seeking the services offered. The operator openly offers a service for a fee (by advertising or any other means) to members of the public.

In contrast, ''private'' or ''non-common carriage'' does not involve offering or holding out by the operator through advertising or any other means. Non-common carriage includes the following:

- Carriage of operator's own employees or property.
- Carriage of participating members of a club.
- Carriage of persons and property, which is only incidental to the operator's primary business.
- Carriage of persons or property for compensation or hire under a contractual business arrangement that did not result from the operator's holding out or offering. In this situation, the customer seeks out an operator to perform the desired service and enters into an exclusive mutual agreement; the operator does not seek out the customer.

Under the proposed rule, both common carriage and non-common carriage large aircraft operators would be required to establish and implement the security requirements of the LASP. Those firms operating under common carriage have been discussed in the currently regulated section of this IRFA; the following discussion relates to non-common carrier operations.

Part 125 of 14 CFR applies to some large aircraft operations that may provide private carriage (but not common carriage). Part 125 governs the operation of large aircraft that are able to carry 6,000 pounds or more of payload capacity and 20 or more passenger seats.

In conducting research for the Regulatory Evaluation, TSA subject matter experts determined that the proposed rule would affect 9,000 aircraft operators regulated by 14 CFR part 91, and 61 aircraft operators regulated by 14 CFR part 125. Due to the unique conditions under which these firms conduct operations, TSA could not identify the respective NAICS codes for these operators. Consequently, TSA could not determine the small entity size standards for these businesses. Without this information, TSA could not reliably estimate the number of small entities operating aircraft in these operating categories. Moreover, TSA could not find reliable revenue and employee data for these firms, further complicating the effort.

Given the constraints discussed above, TSA could only conclude that the proposed rule would affect between 0 and 9,000 small entities currently regulated by 14 CFR part 91, and between 0 and 61 small entities currently regulated by 14 CFR part 125. TSA seeks comment on information that would allow it to refine its estimate of small entities as defined by the RFA.

Airport Operators

Airports that would be affected by the proposed rule include airports regularly serving scheduled or public charter operations in large aircraft and ''reliever airports,'' as designated by the Secretary of Transportation. TSA determined approximately 42 airports regularly serving scheduled or public charter operations and 273 reliever airports would be subject to the proposed rule, a total of 315 airports.

The 42 affected airports TSA has identified that regularly serve scheduled or public charter operations and do not already have a TSA security program are all owned by public entities. Because the airports are publicly owned, the Census Bureau classifies them using NAICS Code 926120, Regulation and Administration of Transportation Programs.

Reliever airports are airports designated by the FAA to relieve congestion at commercial service airports and to provide improved GA access to members of the local community.[39] The 273 reliever airports that would be impacted by the rule are owned by public entities—such as State and local governments—and private, for-profit concerns. The publicly—and privately-owned airports, due to their different ownership characteristics, are classified by different NAICS codes by the U.S. Census Bureau. Privately-owned airports are classified by NAICS code 48811, Airport Operations, while publicly owned airports are classified by NAICS code 926120, Regulation and Administration of Transportation Programs.

NAICS 48811—Airport Operations

Private firms operating reliever airports fall into NAICS code 48811, Airport Operations. The SBA defines firms in this industry with less than $6.5 million in annual revenues as small. To discern the number of small firms likely to be impacted by the proposed rule, TSA first obtained data on the total number affected reliever airports from FAA. From the FAA information, which identified 273 total reliever airports that would be subject to the rule, TSA was able to identify 46 privately-held reliever airports.

Unfortunately, TSA could not find any revenue information on the 46 privately-owned reliever airports, making it impossible to determine if

[39] U.S. Department of Transportation, Federal Aviation Administration, ''Categories of Airports,'' Available from: *http://www.faa.gov/airports_airtraffic/airports/planning_capacity/passenger_allcargo_stats/categories/*. Accessed on February 28, 2007.

they are classified as small entities. However, given that the average annual revenues in the industry were $3.8 million in 2002, well below the $6.5 million threshold set by SBA, it is likely that some of the affected firms are small entities. Due to the lack of available revenue data, TSA assumed for the purposes of this analysis that there are between 0 and 46 small entities in this industry that would be impacted by the rule. TSA seeks comment on this assumption.

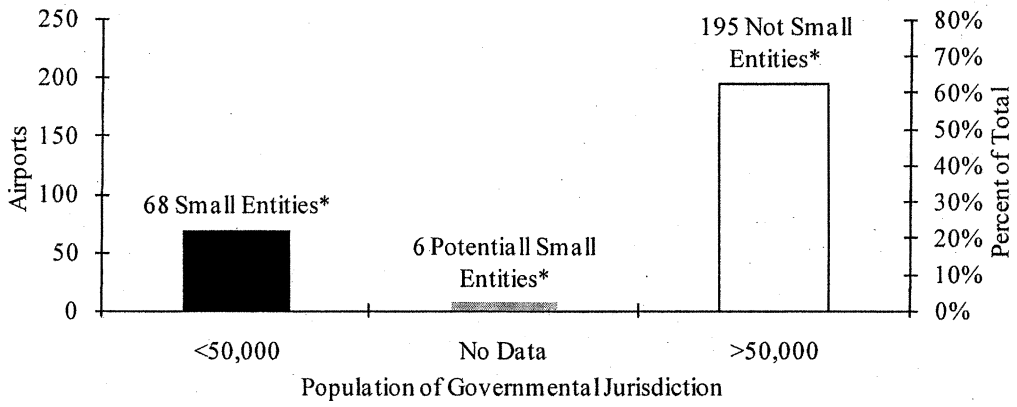
NAICS 926120—Regulation and Administration of Transportation Programs

As previously stated, publicly owned reliever airports likely fall into NAICS code 926120, Regulation and Administration of Transportation Programs. Because firms in this industry are not privately held, for-profit companies, the SBA does not use revenue or employment measures to determine if they are small entities.

Instead, the SBA uses the population of the government jurisdiction that owns the firm to determine if it is a small governmental jurisdiction. Specifically, sec. 601(5) of the RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.[40]

To determine if the proposed rule would have an impact on any small governmental jurisdictions, TSA again accessed the FAA airport data. Of the 315 affected airports, TSA discerned that 269 are owned by governments. After researching the population of all the affected governments using U.S. Census Bureau population data, TSA concluded that between 68 and 74 small governmental jurisdictions would be impacted by the proposed rule. See the figure below.

NAICS 926120: Estimate of Small Publicly Owned Airports



Source: US Census Bureau, 2005 Population Estimates, Census 2000, 1990 Census; FAA
Notes: *The SBA defines firms owned by government jurisdictions to be small if the jurisdiction has a population of less than 50,000.

Summary of Number of Small Entities

Using the data discussed above, TSA concluded that the NPRM would impact between 827 and 9,955 small entities. The ambiguous nature of the revenue and employee data for the firms in some of the affected industries, coupled with the lack of information on operators covered by 14 CFR part 91 and 14 CFR part 125, prevented TSA from making a more refined estimate. See the figure below.

TOTAL ESTIMATE OF SMALL ENTITIES POTENTIALLY AFFECTED BY THE LASP *

Operator classification	NAICS code	Industry	SBA size standard	Low estimate	High estimate
Currently Regulated Aircraft Operators (TFSSP, PCSSP, TFSSP–AC).	481211	Nonscheduled Chartered Passenger Air Transportation.	1,500 employees	759	774
	481212	Nonscheduled Chartered Freight Air Transportation.			
Newly Regulated Aircraft Operators (14 CFR part 91, 14 CFR part 125).	U	U	U	0	9,061
Privately-Owned Airports	48811	Airport Operations	$6.5 million in annual revenue	0	46

[40] Regulatory Flexibility Act, Public Law 96–354, Sep. 19, 1980, 94 Stat. 1164 (codified at 5 U.S.C. 601).

TOTAL ESTIMATE OF SMALL ENTITIES POTENTIALLY AFFECTED BY THE LASP *

Operator classification	NAICS code	Industry	SBA size standard	Low estimate	High estimate
Public Airports	926120	Regulation and Administration of Transportation Programs.	50,000 population of governmental jurisdiction.	68	74
Total				827	9,955

* Total Small Entities Impacted: The NPRM would impact between 827 and 9,957 small entities.
Source: 2002 Economic Census, FAA, SBA, TSA calculations.
Notes: U means data unavailable.

The data used to determine the number of impacted small entities in this analysis exhibit some critical shortcomings. First, TSA did not have access to any comprehensive employment data for some of the affected aircraft operators in the nonscheduled air transportation industry.

Second, TSA was unable to access comprehensive revenue or employment data for the aircraft operators offering services under 14 CFR part 91 and 14 CFR part 125. Additionally, TSA could not identify the appropriate NAICS codes for these operators, making it impossible to identify the size standard that would be necessary to determine if the firms are large or small.

Third, TSA could not obtain revenue data for firms operating privately-owned reliever airports, making it impossible to generate an accurate estimate of the number of small entities in that industry.

Finally, TSA was unable to find reliable information on some of the governmental jurisdictions operating covered airports. This situation prevented TSA from making a more accurate estimate of the number of small governmental jurisdictions that would be subject to the proposed rule.

Due to the reasons described above, TSA may have under- or over-estimated the number of affected small entities. TSA seeks comment on this possibility.

Description and Estimate of Compliance Requirements

The proposed rule would require firms operating certain classes of aircraft and airports to undertake a number of measures aimed at increasing civil aviation security. This section of the analysis provides a brief description of each requirement, followed by an estimate of the unit cost per operator to comply with each requirement. This part of the analysis also attempts to make an initial determination on whether the proposed rule would have a significant economic impact on a substantial number of small entities.

Given the operational and regulatory differences between the various firms that would be affected by the proposed rule, compliance requirements and their attendant costs are described separately for currently regulated aircraft operators, newly regulated aircraft operators, and airport operators. Furthermore, costs are estimated as ranges rather than absolute values in order to reflect the uncertainty surrounding different estimates.

Currently Regulated Aircraft Operators

Security Programs and Profiles

Currently regulated aircraft operators affected by the proposed rule would be required to submit a profile containing several pieces of information and to develop and submit a security program. TSA would make available to all covered aircraft operators a template Large Aircraft Standard Security Program that operators would have the option to either accept without modification or use as the basis of developing their own security program. In estimating costs for this requirement, TSA assumed that nearly all covered operators would choose to adopt the template security program. These requirements would impose costs on currently regulated aircraft operators, which are shown in the figure below. For a more robust discussion on how TSA estimated these costs, see the section on security programs and profiles located above in the Regulatory Evaluation.

UNIT COST: SECURITY PROGRAMS/PROFILES, CURRENTLY REGULATED AIRCRAFT OPERATORS

Hourly compensation	Hours			Total unit cost		
	Low	Primary	High	Low	Primary	High
a	*b*	*c*	*d*	(*a*) × (*b*)	(*a*) × (*c*)	(*a*) × (*d*)
$62.43	2	4	6	$125	$250	$375

Security Coordinator Duties

Currently regulated aircraft operators have existing security coordinators and would not incur new costs as a result of this requirement.

Security Threat Assessments for Flight Crews

Aircraft operators offering services under existing security regulations must utilize flight crew personnel that have undergone a criminal history records check. The proposed rule would require LASP aircraft operators to begin ensuring that their flight crewmembers undergo STAs and would limit the validity of a STA to five years. As proposed, the STA would consist of a CHRC and a check against government terrorism watch-lists and related databases. Existing aircraft operators currently pay an estimated $30 to $35 for CHRCs; however, the collection system used by these operators does not include the terrorism check component of the proposed STA. As a result, TSA intends to establish a new system to enable it to process STA applications from covered aircraft operators. TSA is thus proposing a fee of $74 to recover its costs associated with this new system and the processing of STAs.

Flight crewmembers of currently regulated aircraft operators would be required to submit a new STA application upon publication of a final

rule if their most recent CHRC had been completed five or more years prior to the compliance date of the final rule. Flight crewmembers having CHRCs completed within five years prior to the compliance date in a final rule would be required to submit a STA application once five years had passed since their CHRC. Since TSA instituted the existing operator security programs in early 2003, several existing operators may need to conduct a STA on their flight crewmembers in the first year of the LASP.

Because this represents a new requirement, TSA used the full proposed fee, plus opportunity costs, to estimate a unit cost to existing operator small entities. As noted above, the proposed fee is $74. TSA estimated opportunity costs would consist of 0.5 hours of flight crewmember time to provide the information required for the STA application and to have fingerprints taken. Using an average wage rate of $51.40 for aircraft operator flight crews,[41] 30 minutes represents an opportunity cost of $25.70 per STA, for a total STA unit cost of $99.70. TSA estimated existing operators each employ an average of 18 flight crewmembers based on data provided by TSA subject matter experts and the American Association of Airport Executives, the entity that processes existing operator CHRCs. Based on an assumed turnover rate of 15 percent, however, TSA estimated that on average an existing operator would have only about eight crewmembers whose CHRCs would be expired under the proposed rule. Thus, the maximum per-operator cost for STAs would be approximately $800.

UNIT COST: SECURITY THREAT ASSESSMENTS, CURRENTLY REGULATED AIRCRAFT OPERATORS

Unit fee (inc. opportunity costs) *a*	Flight crewmember STAs *b*	Total unit cost per operator ($a \times b$)
$99.70	8	$800

Control of Access to Weapons

Aircraft operators utilizing the TFSSP-All Cargo would be required to control access to weapons. Presently, these operators are required to ''apply the security measures in its security program for persons who board the aircraft for transportation, and for their property, to prevent or deter the carriage of any unauthorized persons, and any unauthorized weapons, explosives, incendiaries, and other destructive devices, items, or substances.'' [42] The proposed rule modifies current law by inserting between ''unauthorized weapons'' the words ''or accessible.'' TSA has determined this requirement would have a de minimis impact, because few passengers are carried aboard such flights and operators are already required to screen them. Further, operators would have a variety of means of rendering weapons inaccessible to passengers.

Check of Accessible Property

The proposed rule would require an aircraft operator to inspect, pursuant to the terms and method in its security program, any property brought on board that would be accessible to the cabin. Property, for this section, is defined as any container, cargo, or company material that may be used to hide a stowaway or explosives, incendiaries or other destructive devices.

TSA has determined that in most cases affected operators already comply with the anticipated inspection requirements during the normal course of the pre-flight check. Costs associated with this responsibility are captured in the security coordinator duties above. Because currently regulated aircraft operators are not expected to incur any marginal costs for security coordinators, this requirement also would not add any additional costs for these operators.

Watch-List Matching

The proposed regulation would require each aircraft operator to request and obtain certain passenger information from every passenger on each flight operated by the aircraft operator, and transmit the information to an entity approved by TSA to conduct watch-list matching (known as a watch-list service provider). Any changes to the passenger information prior to boarding would be required to be resent to the watch-list service provider.

TSA has estimated the compliance costs for this requirement as the 10-year undiscounted cost of WLSP averaged over the forecast number of flights. This average cost per flight multiplied by the average flights per operator produces an estimated annual cost per operator for WLSP. TSA estimates the cost for compliance would range from $245 to $736 per operator with a primary cost estimate of $491 per operator. To the extent that small entities may make fewer flights per year than large entities, the actual impact to small entities may be lower. However, TSA believes these costs provide a conservative estimate of the impact to small operators. For more discussion on the costs of this requirement, see the section on watch-list matching above, located in the Regulatory Evaluation.

Components	Cost estimates		
	Low	Primary	High
WLSP Costs	$22,787,364	$45,574,727	$68,362,091
Flight Forecast	87,932,347	87,932,347	87,932,347
Cost per Flight	$0.26	$0.52	$0.78
Flights per Operator	946	946	946
Cost per Operator	$245	$491	$736

Audits of Aircraft Operators

Under the proposed rule, each aircraft operator must contract with an auditor approved by TSA to conduct an audit of the aircraft operator's compliance with its security program.

Based on similar audits undertaken relative to other federal aviation programs, TSA estimated the cost for these audits to be approximately $2,257 per audit, on average. Currently, audits are performed to review safety, operations, and maintenance. TSA anticipates that many of these firms will

[41] The flight crew wage reported here is a weighted average of the following occupations from the 2006 NBAA Salary Survey: Aviation Department Manager II (does some flying), Chief Pilot, Senior Captain, and Copilot.

[42] 49 CFR 1544.202.

offer the ''security'' audit as part of their offerings to their current customers and, perhaps, where feasible, bundle the security audit with already scheduled audits.

Based on interviews with 3 International Standard for Business Aircraft Operations auditors, TSA estimated costs for audits could range from $1,464 to $3,050. As stated above, TSA adopted the average of $2,257 as its primary estimate. For more discussion on these costs, see the section in the Regulatory Evaluation that describes this requirement.

Total Cost per Currently Regulated Aircraft Operator

The following figure is a summary of the requirements and compliance costs of the proposed rule for currently regulated aircraft operators. As described above, TSA estimated that between 759 and 774 currently regulated small entities would be impacted by the proposed rule.

TOTAL COMPLIANCE UNIT COST, CURRENTLY REGULATED AIRCRAFT OPERATORS

Requirement	Unit cost		
	Low	Primary	High
Security Programs and Profiles	$125	$250	$375
Security Coordinator Duties	.....	.....	.....
STAs for Flight Crew	800	800	800
Control Access to Weapons	.....	.....	.....
Screening of Accessible Property	.....	.....	.....
Watch-list Matching	245	491	736
Audits	1,464	2,257	3,050
Total	2,634	3,797	4,960

Given the uncertainty in this analysis, it was difficult for TSA to conclusively determine if the proposed rule would have a significant economic impact on a substantial number of currently regulated aircraft operators. Although neither the RFA nor the SBA define the term ''significant economic impact,'' TSA attempted to compare compliance costs to average firm revenues to determine if the rule would have a considerable economic impact on covered small entities. Unfortunately, this review proved difficult due to the lack of revenue data on covered firms.

As previously stated, currently regulated aircraft operators are likely categorized by the Census Bureau using NAICS codes 481211, Nonscheduled Chartered Passenger Air Transportation, and 481212, Nonscheduled Chartered Freight Air Transportation. In 2002, according to the Economic Census, firms in these industries earned annual revenues of approximately $3.9 million and $5.0 million, respectively. For a firm with average annual revenues in either of these industries, a compliance cost of approximately $2,634 to $4,960 would not likely constitute a significant economic impact, given that the cost would equal less than 1 percent of annual revenues.

For the proposed rule to have a significant economic impact on a currently regulated aircraft operator, the aircraft operator would likely have to earn annual revenues of approximately $367,000 or less. In this scenario, the highest estimated compliance costs associated with the proposed rule would represent approximately 1 percent of the firm's annual revenue.

While conducting research for this analysis, TSA was unable to acquire comprehensive revenue data on currently regulated aircraft operators, and therefore could not make a conclusive determination on whether these firms would experience a significant economic impact under the proposed rule. However, in light of the average annual revenues of firms in the respective industries in 2002, TSA does not believe the proposed rule would represent a significant economic impact on a substantial number of currently regulated aircraft operators. TSA requests comment on this preliminary determination.

Newly Regulated Aircraft Operators

Security Programs and Profiles

As described above, covered aircraft operators would be required to submit a profile to TSA and to develop and submit a security program. TSA estimated it would take newly regulated aircraft operators between 8 and 16 hours to review the template security program, assemble the requisite profile information, and submit the requisite documents to TSA for review. TSA assumed an average of 12 hours for its primary estimate. To calculate costs for newly regulated aircraft operators to review security programs and submit the required profile information, TSA again multiplied the estimated hourly range by the hourly wage of $62.43.

UNIT COST: SECURITY PROGRAMS/PROFILES, NEWLY REGULATED AIRCRAFT OPERATORS

Hourly compensation	Hours			Total unit cost		
	Low	Primary	High	Low	Primary	High
a	b	c	d	(a × b)	(a × c)	(a × d)
$62.43	8	12	16	$500	$750	$1,000

Security Coordinator Duties

Newly regulated large aircraft operators would be required to designate Aircraft Operator Security Coordinators (AOSC), Ground Security Coordinators (GSC), and In-Flight Security Coordinators (ISC), and ensure they are properly trained. Each security coordinator position would have unique responsibilities; however, aircraft operator employees could be trained to

serve as one or all three of these positions.

The principal AOSC or an alternate, if applicable, must be available for contact by TSA 24 hours a day, seven days a week to ensure TSA is able to quickly disseminate any intelligence of a threat to a specific aircraft operator or industry segment. The AOSC bears the further responsibility for maintaining any and all records necessary to demonstrate to an auditor or TSA inspector the aircraft operator's compliance with its security program. In addition to these AOSC duties, security coordinators are responsible for the enforcement of policies and procedures relative to the security of the aircraft, including the vetting of crew (where required) and passengers which must be carried out in accordance with the operator's security program. Many of the aircraft operator requirements discussed in the following cost sections fall under the responsibility of the security coordinators.

TSA estimated the amount of time security coordinators of newly regulated aircraft operators would spend on their duties. For a detailed discussion of these estimates, see the section on security coordinator duties in the Regulatory Evaluation. The figure below displays the annual cost per operator of having an AOSC.

UNIT COST: SECURITY COORDINATOR DUTIES, NEWLY REGULATED AIRCRAFT OPERATORS

Hourly compensation	Hours			Total unit cost		
	Low	Primary	High	Low	Primary	High
a	b	c	d	(a × b)	(a × c)	(a × d)
$53.59	164	284	404	$8,780	$15,210	$21,650

Newly regulated aircraft operators would also need to ensure that security coordinators underwent appropriate security training in order to carry out their required functions. The AOSC would thus coordinate with TSA to provide training to GSCs and ISCs. Training would cover topics such as procedures to notify authorities when dealing with suspect items, unauthorized access to the aircraft, threat notification and response, implementation of security directives, and other security related topics. Security coordinators would be required to complete both an initial training course and annual recurring training. TSA again provided a range of estimates of the amount of time newly regulated operators would spend conducting new and recurring training.

For the purposes of estimating costs for this IRFA, TSA assumed that an operator would need to conduct an initial and recurring training of GSCs and ISCs in one year. Although this timeframe is unlikely, TSA feels that it is a conservative assumption that accounts for the maximum potential cost of this requirement.

UNIT COST: SECURITY COORDINATOR TRAINING, NEWLY REGULATED AIRCRAFT OPERATORS

Requirement	Unit cost		
	Low	Primary	High
New Training	$460	$680	$890
Recurring Training	230	340	440
Total	690	1,020	1,330

Security Threat Assessments for Flight Crews

The proposed rule would also require newly regulated aircraft operators to ensure that their flight crewmembers undergo security threat assessments. The STA process would require each flight crewmember to submit fingerprints, along with information such as name, date and place of birth, Social Security Number (voluntary), and other information necessary for TSA to determine whether an applicant has committed a disqualifying crime or poses a threat to transportation or national security. For a comprehensive discussion of how TSA derived the total cost of this provision, see the section of the Regulatory Evaluation that describes this requirement.

For the purposes of estimating costs for this IRFA, TSA estimated the cost of flight crews obtaining STAs on a per operator basis. Based on input from TSA subject matter experts, TSA assumed 1.5 flight crewmembers per aircraft, and 1.8 aircraft per Part 91 operator and 4 aircraft per part 125 operator. The figure below displays the average cost that each newly regulated operator would incur as a result of this NPRM.

UNIT COST: SECURITY THREAT ASSESSMENTS, NEWLY REGULATED AIRCRAFT OPERATORS

Requirement	Total unit cost		
	Low	Primary	High
Security Threat Assessment	$580	$580	$580

Control of Access to Weapons

As described in the more comprehensive Regulatory Evaluation and in the section on currently regulated aircraft operators of this IRFA, this requirement is anticipated to have a de minimis impact on covered operators.

Check of Accessible Property

As previously stated, TSA determined that in most cases affected operators already comply with the anticipated inspection requirements during the normal course of the pre-flight check. Costs associated with this responsibility are captured in the security coordinator duties above.

Watch-List Matching

The estimated cost for WLSP compliance is the same for the newly covered and existing operators. TSA utilizes the same methodology as above to estimate the total unit compliance cost for newly regulated aircraft operators. TSA estimates the cost for compliance would range from $245 to $736 with a primary cost of $491 per operator.

Audits of Aircraft Operators

Under the proposed rule, each aircraft operator must contract with an auditor approved by TSA to conduct an audit of the aircraft operator's compliance with its security program. The cost of this requirement for newly regulated aircraft operators would be identical to the cost for currently regulated operators. TSA estimated that the unit cost of an audit would range from $1,464 to $3,050, with $2,257 being TSA's primary estimate for the cost of this requirement.

Total Cost per Newly Regulated Aircraft Operator

The following figure is a summary of the requirements and compliance costs of the proposed rule for newly regulated aircraft operators. TSA estimated that the cost of complying with the proposed rule would range from $12,259 to $28,356 for newly regulated aircraft operators. As described above, TSA estimated that between 0 and 9,061 small entities in this operator category would be impacted by the proposed rule.

TOTAL COMPLIANCE UNIT COST, NEWLY REGULATED AIRCRAFT OPERATORS

Requirement	Unit cost		
	Low	Primary	High
Security Programs and Profiles	$500	$750	$1,000
Security Coordinator Duties	9,470	16,230	22,990
STAs for Flight Crew	580	580	580
Control Access to Weapons	.....	.....	.....
Screening of Accessible Property	.....	.....	.....
Watch-list Matching	245	491	736
Audits	1,464	2,257	3,050
Total	$12,259	$20,308	$28,356

TSA again encountered analytical difficulties when attempting to determine if the proposed rule would have a significant economic impact on a substantial number of newly regulated aircraft operators. As previously stated, TSA was unable to acquire annual revenue data for these operators. This lack of information prevented TSA from making a conclusive determination of the rule's impact on small entities in this operator category.

For the proposed rule to have a significant economic impact on a newly regulated aircraft operator, the aircraft operator would likely have to earn annual revenues of $2.7 million or less. If a firm with this level of annual revenues incurred compliance costs of $28,356 (the high estimate in the figure above), it would represent 1 percent of annual revenue. Given the uncertainty in its estimates, TSA requests comment on whether the proposed rule would have a significant economic impact on a substantial number of newly regulated aircraft operators.

Airport Operators

Security Programs and Profiles

The proposed rule would require certain privately-owned airports to develop security programs and submit security profiles to TSA. TSA would make available a template partial airport security program that operators would have the option to either accept without modification or use as the basis of developing their own security program.

To calculate the unit cost for airports to comply with this requirement, TSA assumed that nearly all covered airport operators would choose to adopt the template security program, thereby minimizing the cost of implementing this requirement. Second, TSA estimated it would take these newly regulated private airport operators between 8 and 16 hours to review and implement the template security program and assemble the requisite profile information. TSA adopted an average of 12 hours as its primary estimate. Finally, TSA multiplied each hour estimate by a middle management wage rate of $31.24 per hour to generate a unit cost between $250 and $500, with a primary estimate of $375. The requirement to adopt and submit security programs and profiles is not recurring; therefore, airport operators would only incur this cost once over the ten-year period of analysis. This estimate does not include completion of a risk-based self-assessment tool that may complement the security program. TSA has requested comments on whether such a tool should be mandatory but has not set it forth as a requirement in the proposed rule.

UNIT COST: SECURITY PROGRAMS/PROFILES, AIRPORT OPERATORS

Hourly compensation	Hours			Total unit cost		
	Low	Primary	High	Low	Primary	High
a	b	c	d	(a × b)	(a × c)	(a × d)
$31.24	8	12	16	$250	$375	$500

Airport Security Coordinators

The proposed rule would also require airport operators to maintain airport security coordinators (ASC). For a more in-depth discussion of this requirement, see the airport security coordinator section of the Regulatory Evaluation.

TSA estimated airport security coordinators would spend an average of between 0.5 and 1 hour per week on their duties, adopting 0.75 hours per week as its primary estimate. To calculate the cost on an annual basis, TSA translated the weekly hour estimates into annual estimates of 26, 39, and 52 hours, respectively. Finally, to calculate the unit cost associated with this requirement, TSA multiplied the anticipated number annual hours by the ASC average hourly cost of compensation. See the figure below.

UNIT COST: SECURITY COORDINATOR DUTIES, AIRPORT OPERATORS

Hourly compensation	Hours			Total unit cost		
	Low	Primary	High	Low	Primary	High
a	b	c	d	(a × b)	(a × c)	(a × d)
$31.24	26	39	52	$810	$1,220	$1,620

Airport security coordinators would need to undergo training to comply with the proposed rule. TSA training requirements for airport security coordinators differ from those for aircraft operator security coordinators. ASC training is only offered twice per year by the American Association of Airport Executives. This 8-hour training course is taught by professional trainers and requires payment of a $350 registration fee. Since this training is offered at a single location, TSA estimated ASCs would need to expend an additional $450 to cover travel and other incidental expenses. TSA assumed the need to travel to and from the training would effectively add an additional eight hours to the training.

To estimate the cost of this requirement, the eight hours of class time are added to the eight hours of assumed travel time for a total of 16 hours of compensated ASC time. TSA estimated airports would need to train between one and three ASCs in order to meet the requirements that an ASC be available 24-hours per day. Without more detailed information, TSA adopted the average for its primary estimate. See the figure below for a summary of the costs of complying with this requirement. TSA has requested comments on whether it should adopt a self-paced training program for these airports that would reduce the impact of this requirement. For the purposes of the RFA, however, TSA estimated costs for this requirement as it is proposed in the NPRM.

UNIT COST: SECURITY COORDINATOR TRAINING, AIRPORT OPERATORS

Training cost item	Unit cost		
	Low	Primary	High
Training Course Fee	.....	$350	.....
Travel Expenses	.....	450	.....
ASC Compensation	$500	1,000	$1,500
Total	1,300	1,800	2,300

Total Cost per Airport Operator

Using the estimates described above, TSA concluded that the proposed rule would impose a compliance cost of between approximately $2,360 and $4,420 per airport operator. The range of compliance costs reflects the uncertainty surrounding many of the variables used to generate the estimates. See the figure below.

TOTAL COMPLIANCE UNIT COST, AIRPORT OPERATORS

Requirement	Unit cost		
	Low	Primary	High
Security Program and Profile	$250	$375	$500
ASC Duties	810	1,220	1,620

TOTAL COMPLIANCE UNIT COST, AIRPORT OPERATORS—Continued

Requirement	Unit cost		
	Low	Primary	High
ASC Training	1,300	1,800	2,300
Total	2,360	3,395	4,420

After making the estimates described above, TSA has initially concluded that the proposed rule would not impose a significant economic impact on a substantial number of privately-owned airport operators. In 2002, the latest year for which data are available, firms in this industry earned on average approximately $3.8 million in annual revenue according to the U.S. Census Bureau. The cost of complying with the proposed rule, as calculated above, would therefore represent less than 1 percent of revenue for a firm with average industry revenues. Alternatively, if an airport operator incurred the highest estimated compliance cost described above ($4,420), it would need annual revenues of less than $442,000 for the proposed rule to impose costs of 1 percent of firm revenue. Consequently, TSA has initially determined that the rule would not impose a significant economic impact on these types of firms. TSA seeks comment on this preliminary conclusion.

As stated above, the proposed rule would also affect publicly owned airports. These airport operators would have to follow the same requirements as privately-held airport operators: adopt security programs, submit security profiles to TSA, and designate and maintain airport security coordinators.

Because the requirements for these airports are the same as for the privately-owned airports, TSA estimated the unit compliance costs using the same methodology. As stated above, TSA calculated that the proposed rule would impose a cost of between $2,360 and $4,420 per airport operator. Although these airports are publicly owned, TSA was unable to locate revenue information for them. The Agency was thus unable to compare compliance costs to revenue in order to make a judgment on whether the costs represent a significant economic impact to these firms.

TSA therefore requests comment on whether the proposed rule would have a significant economic impact on the 68 to 74 publicly owned small airport operators that TSA identified in its research. Specifically, TSA requests any information that would allow it to compare estimated compliance costs to revenues typically earned by these types of airport operators.

Significant Alternatives Considered

TSA considered four substantive alternatives to the proposed regulation that would have reduced compliance costs for small businesses. First, TSA considered using the current method of watch-list matching employed by aircraft operators under the TFSSP and PCSSP rules. Second, TSA considered using TSA inspectors to conduct audits instead of TSA approved third party auditors. Third, TSA considered leveraging the Secure Flight program currently under development, which would use a web-based application for transmission of passenger information to the Secure Flight vetting engine. Fourth, TSA evaluated the incremental impact of raising the aircraft weight threshold from 12,500 pounds MTOW to 16,500 pounds MTOW and the incremental impact of lowering the aircraft weight threshold to 10,500 pounds MTOW. This section describes those alternatives relative to the proposed regulation. TSA invites comments on these or other substantive alternatives to the proposed rule.

TSA Inspectors

TSA considered using TSA inspectors instead of approved third-party auditors to complete the audits proposed in the rule. Under such a scenario, TSA would need to hire several new employees to complete the inspections. Each operator would complete a TSA inspection every other year. Because TSA would conduct all of the inspections, aircraft operators would no longer pay a biennial fee for audits. This arrangement would reduce the primary unit cost estimate for newly regulated small aircraft operators from $20,308 to $18,051. Assuming a ''significant impact'' is 1 percent of an operator's revenues, this change would reduce the number of affected small entities to those having annual revenues less than $2.5 million. Unfortunately, TSA was unable to estimate how many operators would be affected by this change and, as noted in the alternatives analysis in the Regulatory Evaluation, TSA requests comments that would enable it to quantify these impacts.

Watch-List Matching

TSA considered requiring all large aircraft operators to conduct watch-list matching as currently done under the Twelve-Five and Private Charter Rules. These aircraft operators currently run their passengers against the No Fly List, which they retrieve from TSA. The proposed rule would require aircraft operators to send passenger information to a TSA-approved watch-list service provider. The alternative to the proposed rule is to extend the current method of watch-list matching under the Twelve-Five and Private Charter Rules to large aircraft operators that are not currently required to have a security program. Operationally, this would require that a total of approximately 9,835 aircraft operators have direct access to the watch-list from TSA.

TSA has rejected this alternative based on security grounds. Expanding direct access to the watch-list from 750 aircraft operators today to 9,835 under this alternative increases the opportunity for the list to be compromised and would contradict other TSA initiatives to limit distribution of the watch-lists. To limit the number of entities that have access to the watch-list, TSA proposes to require large aircraft operators to submit passenger information to a TSA-approved watch-list service provider. The proposal would reduce the number of entities with direct access to the watch-list, thus improving security.

Secure Flight Web-Based Application

TSA has indicated the use of a web-based application for some transmissions of passenger information to the Secure Flight vetting engine. While the design and development of the Secure Flight web-based application is in its early stages, TSA subject matter experts have provided two approaches to extending an already established web-based application. These costs reflect an early stage of development and cannot, given this early stage, include costs that may be identified as TSA proceeds with system development. The first approach would

be developed and implemented with the *absence of* an implemented LASP and would amount to $23.2 million undiscounted over ten years. This approach posits that without an implemented LASP, Secure Flight would be required to establish a relationship with each of the aircraft operators. TSA would work with aircraft operators to develop the formatting and transmission procedures for not only for the upload of passenger information but also the download of passenger vetting results. These out-reach or ramp-up activities will be borne by the Secure Flight process. The second approach would be developed and implemented *with* the ability to leverage activities associated with a fully implemented LASP and would amount to $24.2 million undiscounted over ten years. This approach posits that an implemented LASP would establish a relationship with each of the aircraft operators during the initial deployment of the watch-list service provider process. During this period both TSA and the watch-list service providers would work with aircraft operators to develop the formatting and transmission procedures for not only for the upload of passenger information but also the download of passenger vetting results. As a result, Secure Flight would assume a relatively mature process.

Comparison of the First Three Alternatives

TSA opted for the proposed plan as the more efficient and effective way of applying its limited compliance and enforcement resources towards the objective of increasing security. The use of third-parties would allow TSA to meet its security mission into four important ways.

First, third-party auditors would increase effective TSA oversight by reviewing each aircraft operator's compliance with its security program six months after TSA approves its security program and every two years thereafter.

Second, given the number of large aircraft operators (approximately 10,000), the third-party auditor program would allow TSA to ramp up more quickly thereby obtaining the assessment of all large aircraft operators more quickly relative to a program that relied solely on TSA inspectors, given the associated hiring and training associated with new hires.

Third, the third-party auditor program would allow TSA to focus more of its compliance and enforcement resources on aircraft operators that are experiencing problems with implementing and complying with their security programs.

Fourth, the watch-list matching service providers would provide the needed security and do so in a timely fashion. Given the security concerns, TSA believes a reliable mechanism for watch-list matching for large aircraft must be operational without undue delay. While the Secure Flight Program would also provide a reliable mechanism, its development is likely to be several years away and it is likely that it would not be available to address this important security need when TSA would be ready to implement the LASP.

This proposal is consistent with current practices in the aviation industry, which frequently rely on the Federal Aviation Administration's designee program. This type of program has been successfully implemented in other related aviation requirements.

Additionally, the GA industry is very familiar with the third party auditor concept as it relates to safety inspections. Many GA operators undergo third party audits each year to comply with customer requirements. The proposal should be easily integrated into most GA operator's existing audit schedules.

Evaluating Different Aircraft Weight Thresholds

The determination of weight must take into account a number of factors such as the effect on international harmonization, existing policies and programs, and the economic effect on the GA community. Discussed below are two alternatives to the threshold weight issue.

Alternative 1: Lower threshold weight to 10,500 pounds MTOW. This solution will reduce the associated risk and number of unknown aircraft operators by incorporating an additional 3,000-5,000 aircraft into a mandatory security program. This alternative would also include a portion of currently unregulated types of aircraft, including large turboprops and smaller jet aircraft. However, in order to successfully implement this threshold weight, significant modifications to existing security programs and new rulemaking would be required, which would result in delayed program/rule timelines. These additional aircraft require TSA oversight and place an additional strain on existing TSA resources. Furthermore, this change would require additional international coordination, since TSA would be moving away from the globally accepted International Civil Aviation Organization standards.

TSA estimates the cost impact of option one, in terms of undiscounted annualized dollars would add $23.7 million to the undiscounted annualized cost of the rule as proposed.

Alternative 2: Raise threshold weight to 16,000 pounds MTOW. This option would reduce the number of regulated aircraft and parties by approximately 9,000 aircraft which would ultimately decrease the inspection requirements on TSA resources. However, excluding these aircraft would increase the potential risk and could result in higher damage potential. TSA believes that this increased risk and damage potential of aircraft between greater than 12,500 pounds MTOW and 16,000 pounds MTOW are not justified by the reduction in cost. Furthermore, moving away from the common greater than 12,500 pounds MTOW threshold will yield the same concerns discussed in alternative one.

TSA estimates the cost impact of option two, in terms of undiscounted annualized dollars would subtract $26.4 million from the undiscounted annualized cost of the rule as proposed.

Based on the above discussion and analysis by TSNM-GA technical experts, the program office recommends that the threshold of greater than 12,500 pounds MTOW be maintained as the recognized security threshold weight standard for current and future GA security programs and policies. Selecting a lower threshold weight would improve security because more aircraft would be subject to the LASP but would also increase the burden to industry to the point where the burden may not be fully supported by increased security. Selecting a higher threshold weight would lower the burden on the industry because a lower number of aircraft would be subject to the LASP. However, with this higher threshold weight, the proposed LASP would not cover many aircraft that can cause significant damage if used as a missile or to deliver a biological, chemical, or nuclear weapon. TSA believes that mitigating the potential security risk and damage potential of large aircraft 16,000 pounds MTOW or under outweighs the cost difference. Consequently, TSA believes that the weight threshold of greater than 12,500 pounds MTOW is the appropriate balance of risk and burden.

Identification of Duplication, Overlap, and Conflict With Other Federal Rules

TSA has identified an overlap between the proposed LASP and U.S. Customs and Border Protection's (CBP) regulations governing its Advance Passenger Information System (APIS). CBP requires certain aircraft flying to or from the United States to submit passenger manifests to APIS for

comparison to the watch-lists. CBP's watch-list comparison would thus duplicate TSA's proposed requirement that large aircraft operators submit passenger information to watch-list service providers for comparison to the watch-lists.

In recognition of this overlap, TSA would exempt a flight from its watch-list requirement flights covered by its NPRM that also are subject to APIS regulations.

Preliminary Conclusion

Based on this preliminary analysis, TSA has made no determination whether the proposed rule would have a significant economic impact on a substantial number of small entities under section 605(b) of the RFA. TSA requests comment on all aspects of this analysis. TSA will make a final determination in the Final Regulatory Flexibility Analysis for the Final Rule.

3. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this notice of proposed rulemaking and has determined this rule would not have an adverse impact on international trade.

4. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II 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 an expenditure of $100 million or more (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 notice of proposed rulemaking does not exceed this threshold for State, local, and tribal governments; however, proposed security measures for city- or county-owned airports may nevertheless impose a burden on some small municipalities. The impact on the overall economy does exceed the threshold, resulting in an unfunded mandate on the private sector. This regulatory evaluation documents costs and alternatives. TSA will publish a final analysis, including its response to public comments, when it publishes a final rule.

A. Executive Order 13132, Federalism

TSA has analyzed this notice of proposed rulemaking under the principles and criteria of E.O. 13132, Federalism. We 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, and therefore, does not have federalism implications.

B. Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

C. Energy Impact Analysis

TSA has assessed the energy impact of the action in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects

49 CFR Part 1515

Appeals, Commercial drivers license, Criminal history background checks, Explosives, Facilities, Hazardous materials, Incorporation by reference, Maritime security, Motor carriers, Motor vehicle carriers, Ports, Seamen, Security measures, Security threat assessment, Vessels, Waivers.

49 CFR Part 1520

Air transportation, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1522

Accounting, Aircraft operators, Aviation safety, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1540

Aircraft operators, Airports, Aviation safety, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1542

Airports, Arms and munitions, Aviation safety, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1544

Aircraft, Aircraft operators, Airmen, Airports, Arms and munitions, Aviation safety, Explosives, Freight forwarders, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1550

Aircraft, Aviation safety, Security measures.

The Proposed Amendments

In consideration of the foregoing, the Transportation Security Administration proposes to amend Chapter XII of Title 49, Code of Federal Regulations, as follows:

SUBCHAPTER A—ADMINISTRATIVE AND PROCEDURAL RULES

PART 1515—APPEAL AND WAIVER PROCEDURES FOR SECURITY THREAT ASSESSMENTS FOR INDIVIDUALS

1. The authority for part 1515 continues to read as follows:

Authority: 46 U.S.C. 70105; 49 U.S.C. 114, 5103a, 40113, and 46105; 18 U.S.C. 842, 845; 6 U.S.C. 469.

2. Amend § 1515.1 by revising paragraph (a) to read as follows:

§ 1515.1 Scope.

(a) *Appeal.* This part applies to applicants who are appealing an Initial Determination of Threat Assessment or an Initial Determination of Threat Assessment and Immediate Revocation in a security threat assessment as described in:

(1) 49 CFR part 1572 for a hazardous materials endorsement (HME) or a Transportation Worker Identification Credential (TWIC);

(2) 49 CFR part 1540, subpart C, for air cargo workers; or

(3) 49 CFR part 1544, subpart G, for large aircraft flight crew members, individuals authorized to perform screening functions, TSA-approved auditors and watch-list service provider covered personnel.

* * * * *

3. Amend § 1515.5 by revising introductory text in paragraphs (a), (c), and (h), and adding paragraphs (a)(4) and (h)(3) to read as follows:

§ 1515.5 Appeal of Initial Determination of Threat Assessment based on criminal conviction, immigration status, or mental capacity.

(a) *Scope.* This section applies to applicants appealing from an Initial Determination of Threat Assessment that was based on one or more of the following:

* * * * *

(4) TSA has determined that a large aircraft flight crew member, an individual authorized to perform screening functions, an applicant to become a TSA-approved auditor, or a watch-list service provider covered personnel has a disqualifying criminal offense described in 49 CFR 1544.229(d).

* * * * *

(c) *Final Determination of Threat Assessment.* (1) If the Assistant Administrator concludes that an HME or TWIC applicant does not meet the standards described in 49 CFR 1572.103, 1572.105, or 1572.109, or that a large aircraft flight crew member, an individual authorized to perform screening functions, an applicant to become a TSA-approved auditor, or a service provider covered personnel does not meet the requirements in 49 CFR 607, TSA serves a Final Determination of Threat Assessment upon the applicant. In addition—

* * * * *

(h) *Appeal of immediate revocation.* If TSA directs an immediate revocation, the applicant may appeal this determination by following the appeal procedures described in paragraph (b) of this section. This applies—

* * * * *

(3) If TSA withdraws a Determination of No Security Threat issued to a large aircraft flight crew member, an individual authorized to perform screening functions, a TSA-approved auditor, or a service provider covered personnel.

4. Amend § 1515.9 by revising the introductory text in paragraphs (a) and (f), and adding paragraphs (a)(3) and (f)(4) to read as follows:

§ 1515.9 Appeal of security threat assessment based on other analyses.

(a) *Scope.* This section applies to an applicant appealing an Initial Determination of Threat Assessment as follows:

* * * * *

(3) TSA had determined that a large aircraft flight crew member, an individual authorized to perform screening functions, an applicant to become a TSA-approved auditor, or a watch-list service provider covered personnel poses a security threat as provided in 49 CFR 1544.609.

* * * * *

(f) *Appeal of immediate revocation.* If TSA directs an immediate revocation, the applicant may appeal this determination by following the appeal procedures described in paragraph (b) of this section. This applies—

* * * * *

(4) If TSA withdraws a Determination of No Security Threat issued to a large aircraft flight crew member, an individual authorized to perform screening functions, a TSA-approved auditor, or a service provider covered personnel.

5. Amend § 1515.11 by revising the introductory text in paragraph (a) and adding paragraph (a)(4) to read as follows:

§ 1515.11 Review by administrative law judge and TSA Final Decision Maker.

(a) *Scope.* This section applies to the following applicants:

* * * * *

(4) A large aircraft flight crew member, an individual authorized to perform screening functions, a TSA-approved auditor, or a service provider covered personnel, or an applicant to become one, who has been issued a Final Determination of Threat Assessment after an appeal as described in 49 CFR 1515.5 or 1515.9.

* * * * *

SUBCHAPTER B—SECURITY RULES FOR ALL MODES OF TRANSPORTATION

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

6. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

7. Amend § 1520.5 by revising paragraph (b)(1)(i) to read as follows:

§ 1520.5 Sensitive security information.

* * * * *

(b) * * *

(1) * * *

(i) Any aircraft operator, airport operator, watch-list service provider, or fixed base operator security program, or security contingency plan under this chapter;

* * * * *

8. Amend § 1520.7 by revising the introductory text and paragraph (a) to read as follows:

§ 1520.7 Covered persons.

Persons subject to the requirements of part 1520 are:

(a) Each airport operator, aircraft operator, TSA-approved auditor, independent public accounting firm attesting to compliance under part 1544, subpart F, watch-list service provider, and fixed base operator subject to the requirements of subchapter C of this chapter, and each armed security officer under subpart B of part 1562.

* * * * *

9. Add new part 1522 to subchapter B to read as follows:

PART 1522—TSA-APPROVED AUDITORS

Subpart A—General

Sec.
1522.1 Scope and terms used in this part.
1522.3 Qualifications.
1522.5 Application.
1522.7 TSA review and approval.
1522.9 Reconsideration of disapproval of an application.
1522.11 Withdrawal of approval.
1522.13 Responsibilities of TSA-approved auditors.
1522.15 Fraud and intentional falsification of records.
1522.17 TSA Inspection authority.

Subpart B [Reserved]

Subpart C—Auditors for the Large Aircraft Security Program.

Sec.
1522.201 Applicability.
1522.203 Additional qualification requirements.
1522.205 Audit report.
1522.207 Training.
1522.209 Biennial Review.

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44932, 44935–44936, 44942, 46105.

PART 1522—TSA-APPROVED AUDITORS

Subpart A—General

§ 1522.1 Scope and terms used in this part.

(a) This part governs the approval and responsibilities of persons conducting security audits of large aircraft operators that are required to have a security program under part 1544.

(b) In addition to the terms in §§ 1500.3 and 1540.5 of this chapter, the following terms apply in this part:

Applicant means an individual who seeks to become a TSA-approved auditor under this part.

Conflict of interest means a situation when the TSA-approved auditor has impairments that might affect their ability to do their work and report their findings impartially. Examples of situations where a TSA-auditor would have a conflict of interest include but are not limited to any of the following:

(1) The TSA-approved auditor has official, professional, personal, or

financial relationships that might cause an auditor to limit the extent of the inquiry, to limit disclosure, or to weaken or distort audit findings in any way.

(2) The TSA-approved auditor had previous responsibility for decision-making or managing an entity that would affect current operations of the entity or program being audited.

(3) The TSA-approved auditor currently or previously maintained the official records that are the subject of the audit.

(4) The TSA-approved auditor has financial interest that is direct, or is substantial though indirect, in the audited entity or program.

(5) An immediate family member of the TSA-approved auditor is an officer of the operator that is the subject of the audit.

(6) The TSA-approved auditor or an entity with which the TSA-approved auditor has an employment relationship provides to the operator being audited non-audit services that relate to the operator's security program.

TSA-approved auditor or *auditor* means any individual who has been approved under this part to conduct an audit required under this chapter.

§ 1522.3 Qualifications.

To be considered for approval as an auditor, the applicant must—

(a) Have sufficient facilities, resources, and personnel to perform the required audit responsibilities;

(b) Have knowledge of the Federal statutory and regulatory requirements and experience understanding and interpreting Federal statutes and regulations;

(c) Have sufficient, relevant experience to perform the required audit responsibilities;

(d) Obtain a certification or accreditation from an organization that TSA recognizes as qualified to certify or accredit an auditor for the type of audit that the applicant seeks to perform; and

(e) Demonstrate the ability to prepare clear and thorough written reports and other documents required for the auditing function they will perform and demonstrate excellent oral communication skills.

§ 1522.5 Application.

(a) Each applicant must submit an application in a form and manner prescribed by TSA.

(b) An application must include the following information:

(1) The applicant's full name, business address, business phone number, and business email address;

(2) A copy of the applicant's certification from an organization that TSA recognizes as qualified to certify or accredit an auditor for the type of audit that the applicant seeks to perform; and

(3) A statement of how the applicant meets the qualifications set forth on § 1522.3.

§ 1522.7 TSA review and approval.

(a) *Review.* Upon receiving an application, TSA will review the application. TSA will approve the application if the applicant meets the qualifications described in § 1522.3 and other applicable qualifications described in this part and TSA determines that approval is in the interest of safety and the public.

(b) *Approval.* If an application is approved, TSA will send the applicant a written notice of approval. Once approved, an auditor may conduct audits in which he or she does not have a conflict of interest.

(c) *Disapproval.* TSA will send a written notice of disapproval to an applicant whose application is disapproved. The notice of disapproval will include the basis of the disapproval of the application.

§ 1522.9 Reconsideration of disapproval of an application.

(a) *Petition for reconsideration.* If an application is disapproved, the applicant may seek reconsideration of the decision by submitting a written petition for reconsideration to the Assistant Secretary or designee within 30 days of receiving the notice of disapproval. The written petition for reconsideration must include a statement and any supporting documentation explaining why the applicant believes the reason for disapproval is incorrect.

(b) *Review of petition.* Upon review of the petition for reconsideration, the Assistant Secretary or designee disposes of the petition by either affirming the disapproval of the application or approving the application. The Assistant Secretary or designee may request additional information from the applicant prior to rendering a decision.

§ 1522.11 Withdrawal of approval.

(a) *Basis for withdrawal of approval.* TSA may withdraw approval of a TSA-approved auditor if the auditor ceases to meet the standards for approval, fails to fulfill his or her responsibilities under § 1522.11, or it is in the interest of security or the public, such as failure to report an imminent threat under § 1522.11(c).

(b) *Notice of withdrawal of approval.* (1) Except as provided in paragraph (c) of this section, TSA will provide a written notice of proposed withdrawal of approval to the auditor.

(2) The notice of proposed withdrawal of approval will include the basis of the withdrawal of approval.

(3) Unless the auditor files a written petition for reconsideration under paragraph (d) of this section, the notice of proposed withdrawal of approval will become a final notice of withdrawal of approval 31 days after the auditor's receipt of the notice of proposed withdrawal of approval.

(c) *Emergency notice of withdrawal of approval.* (1) If TSA finds that there is an emergency requiring immediate action with respect to a TSA-approved auditor's ability to perform audits, TSA may withdraw approval of that auditor without prior notice.

(2) TSA will incorporate in the emergency notice of withdrawal of approval a brief statement of the reasons and findings for the withdrawal of approval.

(3) The emergency notice of withdrawal of approval is effective upon the TSA-approved auditor's receipt of the notice. The auditor may file a written petition for reconsideration under paragraph (d) of this section; however, this petition does not stay the effective date of the emergency notice of withdrawal of approval.

(d) *Petition for reconsideration.* An auditor may seek reconsideration of the withdrawal of approval by submitting a written petition for reconsideration to the Assistant Secretary or designee within 30 days of receiving the notice of withdrawal of approval.

(e) *Review of petition.* Upon review of the written petition for reconsideration, the Assistant Secretary or designee disposes of the petition by either affirming or withdrawing the notice of withdrawal of approval. The Assistant Secretary or designee may request additional information from the auditor prior to rendering a decision.

§ 1522.13 Responsibilities of TSA-approved auditors.

(a) *Standards for audit.* Each auditor must perform an audit, in a form and manner prescribed by TSA, to determine whether the operator is in compliance with applicable TSA requirements.

(b) *Conflict of interest.* No auditor may undertake an audit in which he or she has a conflict of interest as defined in § 1552.1.

(c) *Audit report.* Each auditor must prepare and submit a report, in a form and manner prescribed by TSA, for each audit that he or she performs.

(d) *Immediate notification to TSA.* If during the course of an audit the auditor believes that there is or may be an instance of noncompliance with TSA

requirements that presents an imminent threat to transportation security or public safety, the auditor must report the instance immediately to TSA.

(e) *Change in information.* Each auditor must inform TSA of any change in the information described in § 1522.3 and 1522.5.

(f) *No authorization to take remedial or disciplinary action.* The auditor is not authorized to require any remedial or disciplinary action against the person subject to the audit.

(g) *Sensitive Security Information.* Each TSA-approved auditor must comply with the requirements in 49 CFR part 1520 regarding the handling and protection of Sensitive Security Information.

(h) *Non-disclosure of proprietary information.* Unless explicitly authorized by TSA, each auditor may not make an unauthorized release or dissemination of any information that TSA or a large aircraft operator indicates as proprietary information and provides to the auditor.

§ 1522.15 Fraud and intentional falsification of records.

No auditor may make, or cause to be made, any of the following:

(a) Any fraudulent or intentionally false statement in any application under this part.

(b) Any fraudulent or intentionally false entry in any record or report that is kept, made, or used to show compliance with this subchapter, or exercise any privileges under this part.

(c) Any reproduction or alteration, for fraudulent purpose, of any report, record, security program, access medium, or identification medium issued or submitted under this part.

§ 1522.17 TSA inspection authority.

(a) Each TSA-approved auditor must allow TSA, at any time or place, to make any inspections, including copying records, to determine compliance of a TSA-approved auditor or an operator required to submit to an audit under this subchapter with:

(1) This subchapter and any security program under this subchapter, and part 1520 of this chapter; and

(2) 49 U.S.C. Subtitle VII, as amended.

(b) At the request of TSA, each TSA-approved auditor must provide evidence of compliance with this part.

Subpart B [Reserved]

Subpart C—Auditors for the Large Aircraft Security Program

§ 1522.201 Applicability.

This subpart applies to auditors who seek to obtain approval from TSA to conduct audits of operators of large aircraft that are required to have a security program under 49 CFR 1544.101(b).

§ 1522.203 Additional qualification requirements.

In addition to the requirements set forth in § 1522.3, an applicant seeking to obtain approval to audit aircraft operators that are required to have a security program under 49 CFR 1544.101(b) must have the following qualifications:

(a) The applicant must have at least five years of experience in inspection or auditing compliance with State or Federal regulations in the security industry, the aviation industry, or government programs. The five years of experience must have been obtained within 10 years of the date of the application.

(b) The applicant must present three professional references that address the applicant's abilities in inspection or auditing and written communications.

(c) Maintain a current accreditation or certification required in § 1522.3(d).

(d) The applicant must have sufficient knowledge of, and ability to determine compliance with, regulations, policies, directives, rules, and regulations, pertaining to the large aircraft security program.

(e) The applicant must have sufficient knowledge of and ability to apply the concepts, principles, and methods of compliance with the requirements of the large aircraft security program to include assessment, inspection, investigation, and reporting of compliance with the large aircraft security program.

(f) The applicant must successfully undergo a security threat assessment under 49 CFR part 1544, subpart G, and have a valid Determination of No Security Threat.

§ 1522.205 Audit report.

(a) Each TSA-approved auditor must prepare and submit a written audit report to TSA in a manner and form prescribed by TSA within 30 days of completing an audit.

(b) The audit report must include the following information:

(1) A description of the facilities, equipment, systems, processes, and/or procedures that were audited.

(2) The auditor's findings regarding the operator's compliance with TSA requirements.

(3) Conclusions on the systems, processes, and/or procedures that were audited.

(4) Signed attestation by the auditor that he or she did not have any conflicts of interest in conducting the audit and that the audit was conducted impartially, professionally, and consistent with the standards set forth by TSA.

(5) The third party auditor must retain copies of completed audit reports for 36 calendar months.

§ 1522.207 Training.

(a) *Initial training.* Each TSA-approved auditor must complete the initial training prescribed by TSA before conducting any audit under this subchapter.

(b) *Recurrent training.* Each TSA-approved auditor must complete recurrent training prescribed by TSA 24 months after his or her most recent TSA-prescribed training. If the TSA-approved auditor completes the recurrent training in the month before or the month after it is due, the TSA-approved auditor is considered to have taken it in the month it is due.

§ 1522.209 Biennial review.

(a) *Initial review.* Except as otherwise required by TSA, each TSA-approved auditor must submit the following information within 24 months after the auditor is approved under § 1522.5. If the TSA-approved auditor submits the following information in the month before or the month after it is due, the TSA-approved auditor is considered to have submitted the information in the month it is due:

(1) Evidence that the auditor successfully completed the initial training under § 1522.207(a) and any recurrent training described § 1522.207(b); and

(2) Evidence that the auditor continues to be certified or accredited by an organization that TSA recognizes as qualified to certify or accredit an auditor for the large aircraft security program.

(b) *Recurrent review.* Except as otherwise required by TSA, each TSA-approved auditor must submit the following information 24 months after the auditor submitted the information required under paragraph (a) or (b) of this section. If the TSA-approved auditor submits the following information in the month before or the month after it is due, the TSA-approved auditor is considered to have submitted the information in the month it is due:

(1) Evidence that the auditor successfully completed the initial training under § 1522.207(a) and any recurrent training described § 1522.207(b); and

(2) Evidence that the auditor continues to be certified or accredited by an organization that TSA recognizes

as qualified to certify or accredit an auditor for the large aircraft security program.

SUBCHAPTER C—CIVIL AVIATION SECURITY

PART 1540—CIVIL AVIATION SECURITY: GENERAL RULES

10. The authority citation for part 1540 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

Subpart A—General

11. Amend § 1540.5 by adding the definition of ''Standard security program'' in alphabetical order to read as follows:

§ 1540.5 Terms used in this subchapter.

* * * * *

Standard security program means a security program issued by TSA that serves as a baseline for a particular type of operator. If TSA has issued a standard security program for a particular type of operator, unless otherwise authorized by TSA, each operator's security program consists of the standard security program together with any amendments and alternative procedures approved or accepted by TSA.

* * * * *

Subpart B—Responsibilities of Passengers and Other Individuals and Persons

12. Revise § 1540.107(c) to read as follows:

§ 1540.107 Submission to screening and inspection.

* * * * *

(c) An individual must provide his or her full name, as defined in § 1560.3, when—

(1) The individual makes a reservation for a covered flight, as defined in § 1560.3.

(2) The individual makes a request for authorization to enter a sterile area.

(3) An aircraft operator described in § 1544.101(b) requests the individual's full name under § 1544.245(b).

13. Add new subpart D to part 1540 to read as follows:

Subpart D—Responsibilities of Holders of TSA-Approved Security Programs

§ 1540.301 Withdrawal of approval of a security program.

(a) *Applicability.* This section applies to holders of a security program approved or accepted by TSA under 49 CFR chapter XII, subchapter C.

(b) *Withdrawal of security program approval.* TSA may withdraw the approval of a security program, if TSA determines continued operation is contrary to security and the public interest, as follows:

(1) *Notice of proposed withdrawal of approval.* TSA will serve a Notice of Proposed Withdrawal of Approval, which notifies the holder of the security program, in writing, of the facts, charges, applicable law, regulation, or order that form the basis of the determination.

(2) *Security program holder's reply.* The holder of the security program may respond to the Notice of Proposed Withdrawal of Approval no later than 15 calendar days after receipt of the withdrawal by providing the designated official, in writing, with any material facts, arguments, applicable law, and regulation.

(3) *TSA review.* The designated official will consider all information available, including any relevant material or information submitted by the holder of the security program, before either issuing a Withdrawal of Approval of the security program or rescinding the Notice of Proposed Withdrawal of Approval. If TSA issues a Withdrawal of Approval, it becomes effective upon receipt by the holder of the security program, or 15 calendar days after service, whichever occurs first.

(4) *Petition for reconsideration.* The holder of the security program may petition TSA to reconsider its Withdrawal of Approval by serving a petition for consideration no later than 15 calendar days after the holder of the security program receives the Withdrawal of Approval. The holder of the security program must serve the Petition for Reconsideration on the designated official. Submission of a Petition for Reconsideration will not stay the Withdrawal of Approval. The holder of the security program may request the designated official to stay the Withdrawal of Approval pending review of and decision on the Petition.

(5) *Assistant Secretary's review.* The designated official transmits the Petition together with all pertinent information to the Assistant Secretary for reconsideration. The Assistant Secretary will dispose of the Petition within 15 calendar days of receipt by either directing the designated official to rescind the Withdrawal of Approval or by affirming the Withdrawal of Approval. The decision of the Assistant Secretary constitutes a final agency order subject to judicial review in accordance with 49 U.S.C. 46110.

(6) *Emergency withdrawal.* If TSA finds that there is an emergency with respect to aviation security requiring immediate action that makes the procedures in this section contrary to the public interest, the designated official may issue an Emergency Withdrawal of Approval of a security program without first issuing a Notice of Proposed Withdrawal of Approval. The Emergency Withdrawal would be effective on the date that the holder of the security program receives the emergency withdrawal. In such a case, the designated official will send the holder of the security program a brief statement of the facts, charges, applicable law, regulation, or order that forms the basis for the Emergency Withdrawal. The holder of the security program may submit a Petition for Reconsideration under the procedures in paragraphs (b)(4) through (b)(5) of this section; however, this petition will not stay the effective date of the Emergency Withdrawal.

(c) *Service of documents for withdrawal of approval of security program proceedings.* Service may be accomplished by personal delivery, certified mail, or express courier. Documents served on the holder of a security program will be served at its official place of business as designated in its application for approval or its security program. Documents served on TSA must be served to the address noted in the Notice of Withdrawal of Approval or Withdrawal of Approval, whichever is applicable.

(1) *Certificate of service.* An individual may attach a certificate of service to a document tendered for filing. A certificate of service must consist of a statement, dated and signed by the person filing the document, that the document was personally delivered, served by certified mail on a specific date, or served by express courier on a specific date.

(2) *Date of service.* The date of service is—

(i) The date of personal delivery;

(ii) If served by certified mail, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark; or

(iii) If served by express courier, the service date shown on the certificate of service, or by other evidence if there is no certificate of service.

(d) *Extension of time.* TSA may grant an extension of time to the limits set forth in this section for good cause shown. A security program holder's request for an extension of time must be in writing and be received by TSA at least two days before the due date in order to be considered. TSA may grant

itself an extension of time for good cause.

PART 1542—AIRPORT SECURITY

14. The authority citation for part 1542 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

15. Amend § 1542.103 by revising introductory text of paragraphs (a) and (b), revising paragraphs (c) and (d), and adding new paragraphs (e) and (f) to read as follows:

Subpart B—Airport Security Program

§ 1542.103 Content.

(a) *Complete program.* Except as otherwise approved by TSA, each airport operator regularly serving operations of an aircraft operator or foreign air carrier described in § 1544.101(a)(1) or § 1546.101(a) of this chapter, must adopt and carry out a complete program, and include in its security program the following:

* * * * *

(b) *Supporting program.* Except as otherwise approved by TSA and except for airports that are required to adopt a complete program under paragraph (a) of this section, each airport regularly serving operations of an aircraft operator or foreign air carrier described in § 1544.101(a)(2) or § 1546.101(b) or (c) of this chapter, must adopt and carry out a supporting program, and include in its security program a description of the following:

* * * * *

(c) *Partial program.* Except as otherwise approved by TSA and except for airports that are required to adopt a complete program under paragraph (a) of this section or a supporting program under paragraph (b) of this section, each of the following airports must adopt and carry out a partial program, and must include in its security program the requirements in paragraph (d) of this section.

(1) Each airport regularly serving large aircraft operations of an aircraft operator described in § 1544.101(b) with scheduled or public charter operations.

(2) Each reliever airport as defined in 49 U.S.C. 47102(22).

(d) *Partial program content.* Except as otherwise approved by TSA, each airport described in paragraph (c) of this section must include in its security program a description of the following:

(1) Name, means of contact, duties, and training requirements of the airport security coordinator as required under § 1542.3.

(2) A description of the law enforcement support used to comply with § 1542.215(b).

(3) Training program for law enforcement personnel required under § 1542.217(c)(2), if applicable.

(4) A system for maintaining the records described in § 1542.221.

(5) Procedures for the distribution, storage, and disposal of Sensitive Security Information (which, as defined in § 1520.5, includes security programs, Security Directives, Information Circulars, and implementing instructions), and, as appropriate, classified information.

(6) Procedures for public advisories as specified in § 1542.305.

(7) Incident management procedures used to comply with § 1542.307.

(e) *Provisional program.* (1) An airport operator that is not subject to paragraph (a), (b), or (c) of this section may request TSA to review and approve its security program.

(2) TSA may approve the security program if it determines that approval is in the interest of safety and the public using the procedures described in § 1544.105(a).

(3) The airport operator must comply with the security program approved under this paragraph (e).

(4) An airport operator or TSA may amend an approved security program using the procedures described in § 1544.105.

(5) TSA may withdrawal approval of a security program using the procedures described in § 1540.301 if it determines that withdrawal of approval is in the interest of safety and the public.

(f) *Use of appendices.* The airport operator may comply with paragraphs (a), (b), (c), and (d) of this section by including in its security program, as an appendix, any document that contains the information required by paragraphs (a), (b), (c), and (d) of this section. The appendix must be referenced in the corresponding section(s) of the security program.

PART 1544—AIRCRAFT OPERATOR SECURITY

16. The authority citation for part 1544 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44905, 44907, 44913–44914, 44916–44918, 44932, 44935–44936, 44942, 46105.

Subpart A—General

17. Amend § 1544.1 by revising paragraph (a)(1) to read as follows:

§ 1544.1 Applicability of this part.

(a) * * *

(1) The operations of aircraft operators engaged in any civil operation in an aircraft with a maximum certificated takeoff weight of over 12,500 pounds.

* * * * *

Subpart B—Security Program

§ 1544.101 [Amended]

18. Amend § 1544.101 as follows:

a. Revise paragraph (a) introductory text;

b. Revise paragraph (b);

c. Remove and reserve paragraphs (c), (d), (e), and (f);

d. Revise paragraph (g) to read as follows;

e. Revise paragraph (h) introductory text; and

f. Remove paragraph (i).

The revisions read as follows:

§ 1544.101 Adoption and implementation.

(a) *Full program.* Each aircraft operator holding an operating certificate under 14 CFR part 119 must carry out the requirements in subparts C, D, and E of this part specified in § 1544.103 (c) and must adopt and carry out a security program that meets the requirements of §§ 1544.103(a), (b), and (c) for each of the following operations:

* * * * *

(b) *Large aircraft program.* Each aircraft operator must carry out the requirements in subparts C, D, and E of this part specified in §§ 1544.103(e) and (f) and must adopt and carry out a security program that meets the requirements of §§ 1544.103(a), (b), (e), and (f) for each operation that meets all of the following:

(1) Is an aircraft with a maximum certificated takeoff weight of over 12,500 pounds.

(2) Is in any civil operation.

(3) Is not one of the following:

(i) Operating under a full program under paragraph (a) of this section;

(ii) Operating under a full all-cargo program under paragraph (h) of this section;

(iii) A public aircraft as described in 49 U.S.C. 40102, provided that the aircraft operator obtains security procedures from TSA if the aircraft deplanes into or enplanes from a sterile area; or

(iv) A government charter under paragraph (2) of the definition of private charter in § 1540.5 of this chapter, provided that aircraft does not deplane into or enplane from a sterile area and the government takes security responsibility for the following:

(A) The aircraft;

(B) Persons onboard; and

(C) Property onboard.

* * * * *

(g) *Limited program.* Each aircraft operator that is not required to have a

full program, a large aircraft program or a full all-cargo program, as identified in paragraphs (a), (b), and (h) of this section respectively, may request a security program from TSA. Each aircraft operator with a limited program must carry out selected provisions of subparts C, D, and E of this part, as provided by TSA and must adopt and carry out the provisions of § 1544.305, as specified in its security program.

(h) *Full all-cargo program.* Each aircraft operator holding an operating certificate under 14 CFR part 119 or 14 CFR part 125 must carry out the requirements in subparts C, D, and E of this part specified in § 1544.103(d) and must adopt and carry out a security program that meets the requirements of §§ 1544.103(a), (b), and (d) for each operation that is—

* * * * *

19. Amend § 1544.103 by adding paragraph (a)(4), revising paragraph (c), and adding paragraphs (d), (e), and (f) to read as follows:

§ 1544.103 Form, content, and availability.

(a) * * *

(4) Includes the standard security program issued by TSA, together with any amendments and alternate procedures approved or accepted by TSA for the aircraft operator.

* * * * *

(c) *Content of a security program for a full program aircraft operator.* The standard security program for a full program aircraft operator described in § 1544.101(a) is the Aircraft Operator Standard Security Program (AOSSP). The security program must include the following:

(1) Section 1544.201, Acceptance and screening of individuals and accessible property.

(2) Section 1544.203, Acceptance and screening of checked baggage.

(3) Section 1544.205, Acceptance and screening of cargo.

(4) Section 1544.207, Inspection of individuals and property.

(5) Section 1544.209, Use of metal detection devices.

(6) Section 1544.211, Use of X-ray systems.

(7) Section 1544.213, Use of explosives detection systems.

(8) Section 1544.215, Security coordinators.

(9) Section 1544.217, Law enforcement personnel.

(10) Section 1544.219, Carriage of accessible weapons.

(11) Section 1544.221, Carriage of prisoners under the control of armed law enforcement officers.

(12) Section 1544.223(a) through (h), Transportation of Federal Air Marshals.

(13) Section 1544.225, Security of the aircraft and facilities.

(14) Section 1544.227, Exclusive area agreements.

(15) Section 1544.228, Access to cargo and security threat assessments for cargo personnel in the United States.

(16) Sections 1544.229 and 1544.230, Fingerprint-based criminal history records checks.

(17) Section 1544.231, Airport-approved and exclusive area personnel identification systems.

(18) Sections 1544.233 and 1544.235, Security coordinators and crewmember training and training for individuals with security-related duties.

(19) Section 1544.237, Flight deck privileges.

(20) Section 1544.241, Regarding voluntary provision of emergency services.

(21) Section 1544.301, Contingency plan.

(22) Section 1544.303, Bomb or air piracy threats.

(23) Section 1544.305, Security directives and information circulars.

(d) *Content of a security program for a full all-cargo program.* The standard security program for a full all-cargo aircraft operator described in § 1544.101(h) is the Full All-Cargo Aircraft Operator Standard Security Program (FACAOSSP). The security program must include the following:

(1) Section 1544.202, Persons and property onboard an all-cargo aircraft.

(2) Section 1544.205, Acceptance and screening of cargo.

(3) Section 1544.207, Inspection of individuals and property.

(4) Section 1544.209, Use of metal detection devices.

(5) Section 1544.211, Use of x-ray systems.

(6) Section 1544.215, Security coordinators.

(7) Section 1544.217, Law enforcement personnel.

(8) Section 1544.219, Carriage of accessible weapons.

(9) Section 1544.223(a) through (h), Transportation of Federal Air Marshals.

(10) Section 1544.225, Security of the aircraft and facilities.

(11) Section 1544.227, Exclusive area agreements.

(12) Section 1544.228, Access to cargo and security threat assessments for cargo personnel in the United States.

(13) Sections 1544.229 and 1544.230, Fingerprint-based criminal history records checks.

(14) Section 1544.231, Airport-approved and exclusive area personnel identification systems.

(15) Sections 1544.233 and 1544.235, Security coordinators and crewmember training and training for individuals with security-related duties.

(16) Section 1544.237, Flight deck privileges.

(17) Section 1544.301, Contingency plan.

(18) Section 1544.303, Bomb or air piracy threats.

(19) Section 1544.305, Security directives and information circulars.

(20) Other provisions of subpart C of this part that TSA has approved upon request.

(21) The remaining requirements of subpart C of this part when TSA notifies the aircraft operator in writing that a security threat exists concerning that operation.

(e) *Content of a security program for a large aircraft operator.* The standard security program for large aircraft operators described in § 1544.101(b) is the large aircraft security program (LASP). The security program must include the following and any applicable requirements in paragraph (f) of this section:

(1) Section 1544.206, Person and property onboard a large aircraft.

(2) Section 1544.215, Security coordinators.

(3) Section 1544.217, Law enforcement personnel.

(4) Section 1544.219, Carriage of accessible weapons.

(5) Section 1544.223(i), Transportation of Federal Air Marshals.

(6) Section 1544.225, Security of the aircraft and facilities.

(7) Sections 1544.233 and 1544.235, Security coordinators and crewmember training.

(8) Section 1544.241, Voluntary provision of emergency services if the large aircraft operator holds an Air Carrier Certificate under 14 CFR part 119.

(9) Section 1544.243, Third party audit.

(10) Section 1544.245, Passenger vetting for large aircraft operators.

(11) Sections 1544.301(a) and (b), Contingency plan.

(12) Section 1544.303, Bomb or air piracy threats.

(13) Section 1544.305, Security directives and information circulars.

(14) Part 1544, subpart G, Security threat assessment for flight crew.

(15) Except as provided in paragraph (f)(1) of this section, an aircraft operator must seek alternative procedures from TSA for the screening of individuals and property for an aircraft that enplanes from or deplanes into a sterile area.

(16) Other provisions of subparts C, D, and E of this part that TSA has approved upon request.

(17) The remaining requirements of subparts C, D, and E of this part when TSA notifies the aircraft operator that a security threat exists concerning that operation.

(f) *Additional requirements for large aircraft operators.* In addition to the requirements in paragraph (e) of this section each aircraft operator described in § 1544.101(b) must include in its security program, the applicable requirements of this paragraph (f).

(1) *Large aircraft over 45,500 kilograms (100,309.3 pounds) or with a passenger-seating configuration of 61 or more.* For large aircraft operated for compensation or hire with a maximum certificated take-off weight of over 45,500 kilograms (100,309.3 pounds), or a passenger-seating configuration of 61 or more, each aircraft operator must include in its security program the following:

(i) Section 1544.201, Acceptance and screening of individuals and their accessible property.

(ii) Section 1544.207(c), Inspection of individuals and property.

(iii) Section 1544.223(a) through (h), Transportation of Federal Air Marshals.

(iv) Procedures for ensuring that each of the following individuals have successfully undergone a security threat assessment under subpart G of this part before granting the individual authority to perform screening functions:

(A) Individuals who screen passengers or property that will be carried in a cabin of the aircraft.

(B) Individuals who serve as immediate supervisors or the next supervisory level to those individuals described in paragraph (a)(1)(iv)(A) of this section.

(2) *All-Cargo operations for aircraft with an MTOW of over 12,500 pounds.* A large aircraft operator in an all-cargo operation must include the following in its security program:

(i) Section 1544.202, Persons and property onboard an all-cargo aircraft.

(ii) Sections 1544.205(a), (b), (d), and (f), Acceptance and screening of cargo.

20. Revise § 1544.105 to read as follows:

§ 1544.105 Approval and amendments to the security program.

(a) *Initial approval of security program.* (1) *Application.* Unless otherwise authorized by TSA, each aircraft operator required to have a security program under this part must apply for a security program in a form and a manner prescribed by TSA at least 90 days before the intended date of operations. The application must be in writing.

(i) Each aircraft operator must include in its application the following:

(A) The aircraft operator's business name and other names, including ''doing business as'';

(B) Address of the aircraft operator's primary place of business or headquarters;

(C) The aircraft operator's state of incorporation, if applicable; and

(D) The aircraft operator's tax identification number.

(ii) Each aircraft operator under the large aircraft program as described in § 1544.101(b) must include the following in its application:

(A) The business name and other names, including ''doing business as.'' If the applicant holds or is applying for a FAA operating certificate, the business name must be the same as the name on the FAA operating certificate.

(B) The names and addresses of each proprietor, general partner, officer, director, and owner of an aircraft identified under § 1544.101(b).

(C) A signed statement from each person listed in paragraph (a)(1)(ii) of this section stating whether he or she has been a proprietor, general partner, officer, director, or owner of a large aircraft that had its security program withdrawn or suspended by TSA.

(D) If the applicant holds a FAA operating certificate, the FAA operating certificate number.

(E) If the applicant does not have a FAA operating certificate, the type of operation under which the applicant operates, for example operating under 14 CFR part 91.

(F) The name, title, address, phone number, and electronic mail address of the Aircraft Operator Security Coordinator (AOSC) and any alternates. The telephone number provided must be a number where at least one AOSC may be reached.

(G) A statement acknowledging and ensuring that each employee and agent of the aircraft operator, who is subject to training under § 1544.233 and 235, will have successfully completed the training outlined in its security program before performing security-related duties.

(2) *Standard security program.* TSA will provide to the aircraft operator security coordinator the appropriate standard security program, any security directives, and amendments to the security program and other alternative procedures that apply to the aircraft operator. The aircraft operator may either accept the standard security program or submit a proposed modified security program to the designated official for approval. TSA will approve the security program under paragraph (a)(3) of the section or issue a written notice to modify under paragraph (a)(4) of this section.

(3) *Approval.* TSA will approve the security program upon determining that—

(i) The aircraft operator has met the requirements of this part, its security program, and any applicable Security Directives;

(ii) The aircraft operator is able and willing to carry out the requirements of its security program;

(iii) The approval of the security program is not contrary to the interests of security and the public interest; and

(iv) The aircraft operator has not held a security program that was withdrawn, unless otherwise authorized by TSA.

(4) *Modification.* (i) If a security program does not satisfy the requirements in paragraph (a)(3) of this section, TSA will provide the aircraft operator written Notice to Modify the security program to comply with the applicable requirements of this part.

(ii) The aircraft operator may either submit a modified security program to TSA for approval, or a petition for Reconsideration of Notice to Modify within 30 days of receipt of the Notice to modify. A Petition for Reconsideration must be filed with the designated official.

(iii) The designated official, upon receipt of a Petition for Reconsideration, either amends or withdraws the Notice, or transmits the Petition, together with any pertinent information, to the Assistant Secretary for reconsideration. The Assistant Secretary may dispose of the Petition within 30 days of receipt by either directing the designated official to withdraw or amend the Notice to Modify, or by denying the Petition and affirming the Notice to Modify.

(5) *Commencement of operations.* The aircraft operator may operate under an approved security program when it meets all requirements, including but not limited to successful completion of training and Security Threat Assessments by relevant personnel, if applicable.

(b) *Amendment requested by an aircraft operator.* An aircraft operator may submit a request to TSA to amend its security program as follows:

(1) The request for an amendment must be filed in writing, with the designated official at least 45 days before the date the aircraft operator proposes for the amendment to become effective, unless a shorter period is allowed by the designated official.

(2) Within 30 days after receiving a proposed amendment, the designated official, in writing, either approves or denies the request to amend.

(3) An amendment to an aircraft operator security program may be approved if the designated official determines that security and the public interest will allow it, and the proposed amendment provides the level of security required under this part.

(4) If the proposed amendment is denied, within 30 days after receiving a denial, the aircraft operator may petition the Assistant Secretary to reconsider the denial. A Petition for Reconsideration must be filed with the designated official.

(5) Upon receipt of a petition for reconsideration, the designated official either approves the request to amend or transmits the petition, together with any pertinent information, to the Assistant Secretary for reconsideration. The Assistant Secretary disposes of the petition within 30 days of receipt by either directing the designated official to approve the amendment, or denying the Petition and affirming the denial.

(6) Any aircraft operator may submit a group proposal for an amendment that is on behalf of it and other aircraft operators that co-sign the proposal.

(c) *Amendment by TSA.* If security and the public interest require an amendment, TSA may amend a security program as follows:

(1) The designated official notifies the aircraft operator, in writing, of the proposed amendment, fixing a period of not less than 30 days within which the aircraft operator may submit written information, views, and arguments on the amendment.

(2) After considering all relevant material, the designated official notifies the aircraft operator of any amendment adopted or rescinds the notice. If the amendment is adopted, it becomes effective not less than 30 days after the aircraft operator receives the notice of amendment, unless the aircraft operator petitions the Assistant Secretary, in writing, to reconsider no later than 15 days before the effective date of the amendment. The aircraft operator must send the written Petition for Reconsideration to the designated official. A timely Petition for Reconsideration stays the effective date of the amendment.

(3) Upon receipt of a Petition for Reconsideration, the designated official either amends or withdraws the notice or transmits the Petition, together with any pertinent information, to the Assistant Secretary for reconsideration. The Assistant Secretary disposes of the Petition within 30 days of receipt by either directing the designated official to withdraw or amend the amendment, or by denying the Petition and affirming the amendment.

(d) *Emergency amendments.* If the designated official finds that there is an emergency requiring immediate action with respect to security in air transportation or in air commerce that makes procedures in this section contrary to the public interest, the designated official may issue an emergency amendment, without the prior notice and comment procedures in paragraph (c) of this section, effective without stay on the date the aircraft operator receives notice of it. In such a case, the designated official will incorporate in the notice a brief statement of the reasons and findings for the amendment to be adopted. The aircraft operator may file a written Petition for Reconsideration under paragraph (c) of this section; however, this does not stay the effective date of the Emergency Amendment.

(e) *Requirement to report changes in information.* Each aircraft operator with an approved security program under this part must notify TSA, in a form and manner approved by TSA, of any changes to the information submitted during its initial application under paragraph (a)(1) of this section.

(1) This notification must be submitted in writing to the designated official not later than 30 days after the date the change occurred.

(2) Changes included in the requirement of this paragraph include, but are not limited to, changes in the holder of a security program's contact information, owners, business addresses and locations, and form of business entity.

(f) TSA may withdraw its approval of an aircraft operator's security program under § 1540.301.

21. Add new § 1544.107 to subpart B to read as follows:

§ 1544.107 Fractional ownership of large aircraft.

(a) This section applies to aircraft operators operating aircraft under a large aircraft program under § 1544.101(b) that are under a fractional ownership program under 14 CFR part 91, subpart K. For operations where the owner in operational control delegates performance of security tasks to the program manager, the security program is considered to be held jointly by the owner and the program manager, and the owner and the program manager are jointly and individually responsible for compliance.

(b) A fractional program manager that manages multiple aircraft may have one large aircraft program that applies to all its operations.

Subpart C—Operations

22. Amend § 1544.201 by adding introductory text to read as follows:

§ 1544.201 Acceptance and screening of individuals and accessible property.

This section applies to each aircraft operator required to comply with this section under 49 CFR 1544.103.

* * * * *

23. Revise § 1544.202 to read as follows:

§ 1544.202 Persons and property onboard all-cargo aircraft.

Each aircraft operator operating under a full all-cargo program or a large aircraft program in an all-cargo operation as described in § 1544.103(f)(2) must apply the security measures in its security program for persons who are carried on the aircraft, and for their property, to prevent or deter the carriage of any unauthorized persons, and any unauthorized or accessible weapons, explosives, incendiaries, and other destructive substances or items.

24. Amend § 1544.205 by revising paragraphs (a), (b), and (d) to read as follows:

§ 1544.205 Acceptance and screening of cargo.

(a) *Preventing or deterring the carriage of any explosive or incendiary.* Each aircraft operator operating under a full program, a full all-cargo program, or a large aircraft program in an all-cargo operation as described in § 1544.103(f)(2) must use the procedures, facilities, and equipment described in its security program to prevent or deter the carriage of any unauthorized persons, and any unauthorized explosives, incendiaries, and other destructive devices, substances or items in cargo onboard an aircraft.

(b) *Screening and inspection of cargo.* Each aircraft operator operating under a full program or a full all-cargo program, or a large aircraft program in an all-cargo operation, as described in § 1544.103(f)(2), must ensure that cargo is screened and inspected for any unauthorized person, and any unauthorized explosive, incendiary, and other destructive substance or item as provided in the aircraft operator's security program and § 1544.207, and as provided in § 1544.239 for operations under a full program, before loading it on its aircraft.

* * * * *

(d) *Refusal to transport.* Except as otherwise provided in its program, each aircraft operator operating under a full

program, a full all-cargo program, or a large aircraft program in an all-cargo operation as described in § 1544.103(f)(2) must refuse to transport any cargo if the shipper does not consent to a search or inspection of that cargo in accordance with the system prescribed by this part.

* * * * *

25. Add new § 1544.206 to subpart C to read as follows:

§ 1544.206 Persons and property on board a large aircraft.

Each aircraft operator operating under a large aircraft program under § 1544.101(b), except for a large aircraft operator in an all-cargo operation as described in § 1544.103(f)(2), must apply the security measures in its security program for any persons and accessible property onboard the aircraft, including company materials (COMAT), to prevent or deter the carriage of any unauthorized persons, and any unauthorized or accessible weapons, explosives, incendiaries, and other destructive devices, substances or items.

26. Revise § 1544.207 to read as follows:

§ 1544.207 Inspection of individuals and property.

(a) *Applicability of this section.* This section applies to the inspection of individuals, accessible property, checked baggage, and cargo by each full program operator under § 1544.101(a); the inspection of individuals, accessible property and cargo by each full all-cargo program operator under § 1544.101(h); and the inspection of individuals and accessible property by a large aircraft program operator under § 1544.103(f)(1), as required under this part.

(b) *Full program aircraft operators.* Each aircraft operator must ensure that passengers and their accessible property do not board an aircraft and that checked baggage is not loaded onto an aircraft unless inspection is conducted as follows:

(1) *Locations within the United States.* The inspection of passengers, accessible property, and checked baggage is conducted by TSA.

(2) *Locations outside the United States.* (i) In non-U.S. locations where the foreign country conducts inspection of passengers, accessible property, and checked baggage, the aircraft operator must ensure that the foreign country or its designee conducts such inspection. TSA may require aircraft operators to conduct supplemental inspection operations.

(ii) In non-U.S. locations where the foreign country does not conduct inspection of passengers, accessible property, and/or checked baggage, an aircraft operator must conduct any inspection not conducted by the foreign country or must not permit non-inspected individuals on the aircraft. The aircraft operator's personnel must be trained and authorized to inspect individuals, accessible property, and checked baggage, as provided in subpart E.

(3) *All locations.* Each aircraft operator must ensure the inspection of all cargo prior to loading on the aircraft. The cargo must be inspected as provided in each aircraft operator's security program or by TSA, or by the foreign country. Where the foreign country does not conduct inspection of cargo, the aircraft operator must conduct the inspection or must not permit non-inspected cargo on the aircraft.

(c) *Full all-cargo aircraft operators and large aircraft operators.* Each aircraft operator must use the measures in its security program and in subpart E of this part to inspect individuals and property.

27. Amend § 1544.217 by revising the introductory text of paragraphs (a)(2) and (b) to read as follows:

§ 1544.217 Law enforcement personnel.

(a) * * *

(2) For operations under a large aircraft program under § 1544.101(b) or a full all-cargo program under § 1544.101(h), each aircraft operator must—

* * * * *

(b) This paragraph (b) applies to operations at airports required to hold security programs under part 1542 of this chapter. For operations under a large aircraft program under § 1544.101(b), or a full all-cargo program under § 1544.101(h), each aircraft operator must—

* * * * *

28. Amend § 1544.219 by adding introductory text, and revising the introductory text of paragraphs (a) and (b) to read as follows:

§ 1544.219 Carriage of accessible weapons.

This section applies to each aircraft operator required to comply with this section under 49 CFR 1544.103.

(a) *Flights for which screening is conducted.* The provisions of §§ 1544.201(d) and 1544.202, with respect to accessible weapons, do not apply to a law enforcement officer (LEO) traveling armed aboard a flight for which screening is required, if the requirements of this section are met.

* * * * *

(b) *Flights for which screening is not conducted.* The provisions of §§ 1544.201(d) and 1544.202, with respect to accessible weapons, do not apply to a LEO aboard a flight for which screening is not required if the requirements of paragraphs (a)(1), (3), and (4) of this section are met.

* * * * *

29. Amend § 1544.223 by adding introductory text and a new paragraph (i), and revising paragraphs (b), (f), and (g) to read as follows:

§ 1544.223 Transportation of Federal Air Marshals.

Each aircraft operator under the full program as described in § 1544.101(a), full all-cargo program as described in § 1544.101(h), or the large aircraft program and required to comply with § 1544.103(f)(1), must comply with paragraphs (a) through (h) of this section. Each aircraft operator under the large aircraft program as described in § 1544.101(b), other than large aircraft operators described in § 1544.103(f)(1), must comply with paragraph (i) of this section.

* * * * *

(b) Each aircraft operator must carry Federal Air Marshals, in the number and manner specified by TSA.

* * * * *

(f) The requirements of §§ 1544.219(a) and 1544.241 do not apply for a Federal Air Marshal on duty status.

(g) Each aircraft operator operating under a security program pursuant to §§ 1544.101(a), (b) and (h), must restrict any information concerning the presence, seating, names, and purpose of Federal Air Marshals at any station or on any flight to those persons with an operational need to know.

* * * * *

(i) Upon prior notification from TSA, large aircraft operators must carry Federal Air Marshals, in the number and manner specified by TSA.

30. Amend § 1544.237 by adding introductory text and revising paragraph (b) to read as follows:

§ 1544.237 Flight deck privileges.

This section applies to each aircraft operator required to comply with this section under 49 CFR 1544.103:

* * * * *

(b) This section does not restrict access for an FAA air carrier inspector, a DOD commercial air carrier evaluator, an authorized representative of the National Transportation Safety Board, or an Agent of the U.S. Secret Service, under 14 CFR parts 121, 125, or 135, or a Federal Air Marshal under this part.

31. Add new § 1544.241 to subpart C to read as follows:

§ 1544.241 Voluntary provision of emergency services.

This section applies to each aircraft operator that is required to comply with this section under 49 CFR 1544.103 and that is an air carrier.

(a) *Qualification under this section.* An individual is qualified for purposes of this section if the individual is qualified under Federal, State, local, or tribal law, or under the law of a foreign government, has valid standing with the licensing or employing agency that issued the credentials, and is a scheduled, on-call, paid, or volunteer employee, as one of the following:

(1) A law enforcement officer who is an employee or authorized by the Federal, state, local, or tribal government or under the law of a foreign government, with the primary purpose of the prevention, investigation, apprehension, or detention of individuals suspected or convicted of government offenses.

(2) A firefighter who is an employee, whether paid or a volunteer, of a fire department of any Federal, state, local, or tribal government who is certified as a firefighter as a condition of employment and whose duty it is to extinguish fires, to protect life, and to protect property.

(3) An emergency medical technician who is trained and certified to appraise and initiate the administration of emergency care for victims of trauma or acute illness.

(b) *Exemption from liability.* (1) Under 49 U.S.C. 44944(b), an individual shall not be liable for damages in any action brought in a Federal or State court that arises from an act or omission of the individual in providing or attempting to provide assistance in the case of an in-flight emergency in an aircraft of an air carrier if the individual meets the qualifications described in paragraph (a) of this section.

(2) Under 49 U.S.C. 44944(c), exemption described in paragraph (b)(1) of this section shall not apply in any case in which an individual provides, or attempts to provide, assistance in a manner that constitutes gross negligence or willful misconduct.

(3) The exemption described in paragraph (b)(1) of this section applies whether or not the individual has volunteered prior to departure under the program described in paragraph (c) of this section.

(4) For purposes of this paragraph (b), the qualified individual need not have his or her credentials present at the time of providing or attempting to provide assistance.

(c) *Program for pre-departure volunteers.* Each aircraft operator must adopt and carry out a program for qualified individuals to volunteer, prior to departure, to be called upon by a crew member or flight attendant to provide emergency services in the event of an in-flight emergency. Prior to accepting an offer of voluntary emergency services from a qualified individual prior to departure, the aircraft operator must request and review any credential, document, and identification offered by the individual to determine whether he or she meets the definition of a qualified individual.

(1) The credential, document, or identification must identify the service category and bear the individual's name, clear full-face picture, and signature and must not have expired, except as provided in paragraph (c)(3) of this section.

(2) If the credential does not bear an expiration date, the qualified individual must also present an official letter identifying current employment in the relevant service category.

(3) If the credential does not bear a full-face image of the individual, the individual must also present a photo identification issued by a government authority.

(4) An individual whose credential bears an expiration date that has passed on the date of the intended flight is not considered a qualified individual for purposes of paragraph (c) of this section.

(d) *Law enforcement officers flying armed and federal air marshals.* The aircraft operator need not apply the requirements of paragraph (c) to a law enforcement officer traveling armed pursuant to § 1544.219 or to a Federal Air Marshal on duty status pursuant to §§ 1544.219 and 1544.223.

(e) *Discretion of the aircraft operator.* The aircraft operator has full discretion to request, accept, or reject a qualified individual's offer of assistance. Nothing in this section prohibits or requires any passenger's assistance in an emergency.

(f) *Confidentiality.* The aircraft operator must not provide any individual, other than the appropriate aircraft operator personnel who need to know, the identity or any other personal or professional information of any qualified individual offering to provide emergency services.

32. Add new § 1544.243 to subpart C to read as follows:

§ 1544.243 Third party audit.

(a) *Applicability.* This section applies to aircraft operators operating under a large aircraft program under § 1544.101(b).

(b) *General.* Each aircraft operator must contract with an auditor approved under 49 CFR part 1522 to conduct an audit of the aircraft operator's compliance with this chapter and its security program in accordance with this section.

(c) *Timing.* (1) *Initial audit.* Except as approved by TSA, each aircraft operator must cause the initial audit to be conducted within sixty days of the approval of the aircraft operator's security program under § 1544.105.

(2) *Biennial audit.* Each aircraft operator must cause an audit to be conducted 24 months after the aircraft operator's most recent audit conducted to meet the requirements in paragraph (c)(1) of this section or this paragraph (c)(2). If the aircraft operator completes the audit in the month before or the month after it is due, the aircraft operator is considered to have completed the audit in the month it is due.

(d) *Auditor's access.* Each aircraft operator must provide the auditor access to all records, equipment, and facilities necessary for the auditor to conduct an audit of the aircraft operator's compliance with this chapter and its security program.

(e) *Audit report.* Each aircraft operator will receive a copy of the audit report from its auditor.

(f) *Comments on audit report.* Within 30 days of receiving a copy of an audit report from the auditor, an aircraft operator may submit written comments on the report to TSA.

33. Add new § 1544.245 to subpart C to read as follows:

§ 1544.245 Passenger vetting for large aircraft operators.

(a) *Applicability and terms used in this section.* (1) *Applicability.* (i) Except as provided in paragraph (a)(1)(ii) of this section, this section applies to aircraft operators operating under a large aircraft program described in § 1544.101(b).

(ii) This section does not apply to any flight operated by a large aircraft operator for which the large aircraft operator has submitted advance passenger information to U.S. Custom and Border Protection (CBP) under 19 CFR 122.49a, 122.75a, or 122.22 and has complied with CBP's instructions. If CBP grants the pilot landing rights under 19 CFR 122.49a, 122.75a, or 122.22, the large aircraft operator may permit all passengers for whom the aircraft operator submitted advance passenger information to CBP to board the aircraft. If CBP identifies a passenger as a selectee under 19 CFR 122.49a, 122.75a, or 122.22, the large aircraft operator may permit the passenger to board the aircraft and the large aircraft operator must comply with the

procedures in its security program pertaining to passengers that are identified as selectees. If CBP identifies a passenger as ''not cleared'' under 19 CFR 122.49a, 122.75a, or 122.22, the large aircraft operator must not permit the passenger to board the aircraft.

(2) *Terms used in this section.* In addition to the terms in §§ 1500.3 and 1540.5 of this chapter, the following terms apply in this section:

Continuous vetting means the process in which an individual's full name, date of birth, gender, passport information, and Redress Number (if available) are continuously matched against the most current watch-list in a manner prescribed by TSA.

Passenger information means:

(1) Full name of the passenger.

(2) Date of birth of the passenger, if available.

(3) Gender of the passenger, if available.

(4) Passport information, if available.

(5) Redress Number of the passenger, if available.

Passport information means the following information from an individual's passport:

(1) Passport number.

(2) Country of issuance.

(3) Expiration date.

(4) Gender.

(5) Full name.

Redress Number means the number assigned by DHS to an individual processed through the redress procedures described in 49 CFR part 1560, subpart C.

Watch-list refers to the No Fly List and Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center.

Watch-list service provider is an entity that TSA has approved under 49 CFR part 1544, subpart F, to conduct watch-list matching for large aircraft operators required under this section.

(b) *Request for and transmission of passenger information.* (1) *Passenger information list.* Except as provided in paragraph (b)(2) of this section, each aircraft operator must:

(i) Request and obtain the full name of every passenger on each flight operated by the aircraft operator;

(ii) Request the gender, date of birth, and Redress Number for every passenger on each flight operated by the aircraft operator;

(iii) Transmit the full name and other available passenger information, and any available passport information, to an entity approved to conduct watch-list matching under 49 CFR part 1544, subpart F (''Watch-list service provider''); and

(iv) Transmit updated passenger information to its watch-list service provider if there are revisions to the passenger's full name, date of birth, gender, passport information, or Redress Number.

(2) *Master passenger list.* An aircraft operator does not need to transmit passenger information required under paragraph (b)(1) of this section or await boarding instructions required under paragraph (c) of this section for individuals who satisfy all of the following:

(i) Prior to obtaining and transmitting passenger information under paragraphs (b)(2)(ii) and (iii) of this section, the aircraft operator must inform the individual that inclusion in the master passenger list is voluntary, provide the individual with notice of the purpose and procedures related to a master passenger list, and obtain from the individual a signed, written statement affirmatively requesting that he or she be placed on the master passenger list.

(ii) The aircraft operator has obtained the full name, gender, date of birth, and Redress Number (if available) of the individuals.

(iii) The aircraft operator has transmitted the full name, gender, date of birth, passport information, and Redress Number (if available) of the individual and any updated passenger information to a watch-list service provider and identified the individual as an individual that should be subject to continuous vetting.

(iv) The aircraft operator ensures that the watch-list service provider has responsibility for conducting continuous vetting of the individual at the time that the individual boards a flight operated by the aircraft operator.

(v) The watch-list service provider that conducts the continuous vetting of the individual has informed the aircraft operator that the individual is cleared to board an aircraft after the aircraft operators transmits the initial passenger information to the watch-list service provider. If the aircraft operator transmits updated passenger information, the aircraft operator must wait until the watch-list service provider informs the aircraft operator that the individual is cleared to board an aircraft.

(vi) The watch-list service provider that conducts the continuous vetting of the individual has not informed the aircraft operator that the individual must be inhibited from boarding the aircraft, unless explicitly authorized by TSA to permit boarding of the individual.

(c) *Watch-list matching results.* An operator must not permit a passenger to board an aircraft until the aircraft operator's watch-list service provider informs the aircraft operator of the results of watch-list matching for that passenger in response to the aircraft operator's most recent submission of passenger information for that passenger. The aircraft operator must comply with instructions transmitted by the watch-list service provider under this paragraph (c), unless explicitly instructed otherwise by TSA.

(1) *Cleared to board an aircraft.* If the aircraft operator's watch-list service provider instructs the aircraft operator that a passenger is cleared, the aircraft operator may permit the passenger to board an aircraft.

(2) *Passenger identified as a selectee.* If the aircraft operator's watch-list service provider instructs the aircraft operator that a passenger is a selectee, the aircraft operator may permit the passenger to board an aircraft. The aircraft operator must comply with the procedures in its security program pertaining to passengers that are identified as selectees.

(3) *Denial to board an aircraft.* If the aircraft operator's watch-list service provider instructs the aircraft operator that the passenger must be inhibited from boarding an aircraft, the aircraft operator must not permit the passenger to board an aircraft. If the aircraft operator's watch-list service provider instructs the aircraft operator to contact TSA for further resolution of the watch-list matching results, the aircraft operator must contact TSA in accordance with procedures set forth in its security program.

(4) *Override by an aircraft operator.* No aircraft operator may override an instruction to inhibit a passenger from boarding an aircraft, unless explicitly authorized by TSA to do so.

(5) *Updated passenger information from an aircraft operator.* When an aircraft operator sends updated passenger information to its watch-list service provider under paragraph (b)(1)(iv) of this section for a passenger for whom the watch-list service provider has already transmitted an instruction, all previous instructions concerning that passenger are voided. The aircraft operator may not permit the passenger to board an aircraft until it receives an updated instruction concerning the passenger from its watch-list service provider. Upon receiving an updated instruction from its watch-list service provider, the aircraft operator must comply with the updated instruction and disregard all previous instruction.

(d) *Use of the watch-list matching results.* An aircraft operator must not use any watch-list matching results provided by the watch-list service

provider or TSA for purposes other than those provided in paragraph (c) of this section and security purposes.

34. Add new subparts F and G to part 1544 to read as follows:

Subpart F—Watch-List Service Providers

Sec.
1544.501 Scope and terms used in this subpart.
1544.503 Qualification standards for approval.
1544.505 Application.
1544.507 TSA review and approval.
1544.509 Reconsideration of disapproval of an application.
1544.511 Withdrawal of approval.
1544.513 Responsibilities of watch-list service providers.
1544.515 Security program.

Subpart F—Watch-List Service Providers

§ 1544.501 Scope and terms used in this subpart.

(a) This subpart applies to entities that conduct watch-list matching for large aircraft operators under §1544.245.

(b) In addition to the terms in §§ 1500.3 and 1540.5 of this chapter, the following terms apply in this part:

Applicant means an entity that seeks approval from TSA to conduct watch-list matching for large aircraft operators under § 1544.245.

Covered personnel means:

(1) Employees who have access to passenger information, the watch-list, or watch-list matching results; and

(2) Officers, principals, and program managers responsible for access of passenger information, the watch-list, or watch-list matching results.

Large aircraft operator means an aircraft operator described in §§ 1544.101(b) or 1544.107.

Passenger information means—

(1) Full name of the passenger.

(2) Date of birth of the passenger, if available.

(3) Gender of the passenger, if available.

(4) Passport information, if available.

(4) Redress Number of the passenger, if available.

Passport information means the following information from an individual's passport:

(1) Passport number.

(2) Country of issuance.

(3) Expiration date.

(4) Gender.

(5) Full name.

Continuous vetting means the process in which an individual's full name, date of birth, gender, passport information, and Redress Number (if available) is continuously matched against the most current watch-list in a manner prescribed by TSA.

Redress Number means the number assigned by DHS to an individual processed through the redress procedures described in 49 CFR part 1560, subpart C.

Watch-list refers to the No Fly List and Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center.

Watch-list service provider is an entity that TSA has approved under this subpart to conduct watch-list matching for large aircraft operators under § 1544.507.

§ 1544.503 Qualification standards for approval.

To be considered for approval to conduct watch-list matching under § 1544.245, the applicant must satisfy all of the following requirements.

(a) The applicant must demonstrate the capability to receive passenger information from large aircraft operators described in § 1544.101(b).

(b) The applicant must demonstrate the capability to conduct automated watch-list matching and continuous vetting of individuals in a system that satisfies standards set forth by TSA for the protection of personally identifiable information and the security of the system.

(c) The applicant must demonstrate the capability to transmit watch-list matching results to the large aircraft operator.

(d) The applicant must successfully undergo a suitability assessment conducted by TSA including a determination that it does not pose or is suspected of posing a threat to transportation or national security.

(e) Every covered personnel of the applicant must successfully undergo a security threat assessment under 49 CFR part 1544, subpart G and have a valid Determination of No Security Threat.

(f) The applicant is incorporated within the United States. The applicant's operations and systems for conducting watch-list matching under this subpart must be located in the United States.

§ 1544.505 Application.

(a) Each applicant must submit an application in a form and manner prescribed by TSA.

(b) An application must include the following information:

(1) The applicant's full name, business address, business phone number, and business email address.

(2) A statement and other documentary evidence of how the applicant meets the qualification standards set forth on § 1544.503.

(3) A system security plan for its information technology system that contains personally identifiable information collected under this part and § 1544.245 or is used to conduct watch-list matching. The system security plan must comply with standards established by TSA.

(4) An attestation report of the attestation conducted under § 1544.513(c)(1)(i).

(5) A security program that meets requirements in § 1544.515.

§ 1544.507 TSA review and approval.

(a) *Review.* Upon receiving an application, TSA will review the application including the system security plan as described in § 1544.505(b)(3). TSA may conduct a site visit as part of its review process. At its discretion, TSA may approve or disapprove the application.

(b) *Approval.* If an application is approved, TSA will send the applicant a written notice of approval. Once approved, the watch-list service provider may perform passenger vetting in accordance with this subpart after TSA receives an attestation report for an attestation conducted under § 1544.513(c)(1)(i) in which the independent public accounting (IPA) firm opines that the watch-list service provider's system is in compliance with its system security plan and TSA standards.

(c) *Disapproval.* TSA will send a written notice of disapproval to an applicant whose application is disapproved.

§ 1544.509 Reconsideration of disapproval of an application.

(a) *Petition for reconsideration.* If an application is disapproved, the applicant may seek reconsideration of the decision by submitting a written petition for reconsideration to the Assistant Secretary or designee within 30 days of receiving the notice of disapproval.

(b) *Review of petition.* Upon review of the petition for reconsideration, the Assistant Secretary or designee disposes of the petition by either affirming the disapproval of the application or approving the application. The Assistant Secretary or designee may request additional information from the applicant prior to rendering a decision.

§ 1544.511 Withdrawal of approval.

(a) *Basis for withdrawal of approval.* TSA may withdraw approval to conduct watch-list matching if a watch-list service provider ceases to meet the qualification standards for approval, fails to fulfill its responsibilities, or in the interest of security or the public.

(b) *Notice of withdrawal.* (1) Except as provided in paragraph (c) of this

section, TSA will provide a written notice of proposed withdrawal of approval to the watch-list service provider.

(2) The notice of withdrawal of approval will include the basis of the withdrawal of approval.

(3) Unless the watch-list service provider files a written petition for reconsideration under paragraph (d) of this section, the notice of proposed withdrawal of approval will become a final notice of withdrawal of approval 31 days after the watch-list service provider's receipt of the notice of proposed withdrawal of approval.

(c) *Emergency notice of withdrawal of approval.* (1) If TSA finds that there is an emergency requiring immediate action with respect to a watch-list service provider's ability to conduct watch-list matching, TSA may withdraw approval of that watch-list service provider without prior notice.

(2) TSA will incorporate in the emergency notice of withdrawal of approval a brief statement of the reasons and findings for the withdrawal of approval.

(3) The emergency notice of withdrawal of approval is effective upon the watch-list service provider's receipt of the notice. The watch-list service provider may file a written petition for reconsideration under paragraph (d) of this section; however, this does not stay the effective date of the emergency notice of withdrawal of approval.

(d) *Petition for reconsideration.* A watch-list service provider may seek reconsideration of the withdrawal of approval of approval by submitting a written petition for reconsideration to the Assistant Secretary or designee within 30 days of receiving the notice of withdrawal of approval.

(e) *Review of petition.* Upon review of the petition for reconsideration, the Assistant Secretary or designee disposes of the petition by either affirming or withdrawing the withdrawal of approval. The Assistant Secretary or designee may request additional information from the watch-list service provider prior to rendering a decision.

§ 1544.513 Responsibilities of watch-list service providers.

(a) *Security program.* Each watch-list service provider must adopt and carry out a security program that meets the requirements of § 1544.515.

(b) *System security plan.* Each watch-list provider must comply with its approved system security plan.

(c) *Authorized watch-list matching.* Each watch-list service provider may only conduct watch-list matching for aircraft operators that hold a large aircraft program, as described in § 1544.101(b), that is approved by TSA under § 1544.105. Each watch-list service provider must confirm with TSA that an aircraft operator holds an approved large aircraft program prior to commencement of watch-list matching for that aircraft operator.

(d) *Attestation of compliance.* (1) Each watch-list service provider must contract with a qualified IPA firm to conduct an attestation of the watch-list service provider's compliance with its system security plan and TSA standards for systems that are used to conduct watch-list matching as follows:

(i) An attestation must be conducted prior to commencement of watch-list matching operations;

(ii) An attestation must be conducted 6 months after commencement of watch-list matching operations; and

(iii) An attestation must be conducted 12 months after the watch-list service provider's most recent attestation conducted to meet the requirements in paragraph (c)(1)(ii) of this section or this paragraph (c)(1)(iii). If the watch-list service provider completes the attestation in the month before or the month after it is due, the watch-list service provider is considered to have completed the attestation in the month it is due.

(2) The IPA firm conducts the attestation in accordance with the American Institute of Certified Public Accountants' (AICPA) Statement for Standards on Attestation Engagements 10 and TSA standards;

(3) The IPA firm must prepare and submit a report, in a form and manner prescribed by TSA, for each audit conducted under paragraph (c)(1) of this section.

(4) An IPA firm is qualified for purposes of paragraph (c)(1) of this section if:

(i) The selection of the IPA firm was in accordance with the relevant AICPA guidance regarding independence; and

(ii) The IPA firm demonstrates the capability to assess information system security and process controls. TSA reserves the right to reject the IPA firm's attestation if, in TSA's judgment, the IPA firm is not sufficiently qualified to perform these services.

(e) *Sensitive Security Information.* Each watch-list service provider must comply with the requirements in 49 CFR part 1520 regarding the handling and protection of Sensitive Security Information.

(f) *Non-disclosure of proprietary information.* Unless explicitly authorized by TSA, each watch-list service provider may not further release or disseminate any information that TSA or a large aircraft operator indicates as proprietary information and provides to the watch-list service provider.

(g) *Privacy policy.* Each watch-list service provider must adopt and make public a privacy policy.

(h) *TSA inspection authority.* (1) Each watch-list service provider must allow TSA, at any time or place, to make any inspections or tests, including copying records, to determine compliance of a watch-list service provider or a large aircraft operator with—

(i) This subpart, 49 CFR 1544.245, and part 1520 of this chapter; and

(ii) 49 U.S.C. Subtitle VII, as amended.

(2) At the request of TSA, each watch-list service provider must provide evidence of compliance with this subpart.

(i) *Use of watch-list.* Watch-list service providers may not use the passenger information transmitted under § 1544.245 and obtained under this subpart, the watch-list, or the watch-list matching results for any purpose other than to conduct watch-list matching under this part in accordance with their security programs.

§ 1544.515 Security program.

(a) Each watch-list service provider must adopt and carry out a security program that includes all of the following requirements:

(1) Procedures for conducting watch-list matching in a manner prescribed by TSA.

(2) Procedures for sending instructions back to aircraft operators based on the results of the watch-list matching.

(3) Procedures for contacting TSA for resolution of passengers that are potential matches to the watch-list.

(4) Procedures for identifying passengers about whom a large aircraft operator must contact TSA for resolution of a potential match to the watch-list.

(5) Procedures for complying with its system security plan.

(6) Procedures for ensuring the physical security of the system used to conduct watch-list matching and the space and furniture used to receive passenger information from aircraft operators, to conduct watch-list matching, to transmit watch-list results to aircraft operators, and to store documents related to watch-list matching.

(7) Procedures for training covered personnel on the requirements of this subpart.

(8) Procedures for conducting continuous vetting of individuals.

(9) Procedures for providing personnel that is available to TSA 24 hours a day, 7 days a week.

(10) Procedures to identify, handle, and protect Sensitive Security Information.

(11) Procedures to maintain confidentiality of proprietary information.

(b) A watch-list service provider or TSA may amend an approved security program using the procedures in § 1544.105.

(c) TSA may withdraw approval of a security program using procedures in § 1540.301.

Subpart G—Security Threat Assessments for Large Aircraft Flight Crew, Applicants To Become TSA-Approved Auditors and Watch-List Service Providers Covered Personnel

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Subpart G—Security Threat Assessments for Large Aircraft Flight Crew, Applicants To Become TSA-Approved Auditors and Watch-List Service Providers Covered Personnel

§ 1544.601 Scope and expiration.

(a) *Scope.* This subpart applies to the following individuals who must undergo a security threat assessment:

(1) Flight crew member for aircraft operators required to hold a large aircraft security program under § 1544.101(b);

(2) Individuals authorized to perform screening functions under § 1544.103(f)(1);

(3) Applicant to become a TSA-approved auditor under § 1522.203; and

(4) Watch-list service provider covered personnel under § 1544.503.

(b) *Expiration.* A Determination of No Security Threat issued under § 1544.611(a) is valid for five years from the date that the individual receives the determination unless TSA issues a withdrawal of Determination of No Security Threat under § 1544.613 that results in a Final Determination of Security Threat Assessment. An individual may renew a Determination of No Security Threat using the procedures set forth in this subpart.

(c) *Individuals who have undergone a CHRC under § 1544.229 or 1544.230.* Flight crew members or employees or contract employees authorized to perform screening functions who have undergone a fingerprint-based criminal history records check under §§ 1544.229 or 1544.230 within five years of the effective date of this rule are not required to undergo a security threat assessment under this part until 5 years after the date of their notification of the results of their criminal history records check.

§§ 1544.603 Enrollment for security threat assessments.

(a) Except for paragraphs (a)(4) and (a)(12)–(16) of this section, an individual who is required to undergo a security threat assessment under this subpart must provide the following information to TSA in a manner and time prescribed by TSA:

(1) Legal name, including first, middle, and last; any applicable suffix; and any other name used previously.

(2) Current mailing address and residential address if it differs from the mailing address; and the previous residential address.

(3) Date of birth.

(4) Social security number. Providing the social security number is voluntary; however, failure to provide it will delay and may prevent completion of the threat assessment.

(5) Gender.

(6) Height, weight, hair and eye color.

(7) City, state, and country of birth.

(8) Immigration status and date of naturalization if the individual is a naturalized citizen of the United States.

(9) Alien registration number, if applicable.

(10) The name, telephone number, and address of the individual's current employer(s). If the individual's current employer is the U.S. military service, include the branch of the service.

(11) Fingerprints in a manner prescribed by TSA.

(12) Passport number, city of issuance, date of issuance, and date of expiration. This information is voluntary and may expedite the adjudication process for individuals who are U.S. citizens born abroad.

(13) Department of State Consular Report of Birth Abroad. This information is voluntary and may expedite the adjudication process for individuals who are U.S. citizens born abroad.

(14) If the individual is not a national or citizen of the United States, the alien registration number and/or the number assigned to the applicant on the U.S. Customs and Border Protection Arrival-Departure Record, Form I–94. This information is voluntary and may expedite the adjudication process for individuals who are not U.S. citizens.

(15) Whether the applicant has previously completed a TSA threat assessment, and if so the date and program for which it was completed. This information is voluntary and may expedite the adjudication process for applicants who have completed a TSA security threat assessment.

(16) Whether the applicant currently holds a federal security clearance, and if so, the date of and agency for which the clearance was performed. This information is voluntary and may expedite the adjudication process for applicants who have completed a federal security threat assessment.

(b) The individual must certify and date receipt of the following statement:

Privacy Act Statement: Authority: 49 U.S.C. 114, 40113. Purpose: This information will be used to verify your identity and to conduct a security threat assessment to evaluate your suitability for a position for which this security threat assessment is required. Furnishing this information, including your SSN, is voluntary; however, failure to provide it will delay and may prevent the completion of your security threat assessment. Routine Uses: Includes disclosure to the FBI to retrieve your criminal history record; to appropriate governmental agencies for licensing, law enforcement, or security purposes, or in the interests of national security; and to foreign and international governmental authorities in accordance with law and international agreement. For further information, see TSA 002 System of Records Notice.

(c) The individual must provide a statement, signature, and date of signature that he or she—

(1) Was not convicted, or found not guilty by reason of insanity, of a disqualifying criminal offense identified in § 1544.229(d) in any jurisdiction during the 10 years before the date of the individual's application for a security threat assessment under this subpart.

(2) Is not wanted, or under indictment, in a civilian or military jurisdiction, for a disqualifying criminal offense identified in § 1544.229(d);

(3) Has, or has not, served in the military, and if so, the branch in which he or she served, the date of discharge, and the type of discharge; and

(4) Has been informed that Federal regulations under 49 CFR 1544.607 impose a continuing obligation on the individual to disclose to TSA if he or she is convicted, or found not guilty by reason of insanity of a disqualifying crime.

(d) Each individual must complete and sign the application prior to submitting his or her fingerprints.

(e) The individual must certify and date receipt of the following statement, immediately before the signature line:

> The information I have provided on this application is true, complete, and correct, to the best of my knowledge and belief, and is provided in good faith. I understand that a knowing and willful false statement, or an omission of a material fact on this application, can be punished by fine or imprisonment or both (see section 1001 of Title 18 United States Code), and may be grounds for denial of approval for the position or privilege for which this security threat assessment is required.

(f) A flight crew member for a large aircraft, an individual authorized to perform screening functions, or a watch-list service provider covered personnel must certify the following statement in writing:

> I acknowledge that if the Transportation Security Administration determines that I pose a security threat, my employer may be notified.

(g) If an Enrollment Provider enrolls an individual, the Enrollment Provider must:

(1) Verify the identity of the individual through two forms of identification prior to fingerprinting, and ensure that the printed name on the fingerprint application is legible. At least one of the two forms of identification must have been issued by a government authority, and at least one must include a photo.

(2) Advise the individual that a copy of the criminal record received from the FBI will be provided to the individual, if requested by the individual in writing;

(3) Identify a point of contact if the individual has questions about the results of the CHRC; and

(4) Collect, control, and process one set of legible and classifiable fingerprints under direct observation by the enrollment provider or a law enforcement officer.

(5) Submit the biographic or biometric data and the application to TSA in the manner specified by TSA.

§ 1544.605 Content of the security threat assessment.

The security threat assessment TSA conducts under this subpart includes a criminal history records check, other analyses, and a final disposition.

§ 1544.607 Criminal history records check (CHRC).

(a) *Fingerprints and other information used.* In conducting criminal history record checks under this subpart, TSA uses fingerprints and may use other identifying information.

(b) *Submission of fingerprints to FBI/CJIS.* In order to conduct a fingerprint-based criminal history records check, TSA transmits the fingerprints to the FBI/CJIS in accordance with the FBI/CJIS fingerprint submission standards, receives the results from the FBI/CJIS, and adjudicates the results of the check in accordance with this section.

(c) *Adjudication of results.* (1) TSA determines that an individual does not pose a security threat warranting denial of approval based on a disqualifying criminal offense if the individual does not have a disqualifying criminal offense described in § 1544.229(d).

(2) An applicant who is wanted, or under indictment in any civilian or military jurisdiction for a felony listed in this section, is disqualified until the want or warrant is released or the indictment is dismissed.

(d) *Determination of arrest status.* When a CHRC on an individual described in this subpart discloses an arrest for any disqualifying criminal offense listed in § 1544.229(d) without indicating a disposition, the individual must provide documentation demonstrating that the arrest did not result in a disqualifying offense before the individual may assume a position or perform a function for which a criminal history records check under this Subpart is required. If the disposition did not result in a conviction or in a finding of not guilty by reason of insanity of one of the offenses listed in § 1544.229(d), the individual is not disqualified under this section.

(e) *Limits on dissemination of results.* Criminal record information provided by the FBI may be used only to carry out this section and § 1544.229. No person may disseminate the results of a CHRC to anyone other than:

(1) The individual to whom the record pertains, or that individual's authorized representative.

(2) Entities who are determining whether to grant the individual a position or function for which the criminal history records check in this subpart is required.

(3) Others designated by TSA.

(f) *Correction of FBI records and notification of disqualification.* (1) Before making a final decision to deny a position or privilege to an individual required to undergo a criminal history records check prescribed by this section, TSA will serve an Initial Determination of Threat Assessment and advise him or her that the FBI criminal record discloses information that would disqualify him or her from the position or privilege and will provide the individual a copy of the FBI record if he or she requests it.

(2) The individual may contact the local jurisdiction responsible for the information and the FBI to complete or correct the information contained in his or her record, subject to the following conditions—

(i) Within 30 days after being advised that the criminal record received from the FBI discloses a disqualifying criminal offense, the individual must notify TSA of his or her intent to correct any information he or she believes to be inaccurate.

(ii) If no notification, as described in paragraph (f)(3)(1) of this section, is received within 30 days, TSA will make a final determination to deny the individual the position or privilege.

(g) *Continuing obligations to disclose.* An individual who received a Determination of No Security Threat under this subpart must disclose to TSA or to another entity identified by TSA within 24 hours if he or she is convicted of any disqualifying criminal offense that occurs while he or she is has a Determination of No Security Threat that has not expired.

§ 1544.609 Other analyses.

To conduct other analyses, TSA completes the following procedures:

(a) Reviews the individual information required in 49 CFR 1544.603.

(b) TSA may search domestic and international Government databases to determine if an individual meets the requirements of 49 CFR 1572.107 or to confirm an individual's identity. TSA may determine that an applicant poses a security threat based on a search of the following databases:

(1) Interpol and other international databases, as appropriate.

(2) Terrorist watch-lists and related databases.

(3) Any other databases relevant to determining whether an applicant poses, or is suspected of posing, a security threat, or that confirm an applicant's identity.

§ 1544.611 Final disposition.

Following completion of the procedures described in §§ 1544.607 and 1544.609, the following procedures apply, as appropriate:

(a) TSA serves a Determination of No Security Threat to the individual if TSA determines that an individual meets the security threat assessment standards described in §§ 1544.607 and 1544.609.

(b) TSA serves an Initial Determination of Threat Assessment on the individual if TSA determines that the individual does not meet the

security threat assessment standards described in §§ 1544.607 and 1544.609. The Initial Determination of Threat Assessment includes—

(1) A statement that TSA has determined that the individual poses or is suspected of posing a security threat warranting disapproval of the application to assume a position or perform a function for which a security threat assessment under this subpart is required;

(2) The basis for the determination;

(3) Information about how the individual may appeal the determination, as described in § 1544.615; and

(4) A statement that if the individual chooses not to appeal TSA's determination within 30 days after receipt of the Initial Determination, or does not request an extension of time within 30 days after receipt of the Initial Determination in order to file an appeal, the Initial Determination becomes a Final Determination of Threat Assessment.

(5) TSA serves a Withdrawal of the Initial Determination of Threat Assessment or a Withdrawal of Final Determination of Threat Assessment on the individual, if the appeal results in a finding that the individual does not pose a threat to security.

§ 1544.613 Withdrawal of Determination of No Security Threat.

(a) TSA may withdraw a Determination of No Security Threat issued under § 1544.611(a) at any time it determines that a flight crew member, an individual authorized to perform screening functions, a TSA-approved auditor, or a watch-list service provider poses or is suspected of posing a security threat warranting withdrawal of the Determination of No Security Threat.

(b) TSA serves withdrawal of the Determination of No Security Threat on the individual if TSA determines that the individual does not meet the security threat assessment standards described in §§ 1544.607 and 1544.609. The withdrawal of the Determination of No Security Threat includes—

(1) A statement that TSA has determined that the individual poses or is suspected of posing a security threat warranting disapproval of the application to assume a position or perform a function for which a security threat assessment under this subpart is required;

(2) The basis for the determination;

(3) Information about how the individual may appeal the determination, as described in § 1544.615; and

(4) A statement that if the individual chooses not to appeal TSA's Initial Determination within 30 days after receipt of the withdrawal of the Determination of No Security Threat, or does not request an extension of time within 30 days after receipt of the withdrawal of the Determination of No Security Threat in order to file an appeal, the withdrawal of the Determination of No Security Threat becomes a Final Determination of Threat Assessment.

(5) TSA serves a Final Determination of Threat Assessment on the individual, if the appeal results in a finding that the individual does not pose a threat to security.

§ 1544.615 Appeals.

If the individual appeals the Initial Determination of Threat Assessment or a withdrawal of the Determination of No Security Threat, the procedures in 49 CFR part 1515 apply.

§ 1544.617 Fees.

(a) Individuals required to undergo a security threat assessment must pay the Security Threat Assessment fee of $56.75 and the cost for the FBI to process fingerprint identification records under Public Law 101–515.

(b) The Security Threat Assessment fee described in paragraph (a) of this section may be adjusted annually on or after October 1, 2007, by publication of an inflation adjustment. A final rule in the **Federal Register** will announce the inflation adjustment. The adjustment shall be a composite of the Federal civilian pay raise assumption and non-pay inflation factor for that fiscal year issued by the Office of Management and Budget for agency use in implementing OMB Circular A–76, weighted by the pay and non-pay proportions of total funding for that fiscal year. If Congress enacts a different Federal civilian pay raise percentage than the percentage issued by OMB for Circular A–76, the Department of Homeland Security may adjust the fees to reflect the enacted level.

(c) If the FBI amends its fee to process fingerprint identification records under Public Law 101–515, TSA or its agent will collect the amended fee.

(d) When an individual submits the enrollment information, as required under 1544.603, to obtain or renew a security threat assessment, the fee must be remitted to TSA or its approved agent in a form and manner approved by TSA.

(e) TSA will not issue any refunds of fees required under this section.

(f) Information about payment options is available though the designated TSA headquarters point of contact. Individual personal checks are not acceptable.

§ 1544.619 Notice to employers.

(a) If the individual is a large aircraft flight crew member, an individual authorized to perform screening functions, or a watch-list service provider covered personnel, TSA will notify the individual's employer that it has served a Determination of No Security Threat, a Final Determination of Threat Assessment, or a Withdrawal of Final Determination of Threat Assessment, as applicable, to the individual.

(b) Each employer must retain a copy of the notification described in paragraph (a) of this section for five years.

PART 1550—AIRCRAFT SECURITY UNDER GENERAL OPERATING AND FLIGHT RULES

35. The authority citation for part 1550 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

36. Amend § 1550.5 by revising paragraph (a), and removing and reserving paragraph (d) to read as follows:

§ 1550.5 Operations using a sterile area.

(a) *Applicability of this section.* This section applies to all aircraft operations in which passengers, crewmembers, or other individuals are enplaned from or deplaned into a sterile area, except for aircraft operators that have a security program accepted or approved under part 1544 or 1546 of this chapter.

* * * * *

(d) [Reserved]

* * * * *

37. Amend § 1550.7 by revising paragraph (a) to read as follows:

§ 1550.7 Operations in aircraft over 12,500 pounds.

(a) *Applicability of this section.* This section applies to each aircraft operation conducted in an aircraft with a maximum certificated takeoff weight of over 12,500 pounds except for those operations specified in § 1550.5 and those operations conducted under a security program under part 1544 or 1546 of this chapter.

* * * * *

Issued in Arlington, Virginia, on October 2, 2008.

Kip Hawley,

Assistant Secretary.

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT OCTOBER 30, 2008

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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act (2005); published 10-30-08

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Irish Potatoes Grown in Washington; Modification of Late Payment and Interest Charge Regulation; comments due by 11-4-08; published 10-20-08 [FR E8-24918]

Specialty Crop Block Grant Program; Farm Bill; comments due by 11-3-08; published 9-4-08 [FR E8-20486]

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Brucellosis in Cattle; State and Area Classifications; Montana; comments due by 11-3-08; published 9-3-08 [FR E8-20374]

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Interagency Cooperation under the Endangered Species Act; comments due by 11-6-08; published 10-27-08 [FR E8-25678]

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Proposed Critical Habitat for the Gulf of Maine Distinct Population Segment of Atlantic Salmon; comments due by 11-4-08; published 9-5-08 [FR E8-20603]

Endangered and Threatened Wildlife and Plants:

Designation of Critical Habitat for Threatened Southern Distinct Population Segment of North American Green Sturgeon; comments due by 11-7-08; published 9-8-08 [FR E8-20632]

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Atka Mackerel in the Bering Sea and Aleutian Islands Management Area; comments due by 11-4-08; published 10-23-08 [FR E8-25327]

Bering Sea and Aleutian Islands Crab Rationalization Program; comments due by 11-3-08; published 9-19-08 [FR E8-21989]

Groundfish of the Gulf of Alaska; comments due by 11-3-08; published 10-3-08 [FR E8-23456]

Fisheries Off West Coast States:

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments; Correction; comments due by 11-6-08; published 10-7-08 [FR E8-23722]

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Coordination of Federal Authorizations for Electric Transmission Facilities; comments due by 11-3-08; published 9-19-08 [FR E8-21867]

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Texas; Reasonable Further Progress Plan, Motor Vehicle Emissions Budgets and Revised 2002 Emissions Inventory; Dallas/Fort Worth Ozone Nonattainment Area; comments due by 11-6-08; published 10-7-08 [FR E8-23674]

Texas; Reasonable Further Progress Plan, Motor Vehicle Emissions Budgets, and Revised 2002 Base Year Emissions Inventory; comments due by 11-6-08; published 10-7-08 [FR E8-23673]

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Revisions to the Regulations Implementing the Program Fraud Civil Remedies Act (1986); comments due by 11-7-08; published 9-8-08 [FR E8-20760]

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Interagency Cooperation under the Endangered Species Act; comments due by 11-6-08; published 10-27-08 [FR E8-25678]

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Harmonization of Cost Accounting Standards 412 and 413 with the Pension Protection Act of 2006; comments due by 11-3-08; published 9-2-08 [FR E8-20255]

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Boeing Model 747-100, 747-100B, 747-200B, 747-200C, 747 200F, 747-300, 747SR, and 747SP Series Airplanes; comments due by 11-7-08; published 9-23-08 [FR E8-22211]

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Proposed Establishment of Class E Airspace:

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Proposed Revision of Class E Airspace:

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Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions; comments due by 11-5-08; published 8-7-08 [FR E8-17953]

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Alcohol and Tobacco Tax and Trade Bureau

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 6197/P.L. 110–448

To designate the facility of the United States Postal Service located at 7095 Highway 57 in Counce, Tennessee, as the "Pickwick Post Office Building". (Oct. 22, 2008; 122 Stat. 5013)

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