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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, January 27, 2009
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WHERE: Office of the Federal Register
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Docket No. AMS FV–08–0090; FVO9–966–1 IFR]

Tomatoes Grown in Florida; Partial Exemption to the Minimum Grade Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule provides a partial exemption to the minimum grade requirements under the marketing order for tomatoes grown in Florida (order). The order regulates the handling of tomatoes grown in Florida and is administered locally by the Florida Tomato Committee (Committee). Absent an exemption, Florida tomatoes covered by the order must meet at least a U.S. No. 2 grade before they can be shipped and sold outside the regulated area. This rule exempts Vintage Ripes™ tomatoes (Vintage Ripes™) from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of Vintage Ripes™ that will meet the order requirements, and will help increase shipments and availability of these tomatoes.

DATES: Effective December 17, 2008; comments received by February 17, 2009 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: William Pimental, Marketing Specialist, or Christian Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or e-mail: *William.Pimental@usda.gov* or *Christian.Nissen@usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 125 and Marketing Order No. 966, both as amended (7 CFR part 966), regulating the handling of tomatoes grown in certain designated counties in Florida, hereinafter referred to as the ''order.'' The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

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

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

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

This rule adds a partial exemption to the minimum grade requirements prescribed under the order. Absent an exemption, Florida tomatoes covered by the order must meet at least a U.S. No. 2 grade before they can be shipped and sold outside the regulated area. This rule exempts Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of Vintage Ripes™ that will meet the order requirements, and will help increase shipments and availability of these tomatoes.

Section 966.52 of the order provides the authority for the establishment of grade and size requirements for Florida tomatoes. Form and shape represent part of the elements of grade. Section 966.323 of the order's rules and regulations specifies, in part, the minimum grade requirements for Florida tomatoes. The current minimum grade requirement for Florida tomatoes is a U.S. No. 2. The specifics of this grade requirement are listed under the U.S. Standards for Grades of Fresh Tomatoes (7 CFR 51.1855–51.1877).

The U.S. Standards for Grades of Fresh Tomatoes (Standards) specify the criteria tomatoes must meet to grade a U.S. No. 2, including that they must be reasonably well formed, and not more than slightly rough. These two elements relate specifically to the shape of the tomato. The definitions section of the Standards defines reasonably well formed as not decidedly kidney shaped, lopsided, elongated, angular, or otherwise decidedly deformed. The term slightly rough means that the tomato is not decidedly ridged or grooved. This rule amends § 966.323 to exempt Vintage Ripes™ from these

shape requirements as specified under the grade for a U.S. No. 2.

Vintage Ripes™ are a trademarked tomato variety bred to look and taste like an heirloom-type tomato. One of the characteristics of this variety is its appearance. Vintage Ripes™ are often shaped differently from other round tomatoes. Depending on the time of year and the weather, Vintage Ripes™ are concave on the stem end with deep, ridged shoulders. They can also be very misshapen, appearing kidney shaped or lopsided. Because of this variance in shape and appearance, Vintage Ripes™ have difficulty meeting the shape requirements of the U.S. No. 2 grade.

In addition, the cost of production and handling for these tomatoes tends to be higher when compared to standard commercial varieties. The shoulders on Vintage Ripes™ are easily damaged, requiring additional care during picking and handling. These tomatoes are also more susceptible to disease. Consequently, Vintage Ripes™ require greater care in production to keep injuries and blemishes to a minimum. Still, when compared to standard commercial varieties, even with taking special precautions, larger quantities of these tomatoes are left in the field or need to be eliminated in the packinghouse to ensure a quality product. Losses can approach 50 percent or higher for Vintage Ripes™. With the higher production costs and the reduced packout, these tomatoes tend to sell at a higher price point than standard round tomatoes.

Heirloom-type tomatoes have been gaining favor with consumers. Vintage Ripes™ were bred specifically to address this demand. However, with its difficulty in meeting established shape requirements, and its increased cost of production, producing these tomatoes for market may not be financially viable without an exemption. In order to make more of these specialty tomatoes available for consumers, the Committee agreed to exempt Vintage Ripes™ from the shape requirements of the U.S. No. 2 grade. This exemption is the same as previously provided for a similar type tomato (72 FR 1919, January 17, 2007).

This rule only provides Vintage Ripes™ with a partial exemption from the grade requirements under the order. Consequently, Vintage Ripes™ will be exempt from the shape requirements of the grade but will still be required to meet all other aspects of the U.S. No. 2 grade. Vintage Ripes™ also continue to be required to meet all other requirements under the order, such as size, pack and container, and inspection.

Prior to the 1998–99 season, the Committee recommended that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. Committee members agree that increasing the grade requirement has been very beneficial to the industry and in the marketing of Florida tomatoes. It is important to the Committee that these benefits be maintained. There was some industry concern that providing a partial exemption for shape for an heirloom-type tomato could result in the shipment of U.S. No. 3 grade tomatoes of standard commercial varieties, contrary to the objectives of the exemption and the order.

To ensure this exemption does not result in the shipment of U.S. No. 3 grade tomatoes of other varieties, this exemption only applies to Vintage Ripes™ covered under the Agricultural Marketing Service's Identity Preservation (IP) program. The IP program was developed by the Agricultural Marketing Service to assist companies in marketing products having unique traits. The program provides independent, third-party verification of the segregation of a company's unique product at every stage, from seed, production and processing, to distribution. This exemption would be contingent upon the Vintage Ripes™ gaining positive program status under the IP program and continuing to meet program requirements. As such, this should help ensure that only Vintage Ripes™ are shipped under this exemption.

Therefore, this rule exempts Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of Vintage Ripes™ tomatoes that will meet order requirements, and will help increase shipments and availability of these tomatoes.

Section 8e of the Act provides that when certain domestically produced commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this rule provides a partial exemption from the minimum grade requirements under the domestic handling regulations, a corresponding change to the import regulations is also needed. A rule providing a similar partial exemption to the minimum grade requirements under the import regulations will be issued as a separate action.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 100 producers of tomatoes in the production area and approximately 70 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000 (13 CFR 121.201).

Based on industry and Committee data, the average annual price for fresh Florida tomatoes during the 2007–08 season was approximately $13.71 per 25-pound container, and total fresh shipments for the 2007–08 season were 45,177,457 25-pound cartons of tomatoes. Committee data indicates that around 25 percent of the handlers handle 94 percent of the total volume shipped outside the regulated area. Based on the average price, about 75 percent of handlers could be considered small businesses under SBA's definition. In addition, based on production data, grower prices as reported by the National Agricultural Statistics Service, and the total number of Florida tomato growers, the average annual grower revenue is below $750,000. Thus, the majority of handlers and producers of Florida tomatoes may be classified as small entities.

This rule provides a partial exemption to the minimum grade requirements for tomatoes grown in Florida. Absent an exemption, Florida tomatoes covered by the order must meet at least a U.S. No. 2 grade before they can be shipped and sold outside the regulated area. This rule exempts Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade. This change increases the volume of Vintage Ripes™ that will meet the order requirements, and will help increase shipments and availability of these tomatoes. This rule amends the provisions of § 966.323. Authority for this action is provided in § 966.52 of the order.

This change represents a small increase in costs for producers and handlers of Vintage Ripes™, primarily from costs associated with developing and maintaining the IP program. However, this rule will make additional volumes of Vintage Ripes™ available for shipment. This should result in increased sales of Vintage Ripes™. Consequently, the benefits of this action are expected to more than offset the associated costs.

One alternative to this action that was considered was to not provide an exemption from shape requirements for Vintage Ripes™. However, providing the exemption will increase the volume of Vintage Ripes™ that will meet the order requirements, and will help increase shipments and availability of these tomatoes for consumers. Further, the same exemption had been provided previously for a similar tomato. Therefore, this alternative was rejected.

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

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the Florida tomato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the September 4, 2008, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrders SmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a partial exemption to the minimum grade requirements prescribed under the order. A 60-day comment period is provided to allow interested persons to respond to this rule. All written comments timely received will be considered before a final determination is made on this matter.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The shipment of Florida Vintage Ripes™ begins in November, 2008; (2) this rule relaxes requirements prescribed in the order; (3) the Committee unanimously recommended this change at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

■ For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

PART 966—TOMATOES GROWN IN FLORIDA

■ 1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 966.323, paragraph (d)(5) all references to ''UglyRipe™'' are revised to read ''UglyRipe™ and Vintage Ripes™''.

Dated: December 10, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–29658 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1280

[Docket No. LS–08–0041]

Lamb Promotion and Research Program: Procedures To Request Conduct of a Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations issued under the Lamb Promotion, Research, and Information Order (Order) pursuant to administrative changes to Web addresses and office locations within the USDA's Agricultural Marketing Service.

DATES: *Effective Date:* December 17, 2008.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch, on (202) 720–1115, fax (202) 720–1125, or by e-mail at *Kenneth.Payne@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Commodity Promotion, Research, and Information Act of 1996 (Act) (7 U.S.C. 7411–7425) authorizes USDA to establish generic programs of promotion, research, and information for agricultural commodities designed to strengthen an industry's position in the marketplace and to maintain and expand existing domestic and foreign markets and uses for agricultural commodities. Pursuant to the Act, a proposed Order on the Lamb Checkoff Program was published in the **Federal Register** on September 21, 2001 (66 FR 48764). The final Order was published in the **Federal Register** on April 11, 2002 (67 FR 17848). Collection of assessments began on July 1, 2002.

This program is funded primarily by those persons engaged in the production and feeding of lambs in the amount of one-half cent ($.005) per pound when live lambs are sold. For purposes of this program, the term ''lamb'' as defined in the Order means, ''any ovine animal of any age, including ewes and rams.''

First handlers, which means the packer or other person who buys or takes possession of lambs from a producer or feeder for slaughter, including custom slaughter, are assessed an additional $.30 cents per head purchased for slaughter or slaughtered by such first handler pursuant to a custom slaughter arrangement. Each

person who processes or causes to be processed lamb or lamb products of that person's own production and markets the processed products is assessed one-half cent ($.005) per pound on the live weight at the time of slaughter and is required to pay an additional assessment of $.30 per head. Assessment rates may be adjusted in accordance with applicable provisions of the Act and the Order. The Order also requires persons to collect and remit assessments to the American Lamb Board (Board). Each producer, feeder, or seedstock producer is obligated to pay that portion of the assessment that is equivalent to that producer's, feeder's, or seedstock producer's proportionate share and shall transfer the assessment to the subsequent purchaser. Additionally, a person who is a market agency (*i.e.*, commission merchant, auction market, or broker in the business of receiving such lamb or lamb products for sale on commission for or on behalf of a producer, feeder, or seedstock producer) is required to collect an assessment and transfer the collected assessment on to the subsequent purchaser(s). Such persons will not be subject to the assessment and are not eligible to participate in a referendum. Any person who processes or causes to be processed lamb or lamb products of that person's own production and markets the processed products will be required to pay an additional assessment and remit the total assessment to the Board. Each first handler who buys or takes possession of lambs from a producer or feeder for slaughter is required to pay an additional assessment and remit the total assessment to the Board.

The Act requires that a referendum to ascertain approval of an Order must be conducted no later than 3 years after assessments first begin. Assessments began on July 1, 2002. A referendum of lamb producers, feeders, seedstock producers, and first handlers of lamb and lamb products was conducted from January 31, 2005, through February 28, 2005. A majority of the participants, who represented a majority of the volume of lambs, voted in favor of the continuation of the Order. The Act also requires a subsequent referendum on the Order be conducted no later than 7 years after assessments first begin. Thus, USDA is required to conduct a nationwide referendum among persons subject to the assessment by July 1, 2009. The Order will continue if a majority of those persons voting, who also represent a majority of the volume of lambs, voted in favor of continuing the program. If the continuation of the Order is not approved by eligible persons voting in the referendum, USDA will begin the process of terminating the program.

This final rule amends Web site addresses cited in sections 1280.626 and 1280.631 that are currently outdated. This final rule also amends the physical address cited in section 1280.626, as it is also outdated. This rule is implemented in preparation for the 2009 referendum.

This rule relates to internal agency management. Therefore, this rule is exempt from the provisions of Executive Orders 12866 and 12988, and for this same reason the notice of proposed rulemaking and opportunity for comment are also not required, and this rule may be effective less than 30 days after publication in the **Federal Register**. In addition, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). Finally, this rule is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA). Therefore, this rule is exempt from the requirements of RFA.

List of Subjects in 7 CFR Part 1280

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Lamb and lamb products, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, Title 7, part 1280 is amended as follows:

PART 1280—LAMB PROMOTION, RESEARCH, AND INFORMATION

■ 1. The authority citation for 7 CFR part 1280 continues to read as follows:

Authority: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

Subpart E—Procedures To Request a Referendum

■ 2. In § 1280.626, paragraph (b) the Web site *http://www.ams.usda.gov/lsg/mpb/rp-lamb.htm* is removed and a new Web site *www.ams.usda.gov/lsmarketingprograms* is added in its place.

■ 3. In § 1280.631, paragraph (a) is revised to read as follows:

§ 1280.631 Results of the referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, the reports from all State FSA offices. The Administrator, AMS, shall tabulate the results of the ballots. USDA will issue an official press release announcing the results of referendum and publish the same results in the **Federal Register**. In addition, USDA will post the official results at the following Web site: *http://www.ams.usda.gov/LSMarketingPrograms* or such other Web site as announced by the Administrator of AMS. Subsequently, State reports and related papers shall be available for public inspection upon request during normal business hours in the Marketing Programs Branch; Livestock and Seed Program, AMS, USDA, Room 2628–S; STOP 0251; 1400 Independence Avenue, SW., Washington, DC.

* * * * *

Dated: December 10, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–29694 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF COMMERCE

Economic Development Administration

[Docket No.: 080213181–8811–01]

RIN 0610–AA64

13 CFR Parts 301, 302, 303, 305, 307, 308, 310, 314 and 315

Revisions to the EDA Regulations

AGENCY: Economic Development Administration, Department of Commerce

ACTION: Extension of public comment period on interim final rule.

SUMMARY: On October 22, 2008, the Economic Development Administration (''EDA'') published an interim final rule in the **Federal Register**. This document extends the deadline for submitting public comments on the interim final rule from December 22, 2008 until January 22, 2009. The extension of the public comment period is necessary to provide additional time for the submission of public comments and to allow for EDA's additional consideration of matters pertaining to the effective implementation of the interim final rule.

DATES: The deadline for submitting public comments on the interim final rule is extended from 5 p.m. (EST) on December 22, 2008 until 5 p.m. (EST) on January 22, 2009.

FOR FURTHER INFORMATION CONTACT: Office of Chief Counsel, ATTN: Hina Shaikh, Economic Development Administration, Department of Commerce, Room 7005, 1401

Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4687.

SUPPLEMENTARY INFORMATION: EDA published an interim final rule (''IFR'') in the **Federal Register** (73 FR 62858) on October 22, 2008. In March 2007, the Office of the Inspector General published a report titled *Aggressive EDA Leadership and Oversight Needed to Correct Persistent Problems in the RLF Program.* In the time since the publication of this report, EDA has made significant improvements in the management and oversight of its revolving loan fund (''RLF'') program, including the issuance of written guidance that provides EDA staff with reasonable steps to help better ensure grantee compliance with RLF requirements. EDA published the interim final rule to synchronize the RLF regulations with that guidance. Additionally, EDA published the IFR to make changes to certain definitions in the Trade Adjustment Assistance for Firms Program regulations set out in 13 CFR part 315. The IFR also provided notice of other substantive and non-substantive revisions made to the EDA regulations.

This document extends the deadline for submitting public comments on the entire interim final rule from 5 p.m. (EST) on December 22, 2008 until 5 p.m. (EST) on January 22, 2009. The procedure for submitting public comments is set forth in the interim final rule and is not changed by this document. The extension of the public comment period is necessary to provide additional time for the submission of public comments and to allow for EDA's additional consideration of matters pertaining to the effective implementation of the interim final rule.

Executive Order No. 12866

It has been determined that this final rule is not significant for purposes of Executive Order 12866.

Congressional Review Act

This document is not ''major'' under the Congressional Review Act (5 U.S.C. 801 *et seq.*).

Executive Order No. 13132

Executive Order 13132 requires agencies to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in Executive Order 13132 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.'' It has been determined that this document does not contain policies that have federalism implications.

Dated: December 10, 2008.

Otto Barry Bird,

Chief Counsel, Economic Development Administration.

[FR Doc. E8–29708 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1 and 93

[Docket No. FAA–2004–17005; Amdt. Nos. 1–63 and 93–90]

RIN 2120–AI17

Washington, DC Metropolitan Area Special Flight Rules Area

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action codifies special flight rules and airspace and flight restrictions for certain aircraft operations in the Washington, DC Metropolitan Area. The FAA takes this action in the interest of national security. This action is necessary to enable the Department of Homeland Security (DHS) and the Department of Defense (DOD) to effectively execute their respective constitutional and Congressionally-mandated duties to secure, protect, and defend the United States.

DATES: Effective February 17, 2009.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule, contact Ellen Crum, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–8783.

For legal questions concerning this final rule, contact C.L. Hattrup, Office of the Chief Counsel, Federal Aviation Administration, Washington, DC 20591; telephone (202) 385–6124. Questions relating to national security determinations relevant to the enactment of this rule, or any matter falling under the purview of other U.S. government agencies, will be referred to the Department of Homeland Security, Department of Defense, Department of Justice, or other agency, as appropriate.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA Administrator has broad authority to regulate the safe and efficient use of the navigable airspace (Title 49 United States Code (U.S.C.) 40103). The Administrator is also obligated to issue air traffic rules and regulations to govern the flight of aircraft, the navigation, protection and identification of aircraft for the protection of persons and property on the ground, and for the efficient use of the navigable airspace. The Administrator is likewise authorized and obligated to issue regulations or orders assigning the use of the airspace to ensure the safety of aircraft as well as the efficient use of the airspace. Additionally, the Administrator is authorized and obligated to prescribe air traffic regulations for the flight of aircraft, to include mandating safe altitudes, for navigating, protecting, and identifying aircraft; protecting individuals and property on the ground; using the navigable airspace efficiently; and preventing collision of aircraft with other airborne objects, land or water vehicles, or other aircraft.

The Administrator is authorized and obligated to establish security provisions governing use of and access to the navigable airspace by civil aircraft, balancing the needs of national security and national defense with the mandate to allow and encourage maximum use of the navigable airspace by civil aircraft. Pursuant to 49 U.S.C. 40103(b)(3)(A), the Administrator is authorized as well as obligated to establish areas in the airspace if the Administrator, after consulting with the Secretary of Defense, determines doing so is necessary in the interest of national security. Since the Department of Homeland Security was established in 2002 after the enactment of the statute referred to above, the Administrator's need and responsibility to consult with the Secretary of Homeland Security in addition to the Secretary of Defense is consistent with the intent and purpose of the statute.

List of Abbreviations and Terms Frequently Used in This Document

ADIZ—Air Defense Identification Zone
AOPA—Aircraft Owners and Pilots Association
ATC–Air Traffic Control
DASSP—DCA Access Standard Security Program
DCA VOR/DME—Washington, DC VHF omni-directional range/distance measuring equipment
DHS—Department of Homeland Security
DOD—Department of Defense
FRZ—Flight Restricted Zone
HSAS—Homeland Security Advisory System
IFR—Instrument flight rules

Maryland Three Airports—College Park Airport, Potomac Airfield, and Washington Executive/Hyde Field
NCR—National Capital Region
NCRCC—National Capital Region Coordination Center
NM—Nautical mile
NOTAM—Notice to Airmen
NPRM—Notice of Proposed Rulemaking
ODNI—Office of the Director of National Intelligence
PCT—Potomac Terminal Radar Approach Control (Potomac TRACON)
SFRA—Special Flight Rules Area
TFR—Temporary flight restriction
TSA—Transportation Security Administration
VFR—Visual flight rules

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I. Overview

A. DC Area Airspace Operations Before September 11, 2001

Before the attacks of September 11, 2001, aircraft operators in the Washington, DC National Capital Region (NCR) were subject to the General Operating and Flight Rules contained in 14 CFR part 91, including rules for operations in Class B airspace. Additionally, aircraft operators were not permitted to enter the prohibited areas already designated under 14 CFR part 73 for portions of the District of Columbia, including the White House, the U.S. Capitol building, and the U.S. Naval Observatory.

B. DC Area Airspace Operations After September 11, 2001

In immediate response to the September 11, 2001 attacks, the FAA implemented numerous temporary flight restrictions (TFRs) across the United States in the interest of national security under 49 U.S.C. 40103(b)(3). Civilian airports in the NCR were closed to commercial and general aviation operations while defense and law enforcement agencies assessed the risk of further terrorist activity. In addition, a 25-nautical-mile-radius (NM) TFR area, extending from the surface to 18,000 feet around Washington, DC, was established. Eventually, commercial flight activities were allowed to resume in graduated stages, and in December 2001, the 25-NM-radius TFR around Washington, DC was reduced to an approximately 15-NM radius centered on the Washington, DC very high frequency omni-directional range/distance measuring equipment (DCA VOR/DME).

After 2001, as part of its homeland defense mission, the North American Aerospace Defense Command (NORAD) was directed to expand its air defense mission to include combat air patrols throughout the United States, focusing primarily on major cities and major airports. This expanded U.S-Canada bi-national domestic defense mission is known as Operation Noble Eagle (ONE). In 2003, as part of the nation's preparation for the war in Iraq, DHS initiated an operation called Operation Liberty Shield to enhance homeland security. In support of that initiative, the FAA, in consultation with the Department of Homeland Security (DHS), the Department of Defense (DOD), and other Federal agencies, implemented TFRs around Washington, DC New York City, and Chicago. The restrictions around New York City and Chicago were later rescinded when Homeland Security Advisory System (HSAS) threat levels declined. Restrictions around Washington, DC, were retained for reasons of national security, as discussed in more detail below.

C. National Security Initiatives

As part of a renewed focus on national security and national defense after September 11, 2001, the Federal government implemented numerous policy changes and initiatives as part of

a coordinated, layered effort to identify, prevent, eliminate or minimize the vulnerabilities exploited by terrorists. For example, on June 20, 2006, the President issued National Security Presidential Directive-47/Homeland Security Presidential Directive-16, Aviation Security Policy, which led to the National Strategy for Aviation Security (NSAS). The NSAS Supporting Plans, which were issued on March 26, 2007, include such things as aviation transportation system security, aviation transportation system recovery, aviation operational threat response, air domain surveillance and intelligence integration, domestic outreach, and international outreach. The NSAS links all agencies with responsibilities across the spectrum of protecting and securing the aviation domain. Primary agencies include DHS, DOD, the Departments of Transportation (DOT), Justice (DOJ), State (DOS), and Energy (DOE), and the Office of the Director of National Intelligence (ODNI).

Another initiative after September 11, 2001, was the creation of the Transportation Security Administration (TSA) under DOT for aviation security. In November 2002, DHS was created, and TSA was transferred to that Department. The FAA did not and does not have the responsibility, authority or ability to independently identify and assess threats to national security. These functions are performed by other Executive Branch departments and agencies with authority to do so.

D. The FAA's Role

The FAA Administrator has responsibility for the management of the nation's airspace and Air Traffic Control (ATC) system. Pursuant to 49 U.S.C. 40103(b)(1) and (b)(2), the FAA Administrator has broad authority to regulate and manage national airspace in the interest of safety and efficiency. The FAA Administrator also has separate statutory authority under 40103(b)(3) to regulate and manage airspace solely for reasons of national security. That paragraph states the FAA Administrator, ''in consultation with the Secretary of Defense'' shall—''(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and (B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.'' The FAA works closely with the Secretary of Defense as well as the U.S. Northern Command (NORTHCOM), NORAD, DHS, and DOJ to identify and evaluate aviation- or airport-related threats or incidents from around the country, facilitate the appropriate level and scope of any response, and ensure that potentially significant information is elevated immediately under existing reporting or emergency notification procedures.

The FAA is responsible for acting as the liaison with the DHS Office of National Capital Region Coordination (ONCRC). In creating the ONCRC, Congress recognized the unique and complex challenges that exist in the National Capital Region that is home to 12 local jurisdictions, two states, the District of Columbia, and all three branches of the Federal government. Actions taken by DHS, DOJ, DOT, DOD, DOS, DOE, ODNI, and the Office of the Director of the National Counterterrorism Center (NCTC) to effectively discharge their complementary responsibilities include, but are not necessarily limited to—

- Creation of the Regional Incident Communication and Coordination System (RICCS), implemented through Memorandum of Understanding of NCR agencies;
- Improvement to the Domestic Emergency Management System; and
- Establishment of the National Capital Region Coordination Center (NCRCC), the Freedom Center, and the National Intelligence Center (NIC) to facilitate better real-time communication sharing among all the responsible agencies.

One of the primary goals of the NCRCC was to enable all agencies to effectively carry out their respective roles and responsibilities, which are fully outlined in the NSAS Aviation Operational Threat Response Plan. The Secretary of Transportation is responsible for coordinating and managing the national airspace system, which includes, but is not limited to, supporting AOTR by expediting and deconflicting clearance and routing of DOD and DHS interdiction assets and providing air contact information to enhance airborne AOTR. The FAA also supports AOTR efforts and steady-state defense, security and other airborne law enforcement and crisis response missions through the planning and execution of a broad spectrum of airport and air traffic management related measures. These actions, including establishment of the DC SFRA, are taken by the FAA as the United States' civil aviation authority.

E. The 2003 NOTAM

In February 2003, under 14 CFR 99.7, *Special Security Instructions*, the FAA established the Washington, DC Metropolitan Area Air Defense Identification Zone (DC ADIZ) through the issuance of a Flight Data Center (FDC) NOTAM. The NOTAM also identified the previously established 15-NM restriction centered on the DCA VOR/DME as the Washington, DC Metropolitan Area Flight Restricted Zone (FRZ). The NOTAM prescribed radio communication, transponder, and flight plan requirements for pilots to follow while operating under visual flight rules (VFR) within the ADIZ. The DC ADIZ was put in place to provide a means for law enforcement and security communities to track aircraft operating in the vicinity of the nation's capital. Some types of operations, such as U.S. military, law enforcement, and lifeguard or air ambulance operations under an FAA/TSA airspace authorization, were excluded from the requirements. NOTAMs, however, are intended to be short-term measures to address temporary or unanticipated situations until the appropriate modifications can be made to procedures, publications, or regulations. Considering the continued significance of the NCR as a potential target, the FAA determined that it was necessary to issue permanent restrictions for operating in the Washington, DC Metropolitan Area.

F. The 2005 Proposed Rule

On August 4, 2005, the FAA published a Notice of Proposed Rulemaking (NPRM) proposing to codify flight restrictions that were implemented by various NOTAMs in effect at that time for certain aircraft operations in the Washington, DC Metropolitan Area (70 FR 45250; Aug. 4, 2005). The NPRM proposed to retain the two-way radio communication, transponder, and flight plan requirements found in the NOTAMs. In addition, although the Washington, DC airspace was referred to as an ADIZ in the NOTAMs, the NPRM proposed to rename the airspace as a Special Flight Rules Area (SFRA). Note that, except in contexts in which use of the term ''DC ADIZ'' or ''ADIZ'' is necessary, the term ''DC SFRA'' is used in the remainder of this document, even though most public comments and historical documents contain the term ''ADIZ.'' The term ''DC SFRA'' includes both the airspace configuration in existence at the time of the NPRM and the re-configured airspace reflected in an August 30, 2007 NOTAM (discussed under ''I.H. The 2007 NOTAM'').

G. Public Comments in Response to the 2005 Proposed Rule

The comment period on the NPRM closed on November 2, 2005. However, in response to requests from Members of Congress, industry associations, and

individual commenters, it was reopened until February 6, 2006 by notice published on November 7, 2005 (70 FR 67388; Nov. 7, 2005). In addition, the FAA held 4 public meetings on January 12 and 18, 2006, in Columbia, MD, and Dulles, VA, respectively.

The FAA received over 21,000 written comments in addition to the oral comments submitted during the public meetings (contained in transcripts placed in the docket for this rulemaking). Commenters included individual pilots, airport owners, professional associations, aviation-related business owners, and search and rescue and aeromedical operators. The FAA notes that each comment was individually written, not a form letter or pre-printed postcard. Many comments contained a high level of detail. The FAA read all comments and meeting transcripts in the development of this final rule. The agency appreciates the input of each commenter. Due to the large number of comments, however, the FAA is not able to respond in detail to each issue raised. Rather, the FAA has identified overall themes for discussion under ''IV. Discussion of Public Comments.''

Many commenters acknowledged that some type of special security is necessary to protect the nation's capital; however, essentially all of the commenters objected to the proposed rule. Many asserted that the FAA was allowing other Federal agencies to force the FAA to make airspace decisions the FAA would not otherwise implement. The FAA disagrees. As discussed above, the FAA Administrator has a responsibility to consult with the Secretary of Defense in the interest of national security. In addition, the FAA participates in government-wide initiatives concerning the protection of the NCR. Many commenters also stated that the DC SFRA covered too large an area, and the specific measures implemented by NOTAM were unworkable. Commenters, therefore, were opposed to those measures being made permanent.

The NPRM proposed a larger DC SFRA with different operating procedures than currently exist. One of the many factors taken into account for establishing the original, larger, and more restrictive area, now known as the DC SFRA, was to enable sufficient time and space for NORAD, as well as other agencies or law enforcement officials with authority to use armed force to counter threats to national security or to protect national security assets, to interdict, or intercept an aircraft. With the benefit of experience gained since the September 11, 2001 attacks, the FAA, in consultation with defense, security, and law enforcement agencies, evaluated the comments to the 2005 NPRM and determined that some of the objections and concerns raised by the public had merit. The FAA and those agencies then considered the overall operational impact of the NCR airspace restrictions, HSAS threat levels, as well as the positive effects of additional controller support, pilot awareness training, security-related initiatives, and better information sharing and response coordination among responsible agencies. Based upon the above considerations, the FAA and the other agencies determined that national security, safety of flight, and safety of people on the ground would not be compromised with a reduced DC SFRA perimeter.

H. The 2007 NOTAM

In response to public comments, the FAA modified the size and shape of the DC SFRA and its associated procedures through FDC NOTAMs 07/0206 and 07/0211, which became effective August 30, 2007. In addition, the FAA added 3 sectors at Potomac Terminal Radar Approach Control (Potomac TRACON) (PCT) to track aircraft in the DC SFRA and took steps to improve functions such as flight plan processing. These modifications are reflected in this final rule.

In the August 30, 2007 NOTAMs, the dimensions of the DC FRZ remained essentially the same, except that the western boundary was moved slightly eastward, while the size of the DC SFRA was reduced from the wide-ranging outer boundary of the Washington Tri-Area Class B Airspace Area to a much smaller 30-NM radius from the DCA VOR/DME. As a result, the number of airports affected by the restrictions was reduced, and more navigable airspace was made available to pilots conducting operations in the area. The requirement for pilots to establish two-way communication with ATC, be equipped with an operating transponder with altitude-reporting capability, and file a flight plan remained the same. However, the revised NOTAMs also added a ''maneuvering area'' for Leesburg Executive Airport, and imposed an indicated airspeed restriction of 180 knots or less (if capable) for all VFR operations within the DC SFRA/DC FRZ. For VFR aircraft operations conducted between 30– and 60–NM from the DCA VOR/DME, aircraft were restricted to an indicated airspeed of 230 knots or less (if capable).

I. Rationale for Adopting This Final Rule

The FAA is taking this final action to enhance security in Washington, DC, the nation's capital. As the nation's capital, it has a unique symbolic, historic, and political status. Washington, DC is the seat of all three branches of the United States government, and is the home of the President (who serves as the Commander in Chief of the Armed Forces) and the Vice President. Likewise, it is the home of the U.S. Congress and the U.S. Supreme Court, and thus is the residence and office location for the officials in the Constitutional order of succession. In addition, World Bank offices, foreign embassies, and the sovereign residences of foreign ambassadors credentialed to the United States are located in Washington, DC.

The FAA, in consultation with the Secretaries of Defense and Homeland Security, has determined that implementation of this rule is necessary to enable those officials in carrying out their responsibilities to lawfully identify, counter, prevent, deter, or, as a last resort, disable with non-lethal or lethal force, any airborne object that poses a threat to national security. The rule will assist air traffic controllers and NCRCC officials in monitoring air traffic by identifying, distinguishing, and, more importantly, responding appropriately when an aircraft is off course or is not complying with ATC instructions. In addition, the FAA is permanently codifying restrictions previously implemented via the NOTAM system. This action will reduce confusion regarding operations within the DC SFRA and DC FRZ.

J. Use of Force

The authority and obligation to use any type of armed force, deadly or otherwise, by the U.S. military is explained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI), ''Standing Rules of Engagement (SROE) for Armed Forces of the United States'' 3121.01B, June 15, 2005. The introductory portion of the SROE is unclassified, and outlines the basic premise and basic guidance for any decision by the President or subordinate military commander or member of the armed forces to use force, deadly or otherwise, in individual self-defense or collective self-defense of the nation. The NSAS Aviation Operational Threat Response Plan further reinforces that conducting air defense of the United States and U.S. interests, including operations to interdict and, when

necessary, defeat airborne threats, as part of the active, layered defense of the United States is a responsibility of the Secretary of Defense. Through its Combatant Commands and NORAD, as appropriate, DOD directs the necessary supporting measures to implement Emergency Security Control of Air Traffic procedures in extreme circumstances. Through NORAD and the Combatant Commands, DOD is the only department authorized to direct engagement using deadly force against airborne civilian aircraft presenting an imminent threat to the United States or U.S. interests, unless the President directs otherwise. Rules for the Use of Force (RUF) for those engaged in law enforcement or security duties also exist for military or civilian law enforcement officers authorized to use force, deadly or otherwise, to protect certain high priority national security assets, and to otherwise perform their law enforcement or security related duties. The FAA is including information regarding the possible use of force in its mandatory online training course for pilots who fly within a 60 NM radius of the DCA VOR/DME so that pilots are aware of the potential risk.

II. Management of Airspace for National Security Purposes

This final rule does not create any new class, type, or category of airspace. However, the Washington, DC SFRA is considered ''national defense airspace'' as referenced in 49 U.S.C. 46307, which states that a person who knowingly or willfully violates regulations or orders issued under 49 U.S.C. 40103(b)(3) may be subject to criminal prosecution. The Department of Justice is responsible for determining if such action is warranted.

As discussed in the ''Authority for This Rulemaking'' section above, 49 U.S.C. 40103 grants the Administrator broad authority to regulate the nation's airspace to ensure its safe and efficient use. Certain regulations currently issued by the Administrator control, designate, or assign airspace for national security and/or national defense purposes. These regulations include, but are not limited to, part 73, subpart C *Prohibited Areas*, and part 99, *Security Control of Air Traffic*. Part 73, subpart C provides for the designation of prohibited areas for national security purposes wherein no person may operate an aircraft without authorization from the agency, organization or military command that established the requirements for the prohibited area. (See 14 CFR 73.85, *Using agency*.) Part 99 states in part that any airspace of the contiguous United States that is not an ADIZ, in which the control of aircraft is required for reasons of national security, is a ''defense area.'' (See 14 CFR 99.3.) Part 99 further provides that each person operating an aircraft in a defense area or ADIZ must comply with special security instructions issued by the Administrator in the interest of national security. (See 14 CFR 99.7.)

III. Summary of the Final Rule

This final rule establishes and defines the DC SFRA, which includes the DC FRZ. It also defines dimensions, procedures and required equipment for operating in the DC SFRA. These procedures include establishing two-way radio communication, filing flight plans, and using discrete transponder codes. In addition, the rule provides for traffic pattern operations at towered and non-towered airports within the DC SFRA, and provides relief from certain procedures for airports located near the boundary of the DC SFRA.

A. Differences Between the Proposed Rule and the Final Rule

Since the proposed rule was published in 2005, the dimensions of the DC SFRA were reduced and procedures amended for aircraft operating within the DC SFRA. These modifications, largely relieving in nature, are reflected in this final rule. Consequently, there are some differences between the NPRM and this final rule. The significant differences are discussed below.

1. Regulatory text proposed as subpart B adopted as subpart V, with modification: At the time the 2005 proposed rule was published, the FAA intended to adopt the proposed regulatory text as 14 CFR part 93, subpart B, which was reserved at the time. In the intervening time, however, the agency adopted another rulemaking action as subpart B. In the final rule, therefore, regulations proposed as subpart B are adopted as subpart V, proposed sections designated as §§ 93.31 through 93.49 are redesignated as §§ 93.331 through 93.345 in the final rule, and proposed §§ 93.45 and 93.49 are removed from the final rule. Provisions proposed in those sections are removed from the final rule because they have become unnecessary due to modifications implemented since the publication date of the NPRM.

In addition, some proposed section headings are modified in the final rule. In the NPRM, certain section headings were in question format, while others were in caption format. In this final rule, section headings are in caption format. The following table provides a comparison between the NPRM and the final rule.

NPRM	Final rule
Subpart B—Washington, DC, Metropolitan Area Special Flight Rules Area.	Subpart V—Washington, DC, Metropolitan Area Special Flight Rules Area.
§ 93.31 What is the purpose of this subpart and who would be affected?	§ 93.331 Purpose and applicability of this subpart.
§ 93.33 What could happen if you fail to comply with the rules of this subpart?	§ 93.333 Failure to comply with this subpart.
§ 93.35 Definitions	§ 93.335 Definitions.
§ 93.37 General requirements for operating in the Washington, DC, Metropolitan Area SFRA.	§ 93.337 Requirements for operating in the DC SFRA.
§ 93.39 Specific requirements for operating in the Washington, DC, Metropolitan Area SFRA, including the FRZ.	§ 93.339 Requirements for operating in the DC SFRA, including the DC FRZ.
§ 93.41 Aircraft operations prohibited	§ 93.341 Aircraft operations in the DC FRZ.
§ 93.43 Requirements for aircraft operations to or from College Park; Potomac Airfield; or Washington Executive/Hyde Field Airports.	§ 93.343 Requirements for aircraft operations to or from College Park Airport; Potomac Airfield; or Washington Executive/Hyde Field Airport.
§ 93.45 Special ingress/egress procedures for Bay Bridge and Kentmorr Airports.	Withdrawn. Referenced airports are no longer fringe airports.
§ 93.47 Special egress procedures for fringe airports	§ 93.345 VFR outbound procedures for fringe airports.

NPRM	Final rule
§ 93.49 Airport security procedures	Withdrawn. Section no longer necessary subsequent to issuance of TSA final rule implementing ground security requirements and procedures at College Park Airport, Potomac Airfield and Washington Executive/Hyde Field (70 FR 7150; Feb. 10, 2005).

2. Dimensions of the DC SFRA: In the final rule, the dimensions of the DC SFRA are reduced to a 30–NM radius around the DCA VOR/DME. The NPRM proposed that the dimensions of the DC SFRA mirror those designated in the NOTAM in effect at that time. Those dimensions, with some exceptions, were based on the outer boundary of the Washington Tri-Area Class B Airspace Area, and included an area of 4,029 square miles. Since the NPRM was published, the FAA, along with other Federal agencies, has determined that the NCR can be protected with a reduced restricted airspace area of 2,837 square miles.

3. Fringe airports: Fringe airports are those airports located within just a few miles of the DC SFRA boundary established in this final rule. The FAA grants relief from certain DC SFRA procedures to pilots operating at fringe airports because departing aircraft penetrate the DC SFRA airspace for only a brief time. At the time of the NPRM, fringe airports included Airlie, VA, Albrecht, MD, Harris, VA, Martin, MD, Martin State, MD, Meadows, VA, and Mylander, MD, Stewart, MD, St. John, MD, Tilghman Whipp, MD, Upperville, VA, and Wolf, MD. With the reduction in the dimensions of the DC SFRA, those fringe airports are no longer within the DC SFRA; therefore, relief from DC SFRA procedures at those airports is no longer necessary. However, since implementation of the August 30, 2007 NOTAM, different airports (specifically, Barnes (MD47), Flying M Farms (MD77), Mountain Road (MD43), Robinson (MD14), and Skyview (51VA)) are now located just inside the boundary of the DC SFRA. These airports are defined as ''fringe airports'' in the final rule.

4. Opening/closing flight plans: In the NPRM, the FAA proposed that pilots open and close their flight plans by contacting an Automated Flight Service Station (AFSS). In response to public comments, the August 30, 2007 NOTAM modified this procedure. As reflected in this final rule, the flight plan is now opened when a pilot receives a discrete transponder code, and closed upon landing or exiting the DC SFRA.

5. Part 91 Operations at Ronald Reagan Washington National Airport (DCA Access Standard Security Program (DASSP)): On July 19, 2005, TSA issued an interim final rule to restore access to Ronald Reagan Washington National Airport for certain operations under the DCA Access Standard Security Program (DASSP). In this final rule, § 93.341 (proposed as § 93.41) is modified to permit aircraft operations under the DASSP.

6. Addition of definition of ''national defense airspace'' in 14 CFR part 1: In the preamble to the NPRM, the FAA stated that the DC SFRA would be classified as ''national defense airspace'' (NDA). It further stated that persons who knowingly or willfully violate the rules concerning operations in national defense airspace would be subject to criminal penalties as described in 49 U.S.C. 46307.

National defense airspace is any airspace established by regulation or order issued under 49 U.S.C. 40103(b)(3). An order or regulation issued under 49 U.S.C. 40103(b)(3) is appropriate when the Administrator, in consultation with the Secretary of Defense, has determined that it is necessary in the interest of national defense to restrict or prohibit flight of civil aircraft that cannot be identified, located, or controlled. The FAA realizes that most pilots consult FAA manuals and regulations for definitions of airspace terms, rather than Title 49 of the United States Code. In the final rule, therefore, the FAA is adding a definition of ''national defense airspace'' to § 1.1 General Definitions.

The FAA notes that, by adding this definition to 14 CFR part 1, the agency is not creating a new category of airspace, nor is it creating any new procedures or requirements. The FAA is simply clarifying that national defense airspace exists in those cases where it was designated under a regulation or order issued pursuant to 49 U.S.C. 40103(b)(3).

7. Change ''aeromedical operations'' references to ''lifeguard or air ambulance operations under an FAA/TSA airspace authorization:'' References to ''aeromedical flight operations'' and ''aeromedical services'' are changed to ''lifeguard or air ambulance operations under an FAA/TSA airspace authorization.'' This language is consistent with current terminology, and is used in the FAA's ''Aeronautical Information Manual.'' An air ambulance flight is performed by an operator that has been issued operations specifications to perform air ambulance operations in either an airplane or a helicopter. ''Lifeguard'' is the call sign used by air ambulance operators whose mission is of an urgent medical nature. A lifeguard call sign is used only for that portion of the flight requiring expeditious handling.

B. Differences Between the August 30, 2007 NOTAM and the Final Rule

The August 30, 2007, NOTAM contains information that is not included in this final rule. Information likely to change (such as telephone numbers and individuals' names) is not included in this rule. Other pertinent information for DC SFRA operations will continue to apply through NOTAM, including warnings concerning potential consequences of violations. This information includes, but is not limited to—

- Requirement for any pilot flying under VFR within a 60–NM radius of the DCA VOR/DME to complete free online training provided by the FAA;
- The requirement for aircraft to operate at altitudes that ensure acceptable radar coverage;
- Waiver procedures;
- Action in the event of a transponder failure;
- Speed restrictions;
- Resource information;
- The definition and requirement for operations within the Leesburg Maneuvering Area; and
- Explanation of DC SFRA transponder and flight plan requirements.

C. Related Regulatory Activity

1. 14 CFR parts 61 and 91: On August 12, 2008, the FAA issued a final rule entitled ''Special Awareness Training for the Washington, DC Metropolitan Area'' (73 FR 46797; Aug. 12, 2008). The final rule, intended to reduce the number of unauthorized flights into the Washington, DC SFRA and DC FRZ through education of the pilot community, focuses primarily on training pilots on the procedures for flying in and around the DC SFRA and DC FRZ. It requires any pilot who flies under VFR within a 60–NM radius of the DCA VOR/DME to complete free online training provided by the FAA on its *http://www.FAASafety.gov* Web site

and retain a completion certificate. This training will also inform pilots of potential adverse consequences arising from violation of the airspace. More than 7,000 pilots have completed the online training course.

2. 49 CFR part 1562: On February 10, 2005, the TSA issued an interim final rule implementing ground security requirements and procedures at three Maryland airports (the ''Maryland Three Airports''—College Park Airport, Potomac Airfield and Washington Executive/Hyde Field) located within the Washington, DC Metropolitan Area Flight Restricted Zone (70 FR 7150; Feb. 10, 2005). That interim final rule established security rules for all pilots operating aircraft to or from any of the Maryland Three Airports as regulated by 49 CFR Part 1562, Subpart A. The interim final rule replaced the Special Federal Aviation Regulation (SFAR) No. 94 previously issued by the FAA (67 FR 7538; Feb. 19, 2002).

3. 49 CFR parts 1520, 1540, and 1562: On July 19, 2005, TSA issued an interim final rule establishing the DASSP to restore access to Ronald Reagan Washington National Airport for certain aircraft operations while maintaining the security of critical Federal government and other assets in the Washington, DC Metropolitan Area (70 FR 41586; July 19, 2005). The interim final rule applies to all passenger aircraft operations into or out of DCA, except U.S. air carrier operations operating under a full security program required by 49 CFR part 1544 and foreign air carrier operations operating under 49 CFR 1546.101(a) or (b). The interim final rule establishes security procedures for aircraft operators and gateway airport and fixed-base operators, and security requirements relating to crewmembers, passengers, and armed security officers onboard aircraft operating into or out of DCA as regulated by 49 CFR part 1562, subpart B.

IV. Discussion of Public Comments

The vast majority of commenters, while acknowledging that the FAA implemented the DC SFRA to enhance security in the Washington, DC Metropolitan Area, believed that the measures were overly burdensome to the aviation community and unnecessary. In addition, commenters repeatedly stated that the FAA had not adequately justified the airspace restrictions and procedures. As discussed in ''I. Overview,'' in response to these comments, the FAA modified, via NOTAM, the airspace restrictions and procedures that were proposed in the NPRM and made them less restrictive.

Commenters raised security, safety and operational, administrative, and regulatory concerns in response to the NPRM. These comments and the FAA's responses are discussed below. (Comments raised regarding the FAA's economic analysis are discussed in the full regulatory evaluation in the docket for this rulemaking.)

A. Security Issues

1. Restrictions on freedom are not justified: Numerous commenters said that the FAA did not provide sufficient justification for the existence of the DC SFRA itself. They felt that the government had, in effect, ''let the terrorists win'' as citizens' freedoms had been taken away in the name of security.

The FAA acknowledges that actions taken immediately following September 11, 2001, imposed new and significant limits on access to the Washington, DC airspace. Initially airspace restrictions were greater than those that currently exist. The FAA has since reduced restrictions for the Maryland Three Airports, has worked with DHS to provide waivers to the NOTAM for aircraft operators, and has amended procedures and reduced the size of the DC SFRA. Though there are more procedures and restrictions in place for operating in the DC SFRA than there are for the Washington Tri-Area Class B Airspace Area, access to the airspace is available to pilots who comply with appropriate procedures. The FAA believes it has provided a balance between security needs and the public's right of transit through the navigable airspace as provided in 49 U.S.C. 40103.

As discussed elsewhere in this preamble, the FAA took this action in consideration of the fact that Washington, DC is unique as a symbolic military and political target. Historically, in times of war, a nation's seat of government provides an inviting target for enemy attacks because of its great political, economic and psychological value.

Washington, DC is the seat of all three branches of the United States Government. The White House, the U.S. Capitol, the Supreme Court and other Federal court buildings are located in Washington, DC, as well other Executive-Legislative-, and Judicial-Branch buildings and the headquarters and operations facilities for the nation's domestic and international security apparatus. The nation's leaders (the President, the Vice President, Members of Congress, Cabinet members, and Supreme Court justices) are located in the NCR. In addition, American symbolic and historical sites (such as monuments and museums) are located in the NCR. World Bank offices, all foreign embassies, and the residences of foreign ambassadors to the United States are also located in the vicinity. The FAA notes that the United States has an obligation to protect other nations' sovereign spaces.

Establishing the DC SFRA was one of many steps that were taken to ensure the security of the nation's capital. The FAA acknowledges that no single procedure or requirement is fail-safe; however, the FAA believes that this rule adds a layer of additional security to minimize actual threats that may require a graduated response by other U.S. government agencies.

2. General aviation aircraft pose no threat: Many commenters said that general aviation aircraft do not pose a threat because their kinetic energy is low, their speeds are slow, and their cargo capacity is small.

The FAA understands the commenters' concerns; however, the Federal government is concerned that an aircraft, regardless of size, could be used to transport individuals with criminal intentions or dangerous materials that could do significant harm to the NCR.

An example of an incident that could have been avoided under this rule is that of the stolen Cessna 150, which on September 12, 1994, was deliberately crashed into the White House by a suicidal pilot. The plane had relatively little fuel on board and no explosive, radiological, biological, or chemical agents. Some commenters pointed to this 1994 incident as evidence that general aviation aircraft pose no real threat. However, had the aircraft been larger, or the pilot been carrying an explosive device or chemical/ radiological/ biological agent, the impact could have resulted in the loss of life on the ground, or long term denial of access to the affected area.

Intelligence information gathered after September 11, 2001, while not specifying an imminent threat of attack in the NCR, suggests that some extremists have considered using small aircraft for terrorist activities. The FAA estimates that there are approximately 200,000 airplanes based at over 19,000 landing facilities within the United States. These facilities include both public- and private-use facilities, and, unlike air carrier operators, most are not subject to Federal security regulations. The government, therefore, remains concerned that terrorists launching attacks using stolen or hijacked planes remains a viable option.

3. General aviation pilots pose no threat: Commenters asked why the government believes that general aviation pilots are a threat when no DC SFRA or DC FRZ incursion to date had been terrorism-related. The commenters pointed out that the attacks of September 11, 2001, were carried out by individuals flying large aircraft.

The FAA notes that there is concern that terrorists may turn to general aviation as an alternative method for conducting operations, especially since the implementation of security enhancements for commercial aircraft and airports.

In addition, the Federal government considers it an unacceptable risk to allow aircraft in the vicinity of Washington, DC without knowing the pilot's intentions. The requirements to file a flight plan before operating in the DC SFRA and squawk a discrete transponder code provide the FAA and other Federal agencies with critical information (i.e., direction of flight, type and color of aircraft, and airspeed) regarding aircraft operating within the DC SFRA.

Commenters also stated that the requirements for operating in the DC SFRA, such as filing a flight plan, squawking a discrete transponder code, and maintaining two-way communications with ATC do nothing to ensure that a pilot entering the DC SFRA is not a terrorist.

The FAA acknowledges that these measures do not ensure that a pilot or a passenger is not a terrorist. However, the measures provide ATC and law enforcement/security officials with additional information that may be useful in identifying a compliant pilot versus a non-compliant pilot. A flight plan provides ATC with pilot information and the pilot's intended route of flight. Further, the use of a discrete transponder code enables ATC to observe and monitor the aircraft while in the airspace. In addition, maintaining two-way radio communication allows officials to communicate with the pilot, and when necessary, determine whether the pilot is experiencing an emergency or aircraft equipment failure, or whether the pilot has simply committed a navigation error. Should there be any aircraft operator in the DC SFRA who has not filed a flight plan or has deviated from the intended route of flight, steps can be taken to get the aircraft back on course and enable those with response or security duties to determine if a threat exists and the appropriate course of action (including use of deadly force).

4. Aviation, especially general aviation, is unfairly being regulated instead of other modes of transportation: Commenters believed the airspace restrictions were unfairly directed at aviation operations (most notably general aviation) while motor vehicles and rail traffic can still pass close to government buildings without much restriction.

The FAA does not have jurisdiction over modes of transportation other than aviation. The agency points out, however, that the modes of transportation mentioned above are in fact restricted in some manner from getting too close to the White House and the U.S. Capitol. For example, at the White House, barriers such as fences, checkpoints, gates, bollards, and other screening systems are designed so that if a detonation does occur, the blast will not result in the destruction of the building or serious harm to protected persons. Vehicular traffic is prohibited on Pennsylvania Ave and E Street between 15th and 17th Streets. Additionally, trucks are not allowed on 17th Street, NW., between Constitution Ave and Pennsylvania Ave. Likewise, there are vehicular restrictions near and around the U.S. Capitol. While motor vehicles must follow roads, and trains must stay on tracks, airplanes can maneuver without such restraints and are not constrained by ground-based barriers and restrictions.

In addition, though many general aviation operators are impacted by these airspace restrictions, the rule itself is not specifically directed at general aviation operations. General aviation operators can and do operate under IFR, and IFR requirements have not been changed. Rather, the rule requires additional procedures for VFR operators, who would otherwise not be required to make their intentions known to ATC.

5. An SFRA was established for Washington, DC, but not for other cities: Many commenters asked why only Washington, DC has permanent airspace restrictions. In addition, they pointed out that airspace restrictions around other places, such as New York City, have been discontinued since September 11, 2001, and said that those around Washington, DC also should be discontinued. Many commenters who lived outside the Washington, DC vicinity expressed concern that SFRAs would be put in place over their locales.

The FAA has received requests from various officials to impose SFRA-type restrictions or prohibitions at locations including New York City and Chicago. The FAA has evaluated these requests, in consultation with other agencies, and concluded that restrictions were not required. Federal agencies that share responsibility for security of the National Airspace System closely monitor the threat to the nation's cities, including the unique security environments of cities such as Washington, DC, New York City, Chicago, and others. When developing risk mitigation plans, TSA considers threats, vulnerabilities, the criticality of a location or transportation system, and the potential consequence of an attack on that location or system. Risk mitigation plans are intended to ensure the security of the location or transportation system while allowing the nation's transportation system to continue operating. Sustainability is a primary concern when developing and implementing a risk mitigation plan.

As previously discussed, Washington, DC is a high-value symbolic military and political target. The requirements of the DC SFRA allow ATC and law enforcement agencies to identify and track aircraft operating in the Washington, DC area and to focus on those targets of interest that may pose a hazard to the Washington, DC area.

The Transportation Security Administration continually reviews and refines risk assessments and mitigation plans in order to address the threat from terrorist groups. The FAA maintains a continuous dialogue with appropriate agencies regarding threat and security issues that may pertain to aircraft operations. In consultation with these agencies, the FAA may implement additional measures, not only in the Washington, DC area, but in other locations, as needed, based on specific, credible intelligence. For example, on March 17, 2003, the national HSAS threat level was raised to Orange (high). In response, the FAA took a number of actions including the issuance of flight restrictions over New York City and Chicago, and cancelled all waivers for operations at the Maryland Three Airports and for sporting events. On April 17, 2003, the HSAS threat level was lowered to Yellow (elevated), and the above-mentioned restrictions were cancelled. It should be noted that the HSAS threat level for the airline sector in the United States is currently at Orange (high).

6. The DC SFRA is not necessary now that other security measures are in place: Several commenters agreed that the DC FRZ is necessary, but objected to the existence of the DC SFRA. They believed that, with the introduction of new security measures since 2003 (such as ground-based missiles, better air interdiction capability, new technology to identify aircraft, laser warning systems, regulations that make it less likely that terrorists can go undetected,

and improved security around general aviation airports), the DC SFRA was no longer necessary.

Commenters are correct that there are layers of security for aviation operations in addition to the DC SFRA. Other measures include vetting the FAA Airmen Certification Database, the joint TSA/industry Airport Watch Program, general aviation airport security guidelines, and mandatory flight school security awareness training, as well as regulatory programs for certain types of general aviation aircraft operators. These measures, when implemented together, provide improved protection of the airspace. In addition, the agency notes that heightened security measures for all aviation operations, not just general aviation, have been implemented.

The FAA acknowledges that new aircraft tracking technology, Automatic Detection and Processing Terminal (ADAPT), has been developed since 2005; however, that system supplies information only regarding the aircraft, not the pilot operating it. The protection of this airspace requires the FAA and other government personnel to identify and track those operating in the DC SFRA. Requiring pilots to file flight plans is the least intrusive method of identifying who is operating an aircraft, and enables the FAA and law enforcement and security agencies to more quickly identify anomalous flight behavior, which may indicate a potential threat to the NCR.

Some commenters asserted that there are better air defense capabilities, such as air interception and use of ground-based missiles, than restricting the airspace. The FAA notes that these measures are intended to be used only as a last resort. The airspace from 15- to 30-NM from the DCA VOR/DME provides a buffer area, which allows ATC and law enforcement/security officials to be aware of a non-compliant aircraft before it penetrates the boundary of the DC FRZ. By the time an aircraft is at the edge of the DC FRZ, it is only minutes away from targets in the nation's capital. Relying solely on air defense capabilities could lead to air interception or use of lethal measures that could result in the loss of innocent lives in instances where pilots made inadvertent navigation errors or experienced equipment failures. Also, the buffer provided by the DC SFRA provides additional warning time for law enforcement officials to take appropriate emergency actions on the ground.

Some pilots who operate in the Washington, DC Metropolitan Area, such as those who operate out of the Maryland Three Airports, those who apply for waivers to operate within the DC FRZ, and crewmembers with an approved DCA Access Standard Security Program are vetted through various databases; however, this is a small percentage of pilots who fly in and through the DC SFRA.

The FAA also acknowledges and appreciates the improved security programs in effect at some general aviation airports. For example, in 2003, the Aircraft Owners and Pilots Association (AOPA) partnered with TSA to deploy a national security enhancement program called ''The Airport Watch Program.'' That program is patterned after the ''Neighborhood Watch'' anti-crime program, and calls on members of the general aviation community to observe and report any suspicious activities at airports. The Aircraft Owners and Pilots Association has funded and distributed a wide range of educational materials, while TSA has provided a national, toll-free hotline (1–866–GA–SECURE). Programs like these add value to overall security efforts. However, they are voluntary and have not been implemented at all airports.

7. Factors determining the dimensions of the DC FRZ and the DC SFRA: Some commenters stated that they did not understand what factors were considered when determining the radii of the DC FRZ and the DC SFRA.

The purpose of the DC SFRA is to identify and track aircraft that may pose a threat to the NCR. Security agencies need enough time to take appropriate action if it is determined that a pilot may have harmful intentions. The FAA, DHS, and DOD determined the lateral limits based on a number of factors, such as launch response time and speed of intercept aircraft, and geographic dispersion of airfields, in addition to the locations of other critical infrastructure within the NCR.

The FAA notes that the agency, in consultation with military and law enforcement agencies, has made every effort to keep the dimensions of the DC FRZ and the DC SFRA as small as possible to reduce the impact on the aviation community while meeting security and safety requirements.

8. The FAA needs the flexibility to change these requirements in response to a verified threat: Many commenters expressed concern that, by codifying the substance of NOTAMs, the FAA would not be able to relax or tighten the Washington, DC Metropolitan Area airspace restrictions in response to changing HSAS threat levels.

The FAA understands the commenters' concerns and assures the public that the agency retains the capability to adjust the restrictions as necessary. The DC SFRA was instituted in 2003 by NOTAM, in lieu of rulemaking, because of the urgent need to implement security measures in the NCR. A NOTAM can be issued quickly, while issuing a codified regulation can take years. However, as stated in 49 U.S.C. 40103(b)(3), ''* * * the Administrator, in consultation with the Secretary of Defense, shall—* * * by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.'' Therefore, the appropriate method to implement permanent airspace restrictions is through the rulemaking process. When it became apparent that this airspace designation would be in effect indefinitely, the FAA initiated rulemaking action.

The FAA notes that only certain elements of the 2007 NOTAM are being adopted as regulations. Some procedural details for SFRA operations, as well as warnings concerning potential consequences of violations, will continue to be addressed through NOTAM. The agency also retains the ability to issue additional special security instructions by NOTAM action under 14 CFR part 99 if security or threat conditions warrant. Airspace restrictions or control measures can be adjusted in accordance with HSAS threat levels and specific intelligence. The Department of Homeland Security will continue to coordinate with other Federal agencies to establish appropriate measures in response to specific threats.

9. Alternatives considered prior to implementation of the DC SFRA: Numerous commenters wanted to know if the government considered any alternatives to the restrictions prior to establishing the SFRA in 2003.

Because of the need to protect the airspace around the Washington, DC Metropolitan Area quickly, the FAA did not publish alternatives for public notice and comment. However, the FAA and military and law enforcement agencies did discuss several alternatives before deciding on the requirements implemented in 2003. Those alternatives included establishing a 55–NM outer ring with a 15–NM inner ring, expanding the P–56 prohibited area above parts of Washington, DC to a radius of 30–NM, and establishing outer rings as large as 75 NM or 110 NM. In each case, factors such as numbers of airports impacted and air traffic procedures were considered. The FAA and Federal law enforcement and security agencies have determined that the DC SFRA provides the minimal

spatial buffer consistent with the requirement to respond to aviation threats in the NCR.

In addition, prior to the August 2007 modifications, the FAA, in consultation with the law enforcement and security agencies, did consider several alternatives, which were discussed in detail in the ''Regulatory Flexibility'' section in the preamble to the NPRM.

10. Threat analysis for the Washington, DC area: Several commenters inquired whether a threat analysis had been done for the Washington, DC area, and whether such analysis was available to the public.

The Department of Homeland Security, in coordination with ODNI, has analyzed the threat, vulnerabilities, and consequences of an airborne attack against the NCR. They have concluded that the DC SFRA is a critical layer in the security and defense of the NCR. These analyses are classified and not available to the public.

11. Treating unintentional airspace incursions as security threats: Numerous commenters objected to the FAA's ''zero tolerance'' approach to unintentional incursions. Many said that they had no violations on their records until they accidentally violated the DC SFRA or DC FRZ. Some asked for an ''amnesty'' program to allow pilots to clear their names of inadvertent or minor violations.

The purpose of this rule is to provide security to the Washington, DC Metropolitan Area. Incursions into this airspace, whether intentional or not, or violations of any other procedures or rules applicable to this airspace, are taken very seriously, and may be enforced in accordance with the FAA's enforcement authority. The focus, emphasis, or level of penalties imposed by the FAA may vary, depending on the threat posture or HSAS threat levels in effect. The FAA's enforcement action does not mean that violations or violators will be categorized as ''national security threats.'' The FAA does not have authority to make such a determination or impose such a label on any violator.

Because airspace established under 49 U.S.C. 40103(b)(3) is, however, ''national defense airspace,'' that term will be used in connection with FAA enforcement actions, regardless of whether an incursion or violation was inadvertent or willful. No additional penalty imposed by the FAA will result from the status of the DC SFRA as ''national defense airspace.'' The status as ''national defense airspace,'' however, is important and relevant to the extent a pilot knowingly or willfully enters the DC SFRA in violation of the DC SFRA rules, procedures, or instructions of an air traffic controller or official while in flight. Unlike a willful violation of other airspace, knowing or willful violations of national defense airspace may subject the pilot to criminal liability under Federal criminal law. See 49 U.S.C. 46307. The exercise of any prosecutorial decision to file criminal charges for a knowing or willful violation is a decision that will be made by appropriate Federal prosecutors or law enforcement officials.

In addition, commenters expressed concern about the use of force by military or law enforcement personnel. The fact that a pilot is flying without permission into airspace designated for national security or without following the proper procedures may be one factor those officials take into account in determining the nature of the threat and what to do about it. As with any breach of a security perimeter, military or law enforcement officials with authority to defend the country may use lawful and appropriate force to do so. In the case of an aircraft incursion, interception, diversion, or other necessary means, force, up to and including deadly force, could be employed if an aircraft or airborne object is deemed to be an imminent or actual threat to national security. That determination will be made by appropriate military or command authority only on a case-by-case basis, specific to the situation. An incursion or violation of the DC SFRA, or any other airspace regulation, regardless of whether the airspace in question is ''national defense airspace,'' does not by itself authorize the use of force. It is however, one of the factors that should and will be considered along with all other relevant facts in existence at the time, in determining whether an aircraft or airborne object poses an imminent threat to national security.

B. Safety and Operational Issues

Many commenters expressed concern that operating within the DC SFRA and the DC FRZ was unsafe for a number of reasons, which are discussed below. With the modifications adopted in the 2007 NOTAMs, the FAA has addressed a number of these concerns. In addition, however, the FAA notes that in accordance with 14 CFR 91.3, *Responsibility and Authority of the Pilot in Command*, the pilot in command is directly responsible for, and is the final authority on operation of the aircraft. Additionally, 14 CFR 91.103, *Preflight action*, requires that the pilot in command, before beginning a flight, become familiar with all available information concerning that flight. When operating under VFR, the pilot in command selects a destination, and makes a personal choice as to the course that will be flown. If the pilot desires to fly through the DC SFRA, he or she should always be prepared with an alternate flight plan in the event that ATC cannot accommodate his or her request, much as he or she would do in order to fly through other controlled airspace areas.

To enhance safety, the FAA has taken numerous actions to disseminate information about the DC SFRA dimensions and operating requirements. These include the development of a free online course entitled ''Navigating the New DC ADIZ'' (available at *http://www.FAASafety.gov*), which includes several downloadable procedures guides. Since July 2007, over 7,000 pilots have completed this course.

Additionally, the FAA has depicted DC SFRA dimensions and communications frequencies on VFR sectional charts. The agency has also worked closely with pilot and aviation associations to inform the flying community. Since 2004, the Potomac Terminal Radar Approach Control (TRACON) (PCT) has hosted a DC SFRA seminar and Operation Raincheck briefings twice a year, with nearly 250 pilots attending each time. PCT personnel go out into the general aviation community to provide pilot briefings, typically conducting about 6 briefings a year with approximately 50 pilots attending each briefing. PCT personnel have staffed booths and conducted DC SFRA seminars at the AOPA annual open house at the Frederick Airport, MD with approximately 150 pilots in attendance.

The FAA works closely with AOPA to disseminate the latest NOTAM information to its members. AOPA includes information pertaining to flight operations in the DC SFRA on its Web site. In addition, AOPA sent out posters that warn of the DC SFRA airspace, as well as distributed hundreds of letters to pilots advising of the DC SFRA and recommending they familiarize themselves with the procedures and airspace dimensions. The FAA continues to meet with AOPA on a regular basis to discuss operations within the DC SFRA.

1. Frequencies are congested, and controllers are overburdened and distracted: Because a greater number of pilots must now establish two-way radio communications with ATC, some commenters said that frequencies were congested and that controllers were overburdened and distracted from their primary air traffic separation duties. In

response to commenters' concerns about frequency congestion and air traffic controller workload, the FAA established several new procedures in connection with the August 30, 2007 NOTAM. First, the agency established three sectors (called ''ADIZ West,'' ''ADIZ South,'' and ''ADIZ East'' in the NOTAM) at PCT. Second, the FAA established a communications frequency dedicated to DC SFRA communications for each of PCT's three DC SFRA sectors. During periods of high workload, including weekends and other times when general aviation pilots are likely to be conducting VFR operations in and around the DC SFRA, PCT can staff the three DC SFRA sectors with PCT personnel whose sole responsibility is to handle DC SFRA traffic. These steps have served to—(1) Mitigate PCT controller workload associated with DC SFRA traffic; (2) separate DC SFRA security identification and tracking functions from air traffic control separation duties, and (3) reduce delays for pilots seeking to operate to, from, or through this airspace area.

The FAA also notes that the reduced dimensions of the DC SFRA, as defined in the August 30, 2007 NOTAM, along with establishment of a Leesburg Maneuvering Area with streamlined communications procedures, have served to reduce air traffic controller workload, frequency congestion, and delays for pilots. In addition, the FAA has further worked to reduce workload and frequency congestion by clarifying to both pilots and controllers that, unless specifically requested by a pilot and approved by ATC, radar services (e.g., traffic advisories, flight following) are not provided in association with DC SFRA security-related identification and tracking.

2. Too many aircraft congregate around the same fixes while awaiting assignment of a discrete transponder code: Numerous commenters expressed concerns about the potential safety hazard created when large numbers of aircraft operate in the vicinity of the same fixes while awaiting assignment of a discrete transponder code to enter the DC SFRA. Commenters noted that when filing a DC SFRA flight plan, pilots had to state a fix (exit or entry point) on their flight plans. Even though there is no requirement for pilots to operate directly to, from, or over these fixes while establishing two-way radio communications with ATC and obtaining a discrete transponder code, commenters stated that many pilots are nevertheless congregating in the vicinity of these fixes.

In response to these concerns, and in connection with the DC SFRA dimensional changes implemented in the August 30, 2007 NOTAM, the FAA made changes to the DC SFRA entry/exit points for flight plan filing purposes. Specifically, the agency established eight ''gates'' around the circumference of the DC SFRA. Pilots list the appropriate gate name on the DC SFRA flight plan, and enter or exit the DC SFRA at any point within the boundaries of that gate. The gate names and boundaries are now depicted on appropriate VFR charts. The FAA has also provided the online DC SFRA training course and its associated guidance materials and works with industry associations to educate pilots about these gates and boundaries.

While the FAA recognizes that any navigational fix tends to be a high-traffic area, the agency reminds pilots that when operating under VFR, the pilot in command is responsible to see and avoid other aircraft. Before the implementation of the DC SFRA, the Washington Tri-Area Class B Airspace Area was among the most congested in the nation, and extreme vigilance for other aircraft has been required. The DC SFRA has increased the number of pilots using air traffic services; however, the actual number of VFR aircraft operations has not changed significantly. What has changed is more awareness of aircraft in the area, which prior to the DC SFRA did not use ATC services; thus most pilots were not aware of the large number of VFR operations conducted.

3. The DC SFRA forces pilots to fly over water and mountainous areas: Commenters noted that the DC SFRA restricts available airspace. Therefore, when pilots were unable to obtain an authorization to fly in the DC SFRA, they were forced to fly over mountainous areas to the west or over water of the Chesapeake Bay to the east. Commenters claimed that flight over mountains and water was unsafe.

Flight over water or mountainous terrain is not inherently unsafe. The FAA acknowledges that when over mountains or water certain precautions should be taken in the event of an emergency, such as an engine failure. Carrying more fuel, identifying emergency landing locations, maintaining a higher altitude or carrying flotation devices are some steps a prudent pilot may take to mitigate any flight risk.

When flying VFR, a pilot must consider the class of airspace and special use airspace along the route, and the associated procedures or requirements that must be met to transit the airspace. For example, most of the DC SFRA is contained within the Washington Tri-Area Class B Airspace Area. In accordance with 14 CFR 91.131, *Operations in Class B Airspace*, no person may operate an aircraft within Class B airspace without a clearance from ATC, and the aircraft must be equipped with a two-way radio and an altitude-reporting transponder. In addition, student pilots must meet specific training provisions of 14 CFR part 61 prior to operating in a Class B airspace area. If a pilot intends to transit Class B airspace, the pilot must be able to meet the above conditions. In addition, a pilot must be prepared to circumnavigate the airspace if ATC is unable to provide a clearance into the airspace. In this area, this may mean a pilot would need to over fly the Blue Ridge Mountains or the Chesapeake Bay, and should always be prepared to do so. Implementation of the DC SFRA did not change this fact.

The FAA believes that the August 30, 2007 reduction in DC SFRA dimensions, along with the establishment of associated new frequencies, gates, and procedures, has created more navigable airspace, thus providing more routes for pilots to transit the area. That action reduces the likelihood of pilots having to fly over mountainous terrain or water.

4. Pilots are afraid to engage in training/proficiency flying activities around the DC SFRA: Many commenters stated that flight training and routine proficiency flying was reduced because of the fear of enforcement actions, thereby making it difficult to maintain the skills necessary to fly safely.

The FAA is aware that there have been some cases in which pilots have not complied with the DC SFRA requirements, and consequently have been escorted by military aircraft and/or been met by law enforcement personnel on the ground. The agency understands that such events can be intimidating and that some pilots may opt to cease or reduce their flying activities rather than risk making an error. The FAA acknowledges that the existence of the DC SFRA may create more of a challenging environment for pilots not accustomed to communicating with ATC and regrets that some pilots may choose not to fly. However, the agency encourages pilots to use the many resources available to learn about DC SFRA operations, including completing the FAA's mandatory Special Awareness Training.

5. Safety is compromised because the DC SFRA requires more complex skills: Commenters asserted that because more complex skills are required to operate within the DC SFRA, pilots have been

challenged beyond their capabilities, which has placed them in an unsafe situation.

The airspace in which an aircraft operates dictates the equipment and communication requirements for those who operate within the designated airspace. Most of the DC SFRA lies within the boundaries of the Washington, DC Tri-Area Class B Airspace Area and as such, pilots have always been required to possess appropriate communication and navigation skills (see 14 CFR 91.131). If a pilot chooses to operate in the DC SFRA, it is imperative that he or she comply with § 91.103, *Preflight action*, which, in part, requires that each pilot in command become familiar with all available information concerning that flight. As stated previously, information pertaining to the DC SFRA is readily available, and should be reviewed by all pilots who operate in the area.

6. Delays in obtaining authorization to re-enter the DC SFRA cause safety problems: Commenters stated that they often encountered delays in obtaining authorization to re-enter the DC SFRA and noted that one pilot actually ran out of fuel while waiting.

When the DC SFRA was initially implemented, both pilots and controllers had to adapt to the new requirements and develop workable DC SFRA operational procedures that could be clearly understood by all concerned. The FAA acknowledges and regrets that many pilots encountered delays when entering and exiting the DC SFRA during that time. Since then, pilots and controllers have become more familiar with the DC SFRA and its operating requirements, and ATC has developed procedures to accommodate the increase in operations. The agency believes that the reduced DC SFRA dimensions and new procedures, dedicated frequencies, and gates have significantly reduced the kind of delays pilots may have encountered when the DC SFRA was initially established.

7. DC SFRA procedures are a distraction to pilots, who should be focused on scanning for other aircraft: AOPA expressed concern that DC SFRA procedures were a distraction to pilots engaged in other important operational activities, such as scanning for other aircraft.

Although flight operations to, from, and within the DC SFRA may increase a pilot's workload by requiring additional attention to communication and navigation, the FAA does not believe that this in itself is a significant distraction to pilots. Well before any pilot who opts to operate within or adjacent to the DC SFRA departs, he or she must obtain a thorough pre-flight briefing in accordance with 14 CFR 91.103. During the pre-flight briefing process, the pilot should resolve any questions or concerns so that when airborne, that pilot can concentrate on flying the aircraft, and scanning for other aircraft. The FAA also notes that in most cases, ATC radio transmissions to aircraft operating within the DC SFRA are minimal.

8. The configuration of the DC SFRA is difficult for pilots to navigate: AOPA asserted that the configuration of the DC SFRA, which includes many irregular boundaries, makes it difficult for pilots to navigate.

The FAA acknowledges that the initial boundaries of the DC SFRA, which were also proposed in the NPRM as dimensions for the DC SFRA, were not ideal. In response to these comments, in August 2007 the FAA reduced and reconfigured the DC SFRA to a 30–NM circle centered on the DCA VOR/DME. The FAA has also depicted these new boundaries on appropriate navigational charts. The agency believes that these steps have made it significantly easier for pilots to navigate in the NCR.

9. Reduced airport services reduce options available to pilots: Some commenters asserted that a DC SFRA-related reduction in general aviation flights resulted in reduced airport services (e.g., maintenance and repair, avionics services, flight instruction, etc.). They alleged that this development had led to even greater reductions in general aviation flights as well as potential compromise of safety because pilots do not have as many options if they need emergency services.

The FAA acknowledges that the existence and operating requirements of the DC SFRA have in some cases resulted in less traffic to some local airports, thus reducing revenue and services. The FAA has analyzed the impacts on local airports and businesses; this analysis is discussed in section ''VII. Regulatory Impact Analysis.'' The reduced size of the DC SFRA impacts fewer airports, so the FAA expects operations at those airports now located outside the DC SFRA to increase. The FAA has also established a maneuvering area to ease traffic flow in and out of the Leesburg Airport. In addition, three airports within the DC FRZ were provided some financial assistance from the Department of Transportation.

C. Administrative and Regulatory Issues

1. The FAA has not met statutory requirements to report to Congress the justification for keeping the DC SFRA: AOPA and some individual commenters said the FAA had not been sending regular reports to Congress, as mandated by the Vision 100—Century of Aviation Reauthorization Act (section 602).

Paragraph (a) of that legislation stated that every 60 days the Administrator must transmit to the Committee on Transportation and Infrastructure of the House of Representatives and to the Committee on Commerce, Science, and Transportation of the Senate, a report (in classified form) containing an explanation of the need for the DC ADIZ (now called the ''DC SFRA'').

The commenters are correct that the FAA did not submit reports to Congress explaining the need for the DC SFRA. During the reorganization of agency functions after September 11, 2001, aviation intelligence responsibilities shifted from the FAA to DHS. The Secretary of DHS, therefore, briefed Congress on the need for the DC SFRA. In addition, in 2007, the Congressional Research Service performed its own research on the aviation security needs in the Washington, DC Metropolitan Area.

Paragraph (c) of the Vision 100 legislation called upon the FAA to transmit a report to Congress every 60 days describing changes in procedures or requirements that could improve operational efficiency or minimize operational impacts on pilots and controllers. The FAA has met this requirement and submits reports describing the changes to improve the operational efficiency or minimize operational impacts to the Committee on Transportation and Infrastructure of the House of Representatives and to the Committee on Commerce, Science, and Transportation of the Senate.

2. The DC SFRA was intended to be temporary and was put in place hastily, without public input: When the DC SFRA was established via the NOTAM system, it was not known how long the flight restrictions would be in place. In the first few months of its implementation, the DC SFRA and its procedures were changed several times in response to changes in the HSAS threat levels. For example, a cut-out was made around Freeway Airport, Mitchellville, MD; certain airports (known as gateway airports) were identified and used as locations where aircraft and crew could be vetted through various databases prior to entering the DC SFRA; and ingress/egress procedures were instituted for Bay Bridge and Kentmorr Airports, Kent Island, MD. Security, law enforcement and FAA officials have met regularly to discuss and assess the security needs of the Washington, DC Metropolitan Area.

In August 2007, the dimensions of the DC SFRA were reduced, and procedures were amended, which has opened up more airspace to the aviation community and simplified procedures for pilots operating within the DC SFRA. The need to protect the nation's capital continues, and the FAA has determined that the most appropriate way to implement this special flight rules area is through the rulemaking process. The FAA also notes that prior to making this DC SFRA permanent, the agency published an NPRM requesting comments from the public. In response, the agency received over 21,000 comments, in addition to comments received at four public meetings.

3. Suggestions from commenters for alternatives to the DC SFRA: The Aircraft Owners and Pilots Association submitted alternatives to the proposal, and recommended retaining the FRZ but only for larger, faster aircraft. AOPA's plan would have excepted aircraft that weigh 6,000 pounds or less and that limit their speed to 160 knots or less from the DC SFRA requirements.

The Experimental Aircraft Association (EAA) also submitted numerous recommendations, including but not limited to reducing the FRZ from a 15–NM radius to a 10–NM radius from the DCA VOR/DME and reducing the DC SFRA to a 20–NM radius of the DCA VOR/DME. In addition, EAA suggested using a larger TFR when HSAS threat levels are elevated.

Many individual commenters suggested retaining the FRZ and eliminating the SFRA. The FAA appreciates these and other suggestions. The agency considered the recommendations but, in consultation with the Interagency Airspace Protection Working Group, determined that reducing the sizes of the FRZ and the SFRA to the degree the commenters suggested would not provide adequate warning time for law enforcement officials to take appropriate emergency actions on the ground. The FAA notes, however, that the size of the DC SFRA was reduced in August 2007.

As to the suggestion that smaller aircraft flying at slower speeds be exempted from meeting DC SFRA requirements, the FAA believes that such a measure would not allow the FAA to meet its objective of tracking all aircraft in the National Capital Region.

Several commenters suggested that aircraft operating in the DC SFRA be equipped with new technology, such as Automatic Dependent Surveillance-Broadcast technology (ADS–B), for monitoring. Use of such technology was not proposed and is therefore outside the scope of this rulemaking. However, the FAA notes that ADS–B has been selected as the preferred next generation technology for surveillance and broadcast services. It has been successfully deployed in Alaska and several other locations. On October 5, 2007, the FAA published in the **Federal Register** an NPRM, which proposed in part, requirements for aircraft operating in Class B and C airspace areas to be equipped with ADS–B technology (72 FR 56947; Oct. 5, 2007). As part of that rulemaking effort, the FAA established an Aviation Rulemaking Committee (ARC) under Order 1110.147. That committee was chartered to deliver a report on how to optimize operational benefits of the ADS–B system and to provide recommendations to the FAA on the development of a final rule.

4. The DC SFRA amounts to a ''taking'' (a seizure of private property without due process): Some commenters believed that the government is, in effect, practicing condemnation/seizure of private property without due process. Commenters alleged that the airspace restrictions have triggered a regulatory taking and, therefore, they deserve compensation. The commenters bolstered their argument by asserting that the decision to prohibit or restrict airspace indirectly results in a loss of business to airports or aviation-related businesses on the ground.

Airspace is not private property; therefore, it is not property that can be owned by any person, as the term ''private property'' is used within the meaning of the U.S. Constitution's Fifth Amendment. While the FAA's regulations or restriction imposed on any navigable, public airspace may interfere with, limit, or even prohibit the right of an individual to use that airspace, the restrictions do not constitute a taking of private property without due process or just compensation. The FAA acknowledges that establishing the DC SFRA will have an indirect impact on aviation-related businesses that may have an adverse economic effect due to a reduction of access to, or need for, their services. However, that indirect economic cost and personal inconvenience is not an impact unique to the general aviation community or the Washington, DC area. Rather, it is an impact experienced by many individuals and businesses in all areas of commerce as a result of the variety and scope of new security measures imposed by various levels of government after the September 11, 2001 attacks.

5. The FAA allowed other Federal agencies to direct its decision making: Numerous commenters asserted that the FAA ''abdicated'' its rulemaking authority to other Federal entities. The commenters believed that the FAA had allowed security and law enforcement agencies to direct civilian airspace policy.

As discussed in ''I. Overview,'' the FAA Administrator has statutory authority to manage the nation's airspace in the interest of national security. In carrying out this responsibility, the FAA consults with the Secretary of Defense and works closely with other Federal agencies to ensure the safety of civil aviation and to protect persons and property on the ground.

V. 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 requirement(s) in this final rule to the Office of Management and Budget for its review. OMB approved the collection of this information and assigned OMB Control Number 2120–0706.

In the preamble to the 2005 NPRM, in the ''Paperwork Reduction Act'' discussion, the FAA solicited comments on the information collection requirement for pilots operating under VFR to file flight plans. The FAA received numerous comments opposing the requirement. These comments, and the FAA's responses, are discussed elsewhere in this preamble.

Number of respondents: The FAA does not know exactly how many pilots will file flight plans to access the DC SFRA and DC FRZ on an annual basis. To calculate the number of respondents, the FAA has divided 256,461 estimated annual number of operations by 15 operations per pilot annually, which equals 17,097.

Cost: The FAA estimates the annual cost to comply with the information collection requirement of this final rule to be $1,831, 098 ($477,017 cost to activate a flight plan plus $1,354,081 cost to file a flight plan). The ten-year cost will be $18,310,980.

The cost to activate a flight plan ($477,017) was calculated as follows.

17,097—Respondents.

15—Number of flight plans filed by each respondent annually.

256,461—Annual number of flight plans.

0.05 hour—Time needed to activate a flight plan.

$37.20/hour—Value of pilot's time.

The cost to file a flight plan ($1,354,081) was calculated as follows.

17,097—Respondents.

256,461—Annual number of flight plans.

0.137 hour—Time (including wait time) needed to file a flight plan.

$37.20/hour—Value of pilot's time.

3.6%—Percent of pilots needing to refile a DC SFRA flight plan.

Hours: The FAA estimates the rule will require 49,223.07 hours (12,823.5 hours to activate a flight plan plus 36,400.02 hours to file a flight plan). The number of hours over 10 years will be 492,230.70.

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 Office of Management and Budget (OMB) control number.

VI. 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 has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

VII. Regulatory Impact Analysis, Regulatory Flexibility Determination and Analysis, International Trade Impact Assessment, and Unfunded Mandates Assessment

A. Regulatory Impact Analysis

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, this 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. We suggest readers seeking greater detail read the full regulatory impact analysis, a copy of which we have placed in the docket for this rulemaking.

In conducting these analyses, the FAA has determined that this final rule: (1) Has benefits that justify its costs; (2) is an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; (3) is ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) will have a significant economic impact on a substantial number of small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

The FAA has analyzed the expected costs of this regulation for a 10-year period, from 2009 through 2018. As required by the Office of Management and Budget (OMB), the present value of this cost stream was calculated using discount factors of 7 and 3 percent. All costs in this analysis are expressed in 2007 dollars.

The FAA costed out four alternatives for this evaluation:

- Alternative 1 is what was contained in the NPRM, which mirrors the Washington Tri-Area Class B airspace area, with certain minor modifications. It also has a 15–NM FRZ. Its cost is $1.34 billion over ten years ($1.15 billion, discounted at 3 percent, and $942.26 million discounted at 7 percent).
- Alternative 2 is the final rule, with a 30–NM DC SFRA, 15–NM DC FRZ. Its cost is $1.04 billion over ten years ($886.34 million, discounted at 3 percent, and $756.98 million, discounted at 7 percent).
- Alternative 3 is the NPRM with enhanced procedures, such as ADS–B-equipped aircraft being exempt from the flight plan requirement and establishing two-way communication requirement, given certain conditions. Its cost is $1.30 billion over ten years ($1.11 billion, discounted at 3 percent, and $919.31 million, discounted at 7 percent).
- Alternative 4 contains a 15–NM DC FRZ, with the DC SFRA being determined by threat and air defense requirements, and established by NOTAM. For costing purposes, this alternative examined two scenarios, a 55–NM DC SFRA and a 20–NM DC SFRA. Its costs range from $3.29 billion over ten years ($2.80 billion, discounted at 3 percent, and $2.13 billion, discounted at 7 percent) to $4.47 billion ($3.82 billion, discounted at 3 percent, and $2.85 billion, discounted at 7 percent).

1. Costs

There are two major sets of cost components—public sector and private sector.

a. Public Sector: (1) A key component in defending the DC SFRA against attackers is the airplanes based at Andrews Air Force Base. Under most of the alternatives, given a 30–NM DC SFRA, the program depends on F–15s, F–16s, and helicopters to be ready to scramble to defend the DC SFRA; a scramble can range from pilots proceeding to battle stations, runway alerts, sending a helicopter to alert the errant aircraft, or sending out military aircraft to intercept the aircraft. The total cost of scrambles, including both F–15/F–16 and helicopter, is $324.64 million over ten years. Given a 20–NM DC SFRA, the program would depend on a fighter combat air patrol, 24 hours a day, 7 days a week (24/7 fighter CAP) instead; this CAP uses F–15s and F–16s as well as KC–135 tankers to refuel these aircraft; these costs sum to $356 million annually. When DOD assets are deployed, air traffic control suspends operations and there is a delay cost. The total cost of suspending operations is $1.93 million over ten years. This estimate only takes local delays into consideration, and does not account for secondary delays and ripple effects that may be imposed on the aviation system.

(2) The FAA installed additional radar facilities for support of the DC SFRA at Washington Dulles International Airport (IAD), Ronald Reagan Washington National Airport (DCA), Baltimore/Washington International Thurgood Marshall Airport (BWI), and PTC. Since these costs are ''sunk'', they are not considered to be an incremental cost of the rule. However, there are recurring annual costs summing to $375,000.

(3) This rule requires additional controllers and flight service station specialists, as well as the cost of filing and activating DC SFRA-related flight plans. The FAA has dedicated 6 additional controller positions for 3 specific regions of the DC SFRA as a result of this rule. Over a ten-year period, the total cost of the additional controllers is $15.50 million. On average, about 4 full time equivalent positions are dedicated to filing flight plans at flight service stations; over a ten-year period, the total cost of the additional FSS specialists will be $6.45 million. The additional cost of filing and activating flight plans, over 10 years, sums to $59.33 million.

Total public-sector costs, over the 10-year period, sum to $411.60 million.

b. Private Sector: The DC SFRA impacts aircraft operators, airports, and aviation-related businesses in the Washington, DC region. DC SFRA requirements have created delays and other costs to operators and have caused some operators to reduce the number of flights they take, shift operations to airspace and airports outside of the DC SFRA, and even to cease operations altogether. DC SFRA-related delays impose costs on operators and aviation-related businesses. The reduced number of operations has reduced revenue at airports and aviation-related businesses.

(1) Operating Restrictions—The DC SFRA has created many delays to operators, including ground, flight, circumnavigation, and re-routing delays. VFR operators in the DC SFRA are required to file a DC SFRA flight plan and communicate with ATC, creating flight, ground, and re-routing delays. In an effort to avoid these delays, some pilots circumnavigate the DC SFRA, although this also imposes an additional cost. Over ten years, the cost of operating restrictions is $355.80 million.

(2) Airports—The DC SFRA impacts many airports in the Washington, DC region, including airports located outside of the DC SFRA boundaries. The DC SFRA affects the behavior of aircraft operators in the region and results in decreased levels of aviation activity at some airports. However, the DC SFRA will also cause aviation activity at some airports in the region to increase. Much of the negative economic impact at some airports will be offset by gains at other airports. Over ten years, the affected airports have net revenue losses of $25.35 million.

(3) Aviation-related business—The DC SFRA impacts aviation-related businesses in the Washington, DC region because it causes some aircraft operators to alter their behavior. Aviation-related businesses include fixed-base operators (FBOs), passenger or freight charter operators, aerial photography and mapmaking businesses, aircraft maintenance and repair facilities, flight schools, restaurants and transportation services located at airports, and other businesses dependent on aviation activity. A decrease in the number of operations and active aircraft directly results in a decrease in revenue at these businesses. Other aviation-related businesses incur additional costs as a consequence of DC SFRA requirements. Over ten years, the affected businesses have revenue losses of $246.86 million.

Total private sector costs, over ten years, sum to $628.00 million. Total public and private sector costs combined, over ten years, sum to $1.04 billion.

2. Benefits and Cost-Benefit Comparison

The FAA looked at five scenarios, and computed the estimated mean consequence resulting if each scenario were to occur once in a 10-year period. The estimated means ranged from $0.12 billion ($0.09 billion, discounted) to $9.81 billion ($6.89 billion, discounted). These were compared to the cost of the rule, which is $1.04 billion ($756.98 million, discounted). For three of these five scenarios, the required risk reduction could be less than 100 percent, and the rule would be cost beneficial.

B. Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) 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.

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 1980 act 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.

The FAA gathered data for airports and other aviation-related businesses that are located 60NM from the DCA VOR/DME. The U.S. Small Business Administration (SBA) classifies businesses as small based on size standards, typically expressed as annual revenue or number of employees. SBA publishes a table of small business size standards matched to North American Industry Classification System (NAICS) codes. The SBA defines privately owned airports as a small entity if annual revenue is less than $6.5 million. Publicly owned airports are defined as a small entity if annual revenue is less than $5 million. As Table 1 shows, all impacted airports (with the exception of BWI, DCA and IAD) are well below these annual revenue thresholds. Revenue data is for 2007.

TABLE 1—AIRPORT REVENUE

Facility	2007 Revenue	Facility	2007 Revenue
Essex Skypark	$47,440	Lee	$347,758
Freeway	103,000	Harford County	378,192
Shoestring Aviation Airfield	110,482	Winchester Regional	386,365
Hanover	116,019	Hagerstown Regional	439,083
Maryland	119,100	Ridgely Airpark	493,240
College Park	122,590	Stafford Regional	500,000
Davis	140,188	Bay Bridge	501,740
Potomac Airfield	142,000	St. Mary's County Regional	510,932
Front Royal-Warren County	151,280	Culpeper Regional	536,485
Fallston	172,171	Warrenton-Fauquier	802,200
Clearview Airpark	219,968	Leesburg Executive	805,068
Tipton	250,000	Frederick Municipal	867,082
Suburban	259,859	Montgomery County Airpark	920,103
Orange County	272,530	Manassas Regional	1,192,389
Shannon	297,402	Martin State	1,260,000

TABLE 1—AIRPORT REVENUE—Continued

Facility	2007 Revenue	Facility	2007 Revenue
Washington Executive/Hyde Field	300,670	Carroll County Regional	1,302,400
Cambridge-Dorchester	301,297	Easton/Newnam Field	1,621,671

The SBA size standards for aviation-related businesses at airports are listed in Table 2. The size standard for flight schools is annual revenue less than $23.5 million, for aircraft sales businesses it is annual revenue less than $9 million, and for other business types it is generally annual revenue less than $6.5 million. The SBA threshold for charter operators is less than 1,500 employees.

TABLE 2—SBA SIZE STANDARDS

Business type	Annual revenue or employee threshold for small business
Aerial Photography	<$6.5 million.
Aircraft Rental	<$6.5 million.
Aircraft Sales	<$9 million.
Charter, sightseeing, courier.	<1,500 employees.
Fixed Base Operator	<$6.5 million.
Flight School	<$23.5 million.
Other	<$6.5 million.
Repair Station	<$6.5 million.
Working (agriculture, helicopter lift, etc.).	<$6.5 million.

The FAA matched each DC SFRA-impacted aviation-related business to its appropriate NAICS code and compared it to the SBA size standard for that NAICS code. The FAA estimates that the majority of impacted businesses are considered small under the SBA size standards.

The FAA found that the impact of the DC SFRA on some of these businesses was positive, while for others, it was negative. ''Congress considered the term 'significant' to be neutral with respect to whether the impact is beneficial or harmful to small businesses. Therefore, agencies need to consider both beneficial and adverse impacts in an analysis.'' [1] The FAA estimated the annualized revenue impact of the rule on each of the small entities, and determined that the rule will have a significant economic impact on a substantial number of small entities. Except for two small entities which happen to be airports, the actual or estimated ratio of annualized revenue impacts to annual revenue was greater than 1 percent. Accordingly, the FAA prepared a regulatory flexibility analysis, as described below.

C. Regulatory Flexibility Analysis

Under section 603(b) of the RFA (as amended), each final regulatory flexibility analysis is required to address the following points: (1) Reasons the agency considered the rule, (2) the objectives and legal basis for the rule, (3) the kind and number of small entities to which the rule will apply, (4) the reporting, recordkeeping, and other compliance requirements of the rule, and (5) all Federal rules that may duplicate, overlap, or conflict with the rule.

1. Reasons the FAA considered the rule—The FAA is taking this final action to enhance security in Washington, DC, the Nation's capital. As the Nation's capital, it has a unique symbolic, historic, and political status. Washington, DC is the seat of all three branches of the United States government, and is the home of the President and the Vice President. Likewise, it is the home of the U.S. Congress and the U.S. Supreme Court, and thus is the residence and office location for the officials in the Constitutional order of succession.

The FAA, in consultation with the Secretaries of Defense and Homeland Security, has determined that implementation of this rule is necessary to enable those officials in carrying out their responsibilities to lawfully identify, counter, prevent, deter, or, as a last resort, disable with non-lethal or lethal force, any airborne object that poses a threat to national security. The rule will assist air traffic controllers and National Capital Region Communications Center officials in monitoring air traffic by identifying, distinguishing, and, more importantly, responding appropriately when an aircraft is off course or is not complying with ATC instructions.

2. The objectives and legal basis for the rule—The objective of the rule is to codify the airspace restrictions within the Washington, DC Metropolitan Area. This effort is to assist DHS and DOD in their efforts to enhance security protection of vital national assets located within the National Capital Region. The legal basis for the rule is found in 49 U.S.C. 40103, *et seq.* The FAA and DHS must consider, as a matter of policy, maintaining and enhancing safety and security in air commerce as its highest priorities (49 U.S.C. 40101 (d)).

3. The kind and number of small entities to which the rule will apply—The FAA identified 34 small airports and 395 small aviation-related businesses that the rule will impact. Of the 34 small airports, 12 are in the DC SFRA. Of the 395 small aviation-related businesses, 274 are in the DC SFRA. Table 1 above lists the 34 small airports and Table 3 below shows the different types and number of small aviation-related businesses to which this rule will apply.

TABLE 3—TYPE AND NUMBER OF SMALL AVIATION-RELATED BUSINESS IMPACTED

Business type	Count
Aerial Photography	16
Aircraft Rental	18
Aircraft Sales	121
Charter Operators	21
Fixed Base Operators	61
Flight School	127
Repair Stations	9
Working	7
Other	15
Total	395

4. The reporting, recordkeeping, and other compliance requirements of the rule—As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted a copy of these sections to OMB for its review. However, there are no sections of the paperwork package that apply to the airports and aviation-related businesses. All of the economic impact discussed below deals with business gained or lost due to the requirements of the DC SFRA.

5. All federal rules that may duplicate, overlap, or conflict with the rule—The FAA is unaware of any Federal rules that duplicate, overlap, or conflict with the rule.

6. Other considerations—Affordability analysis—For the purpose of this analysis, the degree to which small entities can afford the reduction in revenue resulting from the final rule is predicated on the availability of financial resources. Costs can be paid from existing assets such as cash, by

[1] Small Business Administration, ''A Guide for Government Agencies—How To Comply With the Regulatory Flexibility Act'', May 2003, page 21.

borrowing, through the provision of additional equity capital, by accepting reduced profits, by raising prices, or by finding other ways of offsetting costs.

One means of assessing the affordability is the ability of each of the small entities to meet its short-term obligations, such as looking at net income, working capital and financial strength ratios. According to financial literature, a company's short-run financial strength is substantially influenced by its working capital position and its ability to pay short-term liabilities, among other things. However, the FAA was unable to find sufficient financial information for the majority of affected entities, and so used an alternative way of analyzing affordability. The approach used by the FAA was to compare the rule's impact on entity revenues with estimated revenues in the absence of the rule.

The FAA was able to estimate the annual change in revenue and 2007 revenue for the airports. However, the FAA was unable to locate revenue data for the aviation-related businesses. This analysis first discusses the airports and then the aviation-related businesses.

(a) Airports—Table 38 in the full regulatory impact analysis lists the public use airports within the DC SFRA and between the DC SFRA and 60 nautical miles from the DCA VOR/DME that are small entities. Column A lists each airport's estimated annual revenue in the absence of the rule and 2007 NOTAM.[2] Column B lists each airport's estimated revenue in 2007 (with the NOTAM). Column C lists each airport's estimated change in revenue as a result of the DC SFRA, and was computed by subtracting Column A from Column B. A negative change in revenue implies that the airport is worse off because of this rule. Column D is the quotient of Column C and column A, or the ratio of annualized revenue change associated with the rule to the estimated non-NOTAM annualized revenue.

This information was used to assess the significance and affordability of this rule. Column E shows the airports for which the FAA expects this rule would have a significant impact, as described previously. Column F examines affordability using the alternative approach described above. The FAA considers that an airport would have trouble affording the rule if the change in its revenue is negative and exceeds 10 percent of its annualized change in revenue as a percentage of non-NOTAM revenue. The idea is that if a business has such a high loss in revenue, percentage-wise, it would likely have trouble affording the rule.

Table 4 summarizes Table 38 in the full regulatory impact analysis by showing the number of airports, the number of those airports that might have trouble affording this rule, and the resultant percentage.

TABLE 4—AFFORDABILITY OF SMALL BUSINESS AIRPORTS

Total number of small airports impacted	34
Number of small airports for which the rule might be non-affordable	12
Percentage	35.29%

(b) Other Aviation-Related Businesses—Aviation-related businesses less than 60nm from DCA were identified from Dun & Bradstreet reports, comments to the 2005 DC SFRA NPRM, airport Web sites, AOPA Pilot Guide, World Aerospace Directory, FAA Operating Specification Sub System (OPSS), FAA Vital Information System (VIS), and FAA Form 5010 database. Although there was not enough data for the FAA to estimate business-by-business revenue impacts, the agency was able to estimate aggregate revenue impacts for business within and outside of the DC SFRA. The aggregate data show that as a group, DC SFRA businesses will have trouble affording this rule, as shown in Table 22 in the full regulatory impact analysis, whereas non-SFRA businesses will benefit from this rule, as shown in Table 23 in the full regulatory impact analysis. Thus, from the perspective of affordability, the FAA expects that a number of aviation-related businesses based at airports inside the DC SFRA will have trouble affording this rule. (See Table D–1 in Appendix D in the full regulatory impact analysis for a list of SFRA and non-SFRA businesses.)

7. Liquidity analysis/profitability analysis—As explained earlier, except for aggregate revenue data, the FAA was unable to find enough financial data for the impacted small businesses both inside and outside the DC SFRA to perform a liquidity analysis or a profitability analysis.

8. Disproportionality analysis—The FAA considered whether small entities will be disadvantaged relative to large entities due to disproportionate impacts. There was no need for the FAA to conduct a disproportionality analysis for the airports because all airports affected by this rule are small businesses, so none would be advantaged over any other. For the aviation-related businesses, as can be seen in Table 5, the estimated revenue impact per aircraft operation is larger for the large businesses than for the small businesses; thus, there will be no disproportionate impact.

TABLE 5—DISPROPORTIONALITY ANALYSIS FOR AVIATION-RELATED BUSINESSES

	Total revenue	Total operations	Revenue impact per aircraft operation
Large	$8,581,818	237,643	$36.11
Small	531,751	148,519	3.58

9. Competitiveness analysis—For the airports outside the DC SFRA, the average net increase in revenue as a percentage of estimated non-NOTAM revenue was 4.9 percent. For those airports inside the DC SFRA, the average net decrease in revenue as a percentage of non-NOTAM revenue was 44.9 percent. Much of this decrease comes from the three airports within the DC FRZ—College Park, Potomac Airfield, and Washington Executive/Hyde Field; without these three airports, the average net decrease in revenue as a percentage of revenue resulting from the rule would be about 19.7 percent. The FAA expects that based on the results of this analysis, this rule will improve the competitiveness of small businesses outside the DC SFRA vis-á-vis those inside the DC SFRA, since the revenue of most aviation-related businesses is dependent on the number of aircraft operations taking place at that airport.

10. Business closure analysis—It is difficult for the FAA to determine the

[2] This value is used to ensure that the analysis examines the rule in accordance with the pre-9/11 baseline established in the full regulatory impact analysis.

extent to which airports significantly impacted by this rule might have to cease operations. There are too many variables and some of the airports within the DC SFRA are already in serious financial difficulty; the information shown in the affordability analysis can be indicators of airport business closures. The FAA has no comparable financial information on the aviation-related businesses. To what extent the final rule makes the difference in whether these entities remain in business is difficult to answer. The FAA believes that there is a likelihood of business closure for some of these businesses as a result of this rule.

Alternatives

The FAA considered alternatives to the rule for both airports and aviation-related businesses. A discussion of these alternatives follows. The third alternative is the final rule. For each alternative, the FAA first states the alternative, followed by a discussion, and why the FAA believes that the alternative would not enhance security.

Alternative 1—Retain the DC FRZ, eliminate the rest of the DC SFRA—Under this alternative, airspace in the Washington DC Metropolitan area with flight restrictions would be reduced considerably. The only flight restrictions remaining would be within approximately 15 NM of the DCA VOR/DME, restricting all aircraft operations except part 121 operators, DOD operations, law enforcement operations and authorized emergency medical services operations. This removes the requirement for filing flight plans for aircraft operators in airspace outside the DC FRZ, resulting in reduced pilot and controller workload. This alternative would provide relief to those VFR operators that will operate in the DC SFRA area but not into the DC FRZ. It would restore former air traffic control procedures and air space configurations for some of the area. The FAA estimates that implementation of this alternative would have a positive effect for all of the impacted airports except for College Park, Washington Executive/Hyde Field, and Potomac.

Conclusion: This alternative is not preferred because it does not meet the safety and security requirements of those security agencies responsible for the safety of the Washington DC Metropolitan area. Thus, the FAA does not consider this to be a significant alternative in accordance with 5 U.S.C. 603(d).

Alternative 2—Rescind the FAA's NOTAM and the DC SFRA/DC FRZ immediately—This alternative would provide immediate relief to these airports and aviation-related businesses by removing security provisions and restoring former air traffic control procedures and airspace configurations. Implementation of this alternative would facilitate the return of pilots who, for the sake of operating simplicity and reduced flying costs, relocated to other airports. This would be the option with the least impact.

Conclusion: The FAA believes that the threat of terrorists must be guarded against, and this option would not adequately achieve that goal. Rescinding these actions would increase the vulnerability and diminish the level of protection now in place to safeguard vital national assets located within the NCR. This alternative is rejected because it would compromise the security of vital national assets and increase their vulnerability. Thus, the FAA does not consider this to be a significant alternative in accordance with 5 U.S.C. 603(d).

Alternative 3—Codify existing flight restrictions over the Washington, DC Metropolitan Area (Final Rule)—Under this alternative, the government would maintain the present security and air traffic operational restrictions. The rule enhances security measures in that it requires any aircraft operating to and from the affected airports and transiting the DC SFRA to be properly identified and cleared. This alternative would affect all airports and aviation-related businesses.

Conclusion: This alternative is preferred because it balances the security concerns against the impact on the airports and aviation-related businesses.

Alternative 4—Exempt small, slow aircraft—This alternative would exempt small, piston-driven aircraft. The rationale behind this alternative is that these aircraft are slower than turbine-driven aircraft and are much less likely to be a threat. Most general aviation aircraft fall into this category, and so most aircraft operators would not be subject to this rule. However, the FAA's air traffic controllers cannot distinguish between piston-drive and turbine-drive aircraft from radar or from transponder codes, making this alternative difficult to enforce, thus having the potential to compromise security.

Conclusion: This alternative would increase the vulnerability of and diminish the level of protection now in place to safeguard vital national assets located within the National Capital Region. This alternative is rejected because it would compromise the security of vital national assets and increase their vulnerability. Thus, the FAA does not consider this to be a significant alternative in accordance with 5 U.S.C. 603(d).

D. 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 this final rule and determined that it will have only a domestic impact and therefore no effect on international trade.

E. 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 (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.'' 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. The requirements of Title II do not apply.

VIII. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA has 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.

IX. 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 rulemaking action qualifies for the

categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

X. 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 (May 18, 2001). We have determined that it is not a ''significant energy action'' under the executive order because, while it is a ''significant regulatory action'' under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

XI. Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents 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 can also get 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.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit or you may visit *http://DocketsInfo.dot.gov*.

XII. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

List of Subjects

14 CFR Part 1

Air transportation.

14 CFR Part 93

Aircraft flight, Airspace, Aviation safety, Air traffic control, Aircraft, Airmen, Airports.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends parts 1 and 93 of title 14 Code of Federal Regulations (14 CFR parts 1 and 93) as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

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

■ 2. Amend § 1.1 by adding the definition of ''National defense airspace'' in alphabetical order to read as follows:

§ 1.1 General definitions.

* * * * *

National defense airspace means airspace established by a regulation prescribed, or an order issued under, 49 U.S.C. 40103(b)(3).

* * * * *

PART 93—SPECIAL AIR TRAFFIC RULES

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

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

■ 4. Add subpart V, consisting of §§ 93.331 through 93.345, to read as follows:

Subpart V—Washington, DC Metropolitan Area Special Flight Rules Area

Sec.

93.331 Purpose and applicability of this subpart.
93.333 Failure to comply with this subpart.
93.335 Definitions.
93.337 Requirements for operating in the DC SFRA.
93.339 Requirements for operating in the DC SFRA, including the DC FRZ.
93.341 Aircraft operations in the DC FRZ.
93.343 Requirements for aircraft operations to or from College Park Airport, Potomac Airfield, or Washington Executive/Hyde Field Airport.
93.345 VFR outbound procedures for fringe airports.

Subpart V—Washington, DC Metropolitan Area Special Flight Rules Area

§ 93.331 Purpose and applicability of this subpart.

This subpart prescribes special air traffic rules for aircraft operating in the Washington, DC Metropolitan Area. Because identification and control of aircraft is required for reasons of national security, the areas described in this subpart constitute national defense airspace. The purpose of establishing this area is to facilitate the tracking of, and communication with, aircraft to deter persons who would use an aircraft as a weapon, or as a means of delivering weapons, to conduct an attack on persons, property, or buildings in the area. This subpart applies to pilots conducting any type of flight operations in the airspace designated as the Washington, DC Metropolitan Area Special Flight Rules Area (DC SFRA) (as defined in § 93.335), which includes the airspace designated as the Washington, DC Metropolitan Area Flight Restricted Zone (DC FRZ) (as defined in § 93.335).

§ 93.333 Failure to comply with this subpart.

(a) *Any violation*. The FAA may take civil enforcement action against a pilot for violations, whether inadvertent or intentional, including imposition of civil penalties and suspension or revocation of airmen's certificates.

(b) *Knowing or willful violations*. The DC FRZ and DC SFRA were established for reasons of national security under the provisions of 49 U.S.C. 40103(b)(3). Areas established by the FAA under that authority constitute ''national defense airspace'' as that term is used in 49 U.S.C. 46307. In addition to being subject to the provisions of paragraph (a) of this section, persons who knowingly or willfully violate national defense airspace established pursuant to 49 U.S.C. 40103(b)(3) may be subject to criminal prosecution.

§ 93.335 Definitions.

For purposes of this subpart—

DC FRZ flight plan is a flight plan filed for the sole purpose of complying with the requirements for VFR operations into, out of, and through the DC FRZ. This flight plan is separate and distinct from a standard VFR flight plan, and does not include search and rescue services.

DC SFRA flight plan is a flight plan filed for the sole purpose of complying with the requirements for VFR operations into, out of, and through the DC SFRA. This flight plan is separate and distinct from a standard VFR flight

plan, and does not include search and rescue services.

Fringe airports are the following airports located near the outer boundary of the Washington, DC Metropolitan Area Special Flight Rules Area: Barnes (MD47), Flying M Farms (MD77), Mountain Road (MD43), Robinson (MD14), and Skyview (51VA).

Washington, DC Metropolitan Area Flight Restricted Zone (DC FRZ) is an area bounded by a line beginning at the Washington VOR/DME (DCA) 311° radial at 15 nautical miles (NM) (Lat. 38°59′31″ N., Long. 077°18′30″ W.); then clockwise along the DCA 15 nautical mile arc to the DCA 002° radial at 15 NM (Lat. 39°06′28″ N., Long 077°04′32″ W.); then southeast via a line drawn to the DCA 049° radial at 14 NM (Lat. 39°02′18″ N., Long. 076°50′38″ W.); thence south via a line drawn to the DCA 064° radial at 13 NM (Lat. 38°59′01″ N., Long. 076°48′32″ W.); thence clockwise along the 13 NM arc to the DCA 276° radial at 13 NM (Lat.38°50′53″ N., Long 077°18′48″ W.); thence north to the point of beginning, excluding the airspace within a one nautical mile radius of the Freeway Airport, W00, Mitchellville, MD from the surface up to but not including flight level (FL) 180. The DC FRZ is within and part of the Washington, DC Metropolitan Area SFRA.

Washington, DC Metropolitan Area Special Flight Rules Area (DC SFRA) is an area of airspace over the surface of the earth where the ready identification, location, and control of aircraft is required in the interests of national security. Specifically, the DC SFRA is that airspace, from the surface to, but not including, FL 180, within a 30-mile radial of Lat. 38°51′34″ N., Long. 077°02′11″ W., or the DCA VOR/DME. The DC SFRA includes the DC FRZ.

§ 93.337 Requirements for operating in the DC SFRA.

A pilot conducting any type of flight operation in the DC SFRA must comply with the restrictions listed in this subpart and all special instructions issued by the FAA in the interest of national security. Those special instructions may be issued in any manner the FAA considers appropriate, including a NOTAM. Additionally, a pilot must comply with all of the applicable requirements of this chapter.

§ 93.339 Requirements for operating in the DC SFRA, including the DC FRZ.

(a) Except as provided in paragraphs (b) and (c) of this section and in § 93.345, or unless authorized by Air Traffic Control, no pilot may operate an aircraft, including an ultralight vehicle or any civil aircraft or public aircraft, in the DC SFRA, including the DC FRZ, unless—

(1) The aircraft is equipped with an operable two-way radio capable of communicating with Air Traffic Control on appropriate radio frequencies;

(2) Before operating an aircraft in the DC SFRA, including the DC FRZ, the pilot establishes two-way radio communications with the appropriate Air Traffic Control facility and maintains such communications while operating the aircraft in the DC SFRA, including the DC FRZ;

(3) The aircraft is equipped with an operating automatic altitude reporting transponder;

(4) Before operating an aircraft in the DC SFRA, including the DC FRZ, the pilot obtains and transmits a discrete transponder code from Air Traffic Control, and the aircraft's transponder continues to transmit the assigned code while operating within the DC SFRA;

(5) For VFR operations, the pilot must file and activate a DC FRZ or DC SFRA flight plan by obtaining a discrete transponder code. The flight plan is closed upon landing at an airport within the DC SFRA or when the aircraft exits the DC SFRA;

(6) Before operating the aircraft into, out of, or through the Washington, DC Tri-Area Class B Airspace Area, the pilot receives a specific Air Traffic Control clearance to operate in the Class B airspace area; and

(7) Before operating the aircraft into, out of, or through Class D airspace area that is within the DC SFRA, the pilot complies with § 91.129 of this chapter.

(b) Paragraph (a)(5) of this section does not apply to operators of Department of Defense aircraft, law enforcement operations, or lifeguard or air ambulance operations under an FAA/TSA airspace authorization, if the flight crew is in contact with Air Traffic Control and is transmitting an Air Traffic Control-assigned discrete transponder code.

(c) When operating an aircraft in the VFR traffic pattern at an airport within the DC SFRA (but not within the DC FRZ) that does not have an airport traffic control tower, a pilot must—

(1) File a DC SFRA flight plan for traffic pattern work;

(2) Communicate traffic pattern position via the published Common Traffic Advisory Frequency (CTAF);

(3) Monitor VHF frequency 121.5 or UHF frequency 243.0, if the aircraft is suitably equipped;

(4) Obtain and transmit the Air Traffic Control-assigned discrete transponder code; and

(5) When exiting the VFR traffic pattern, comply with paragraphs (a)(1) through (a)(7) of this section.

(d) When operating an aircraft in the VFR traffic pattern at an airport within the DC SFRA (but not within the DC FRZ) that has an operating airport traffic control tower, a pilot must—

(1) Before departure or before entering the traffic pattern, request to remain in the traffic pattern;

(2) Remain in two-way radio communications with the tower. If the aircraft is suitably equipped, the pilot must also monitor VHF frequency 121.5 or UHF frequency 243.0;

(3) Continuously operate the aircraft transponder on code 1234 unless Air Traffic Control assigns a different code; and

(4) Before exiting the traffic pattern, comply with paragraphs (a)(1) through (a)(7) of this section.

(e) Pilots must transmit the assigned transponder code. No pilot may use transponder code 1200 while in the DC SFRA.

§ 93.341 Aircraft operations in the DC FRZ.

(a) Except as provided in paragraph (b) of this section, no pilot may conduct any flight operation under part 91, 101, 103, 105, 125, 133, 135, or 137 of this chapter in the DC FRZ, unless the specific flight is operating under an FAA/TSA authorization.

(b) Department of Defense (DOD) operations, law enforcement operations, and lifeguard or air ambulance operations under an FAA/TSA airspace authorization are excepted from the prohibition in paragraph (a) of this section if the pilot is in contact with Air Traffic Control and operates the aircraft transponder on an Air Traffic Control-assigned beacon code.

(c) The following aircraft operations are permitted in the DC FRZ:

(1) Aircraft operations under the DCA Access Standard Security Program (DASSP) (49 CFR part 1562) with a Transportation Security Administration (TSA) flight authorization.

(2) Law enforcement and other U.S. Federal aircraft operations with prior FAA approval.

(3) Foreign-operated military and state aircraft operations with a State Department-authorized diplomatic clearance, with State Department notification to the FAA and TSA.

(4) Federal, State, Federal DOD contract, local government agency aircraft operations and part 121, 129 or 135 air carrier flights with TSA-approved full aircraft operator standard security programs/procedures, if operating with DOD permission and notification to the FAA and the National

Capital Regional Coordination Center (NCRCC). These flights may land and depart Andrews Air Force Base, MD, with prior permission, if required.

(5) Aircraft operations maintaining radio contact with Air Traffic Control and continuously transmitting an Air Traffic Control-assigned discrete transponder code. The pilot must monitor VHF frequency 121.5 or UHF frequency 243.0.

(d) Before departing from an airport within the DC FRZ, or before entering the DC FRZ, all aircraft, except DOD, law enforcement, and lifeguard or air ambulance aircraft operating under an FAA/TSA airspace authorization must file and activate an IFR or a DC FRZ or a DC SFRA flight plan and transmit a discrete transponder code assigned by an Air Traffic Control facility. Aircraft must transmit the discrete transponder code at all times while in the DC FRZ or DC SFRA.

§ 93.343 Requirements for aircraft operations to or from College Park Airport, Potomac Airfield, or Washington Executive/Hyde Field Airport.

(a) A pilot may not operate an aircraft to or from College Park Airport, MD, Potomac Airfield, MD, or Washington Executive/Hyde Field Airport, MD unless—

(1) The aircraft and its crew and passengers comply with security rules issued by the TSA in 49 CFR part 1562, subpart A;

(2) Before departing, the pilot files an IFR or DC FRZ or DC SFRA flight plan with the Washington Hub Flight Service Station (FSS) for each departure and arrival from/to College Park, Potomac Airfield, and Washington Executive/Hyde Field airports, whether or not the aircraft makes an intermediate stop;

(3) When filing a flight plan with the Washington Hub FSS, the pilot identifies himself or herself by providing the assigned pilot identification code. The Washington Hub FSS will accept the flight plan only after verifying the code; and

(4) The pilot complies with the applicable IFR or VFR egress procedures in paragraph (b), (c) or (d) of this section.

(b) If using IFR procedures, a pilot must—

(1) Obtain an Air Traffic Control clearance from the Potomac TRACON; and

(2) Comply with Air Traffic Control departure instructions from Washington Executive/Hyde Field, Potomac Airport, or College Park Airport. The pilot must then proceed on the Air Traffic Control-assigned course and remain clear of the DC FRZ.

(c) If using VFR egress procedures, a pilot must—

(1) Depart as instructed by Air Traffic Control and expect a heading directly out of the DC FRZ until the pilot establishes two-way radio communication with Potomac Approach; and

(2) Operate as assigned by Air Traffic Control until clear of the DC FRZ, the DC SFRA, and the Class B or Class D airspace area.

(d) If using VFR ingress procedures, the aircraft must remain outside the DC SFRA until the pilot establishes communications with Air Traffic Control and receives authorization for the aircraft to enter the DC SFRA.

(e) VFR arrivals:

(1) If landing at College Park Airport a pilot may receive routing via the vicinity of Freeway Airport; or

(2) If landing at Washington Executive/Hyde Field or Potomac Airport, the pilot may receive routing via the vicinity of Maryland Airport or the Nottingham VORTAC.

§ 93.345 VFR outbound procedures for fringe airports.

(a) A pilot may depart from a fringe airport as defined in § 93.335 without filing a flight plan or communicating with Air Traffic Control, unless requested, provided:

(1) The aircraft's transponder transmits code 1205;

(2) The pilot exits the DC SFRA by the most direct route before proceeding on course; and

(3) The pilot monitors VHF frequency 121.5 or UHF frequency 243.0.

(b) No pilot may operate an aircraft arriving at a fringe airport or transit the DC SFRA unless that pilot complies with the DC SFRA operating procedures in this subpart.

Issued in Washington, DC, on December 9, 2008.

Robert A. Sturgell,

Acting Administrator.

[FR Doc. E8–29711 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2008–1252; Airspace Docket No. 08–AWP–12]

RIN 2120–AA66

Revision of Restricted Areas 4806W, 4807A&B, and 4809; Nevada

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the using agency of Restricted Area 4806W (R–4806W), Las Vegas; 4807 (R–4807 A & B), Tonopah; and 4809 (R–4809) Tonopah, NV, from ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV'' to ''USAF Warfare Center, Nellis AFB, NV''. The FAA is taking this action in response to a request from the United States Air Force to reflect an administrative change of responsibility for the restricted area. This action does not change any boundaries, times of designation, or activities conducted in the restricted airspace area.

DATES: *Effective Date:* 0901 UTC, March 12, 2009.

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:

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by changing the using agency for R–4806W, R–4807A & B, and R–4809 currently shown as, ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV'' to ''USAF Warfare Center, Nellis AFB, NV''. This is an administrative change and does not affect the boundaries, designated altitudes, or activities conducted within the restricted areas. Therefore, notice and public procedures under 5 U.S.C. 553(b) is unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under 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 rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in

Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends restricted areas in Nevada.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with 311d., FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures.'' 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 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 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.

§ 73.48 [Amended]

■ 2. § 73.48 is amended as follows:

* * * * *

R–4806W Las Vegas, NV [Amended]

Under Using agency, remove the words ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV.,'' and insert the words ''USAF Warfare Center, Nellis AFB, NV''

* * * * *

R–4807A Tonopah, NV [Amended]

Under Using agency, remove the words ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV.,'' and insert the words ''USAF Warfare Center, Nellis AFB, NV''

* * * * *

R–4807B Tonopah, NV [Amended]

Under Using agency, remove the words ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV.,'' and insert the words ''USAF Warfare Center, Nellis AFB, NV''

* * * * *

R–4809 Tonopah, NV [Amended]

Under Using agency, remove the words ''U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV.,'' and insert the words ''USAF Warfare Center, Nellis AFB, NV''

* * * * *

Issued in Washington, DC, on December 8, 2008.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E8–29754 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9437]

RIN 1545–BI00

Amendments to the Section 7216 Regulations—Disclosure or Use of Information by Preparers of Returns

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and removal of temporary regulations.

SUMMARY: This document contains final regulations that provide rules relating to the disclosure and use of tax return information by tax return preparers. These regulations affect tax return preparers and provide updated guidance regarding the disclosure of a taxpayer's social security number to a tax return preparer located outside of the United States.

DATES: *Effective Date:* These regulations are effective on *December 16, 2008*.

Applicability Date: See § 301.7216–3(d), which states that the regulations apply to disclosures or uses of tax return information occurring on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Molly K. Donnelly, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 301. On December 8, 2005, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–137243–02) in the **Federal Register** (70 FR 72954) proposing amendments to the regulations under section 7216 (regarding the use or disclosure of tax return information by income tax return preparers). On January 3, 2008, the Treasury Department and the IRS issued final regulations under section 7216 (TD 9375) applicable to disclosures or uses of tax return information occurring on or after January 1, 2009. Thus, TD 9375 replaced previously issued final regulations that remain applicable to disclosures or uses of tax return information occurring prior to January 1, 2009.

TD 9375 included a revision of § 301.7216–3(b)(4) which, for disclosures and uses of tax return information occurring on or after January 1, 2009, provided that an income tax return preparer located in the United States may not disclose the taxpayer's social security number (SSN) to a tax return preparer located outside of the United States even if the taxpayer consents to the disclosure.

On July 1, 2008, a temporary regulation (TD 9409) was published in the **Federal Register** (73 FR 37804) that created a limited exception to the rule prohibiting the disclosure of a taxpayer's SSN outside of the United States. This temporary regulation modified the rules under § 301.7216–3(b)(4). A notice of proposed rulemaking (REG–121698–08) cross-referencing the temporary regulations was published in the **Federal Register** for the same day (73 FR 37910), requesting comments and setting a public hearing date.

Summary of Comments and Explanation of Revisions

The IRS and the Treasury Department requested written or electronic comments by September 30, 2008. Persons wishing to present oral comments at the public hearing scheduled for October 6, 2008, were to submit an outline of the topics to be discussed at the hearing by September 15, 2008, and written or electronic comments by September 30, 2008. No written or electronic comments or requests to speak at the hearing, together with the required outline of topics, were submitted, and the hearing was cancelled (73 FR 56534).

The final regulations adopt the rules published in the proposed regulations without substantial change. The final regulations maintain the general rule in § 301.7216–3(b)(4) providing that an income tax return preparer located in the United States may not disclose the taxpayer's SSN to a tax return preparer located outside of the United States even if the taxpayer consents to the disclosure. The final regulations create a limited exception to the general rule providing that a tax return preparer located within the United States,

including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States only if the tax return preparer discloses the SSN through the use of an adequate protection safeguard as described in guidance published in the Internal Revenue Bulletin and verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent pursuant to the specifications described in guidance published in the Internal Revenue Bulletin.

The rules adopted in the final regulations are substantially identical to those proposed in the notice of proposed rulemaking with the exception that § 301.7216–3T(d), which set forth the effective date for the rules contained in the temporary regulations, was removed and not adopted in the final regulations because the identical effective date is currently set forth in § 301.7216–3(d). In addition, minor and non-substantive edits were made to provide grammatical consistency and clarity throughout the regulations. Additional guidance regarding the adequate data protection safeguard set forth in the regulations may be found in Revenue Procedure 2008–35, 2008–29 I.R.B. 132. *See* § 601.601(d)(2)(ii)(b).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Molly K. Donnelly, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

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

■ **Par. 2.** Section 301.7216–3 is amended by revising paragraph (b)(4) to read as follows:

§ 301.7216–3 Disclosure or use permitted only with the taxpayer's consent.

* * * * *

(b) * * *

(4) *No consent to the disclosure of a taxpayer's social security number to a return preparer outside of the United States with respect to a taxpayer filing a return in the Form 1040 Series*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, a tax return preparer located within the United States, including any territory or possession of the United States, may not obtain consent to disclose the taxpayer's social security number (SSN) with respect to a taxpayer filing a return in the Form 1040 Series, for example, Form 1040, Form 1040NR, Form 1040A, or Form 1040EZ, to a tax return preparer located outside of the United States or any territory or possession of the United States. Thus, if a tax return preparer located within the United States (including any territory or possession of the United States) obtains consent from an individual taxpayer to disclose tax return information to another tax return preparer located outside of the United States, as provided under §§ 301.7216–2(c) and 301.7216–2(d), the tax return preparer located in the United States may not disclose the taxpayer's SSN, and the tax return preparer must redact or otherwise mask the taxpayer's SSN before the tax return information is disclosed outside of the United States. If a tax return preparer located within the United States initially receives or obtains a taxpayer's SSN from another tax return preparer located outside of the United States, however, the tax return preparer within the United States may, without consent, retransmit the taxpayer's SSN to the tax return preparer located outside the United States that initially provided the SSN to the tax return preparer located within the United States. For purposes of this section, a tax return preparer located outside of the United States does not include a tax return preparer who is continuously and regularly employed in the United States or any territory or possession of the United States and who is in a temporary travel status outside of the United States.

(ii) *Exception.* A tax return preparer located within the United States, including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States only if the tax return preparer within the United States discloses the SSN to a tax return preparer outside of the United States through the use of an adequate data protection safeguard as defined by the Secretary in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter) and verifies the maintenance of the adequate data protection safeguards in the request for the taxpayer's consent pursuant to the specifications described by the Secretary in guidance published in the Internal Revenue Bulletin.

* * * * *

§ 301.7216–3T [Removed]

■ **Par. 3.** Section 301.7216–3T is removed.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: December 10, 2008.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8–29770 Filed 12–15–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0100]

RIN 1625–AA09

Drawbridge Operation Regulations; Wabash River; Activity Identifier; Permanent Change to Operating Schedule

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard moves that the procedures for Operation of Drawbridges across the Wabash River be revised to reflect the needs of navigation. There were no comments or

related materials received from the public for the Notice of Final Rulemaking docket number USCG–2008–0100 that preceded this Final Rule.

DATES: This rule is effective January 15, 2009.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–0100 and are available online at *http://www.regulations.gov.* This material is also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the Eighth Coast Guard District, Bridge Branch, 1222 Spruce Street, Suite 2.107F, St. Louis, MO 63103–2832 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call Mr. Roger Wiebusch, Bridge Administrator, (314) 269–2378. If you have questions on viewing the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

Regulatory Information

On May 5, 2008, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Wabash River, IL; Permanent Change to Operating Schedule'' in the **Federal Register** (Vol. 73, No. 87). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The Wabash River is a 475 mile long river in the eastern United States that flows generally southwest from Ohio, through Indiana, to Kentucky. The System rises in the vicinity of St. Henry, Ohio and flows across northern Indiana to Illinois where it forms the southern Illinois-Indiana border before draining into the Ohio River. The Wabash River flows into the Ohio River near Uniontown, Kentucky. The Wabash River drawbridge operation regulations, contained in 33 CFR 117.397, state that all drawbridges shall open on signal if given 72 hours advance notice. The Coast Guard has determined that this regulation is no longer necessary due to the lack of navigation on the river. This action was coordinated with the local marine industry and no objections or concerns were raised.

Discussion of Changes

The changes to 33 CFR 117.397 will reflect the current needs of navigation on the Wabash River. The last request for opening of a drawspan on the Wabash River was in 1991. The U.S. Army Corps of Engineers does not maintain any project depth or navigable channel on the river. Commercial use of the waterway is only possible during periods of high water. During these periods ''snag and debris removal'' operations are carried out by small commercial vessels that can safely pass beneath all closed drawspans on the waterway.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary.

The drawbridges of the Wabash River do not presently open for the passage of vessels due to the lack of navigation on the river. The last recorded opening of a Wabash River drawspan was in 1991. Consultation with bridge owners indicated that currently no bridge on the Wabash River has a bridge tender position assigned to it. Therefore, no jobs will be lost, nor will any forms of commerce be disrupted by the rule.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. This rule is neutral to all business entities since it only clarifies how the bridges are operated.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this final rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and

would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Revise § 117.397 to read as follows:

§ 117.397 Wabash River

The draws of the bridges across the Wabash River need not be opened for the passage of vessels.

Dated: November 24, 2008.

Joel R. Whitehead,

RADM, USCG.

[FR Doc. E8–29733 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[EPA–HQ–OAR–2005–0159; FRL–8752–2]

RIN 2060–AP28

The Treatment of Data Influenced by Exceptional Events (Exceptional Event Rule): Revised Exceptional Event Data Flagging Submittal and Documentation Schedule To Support Initial Area Designations for the 2008 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: The EPA issued ''The Treatment of Data Influenced by Exceptional Events (Exceptional Event Rule): Revised Exceptional Event Data Flagging Submittal and Documentation Schedule for Monitoring Data Used in Designations for the 2008 Ozone NAAQS'' as a direct final rule on October 6, 2008, 73 FR 58042. Because EPA received an adverse comment, we are withdrawing the direct final rule amendments to ''The Treatment of Data Influenced by Exceptional Events (Exceptional Event Rule): Revised Exceptional Event Data Flagging Submittal and Documentation Schedule to Support Initial Area Designations for the 2008 Ozone NAAQS'' published in the **Federal Register** on October 6, 2008 (73 FR 58042).

DATES: As of December 16, 2008, EPA withdraws the direct final rule amendments published on October 6, 2008 (73 FR 58042).

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2005–0159. 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 or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at Air 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.

FOR FURTHER INFORMATION CONTACT: Thomas E. Link, Air Quality Planning Division, Office of Air Quality Planning and Standards, Mail Code C539–04, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: 919–541–5456; fax number: 919–541–0824; e-mail address: *link.tom@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action affects states and local air quality agencies and may also affect Tribal air quality agencies that have implemented air quality monitoring networks or have authority to implement air quality programs.

II. Background Information

The EPA issued ''The Treatment of Data Influenced by Exceptional Events (Exceptional Event Rule): Revised Exceptional Event Data Flagging Submittal and Documentation Schedule

for Monitoring Data Used in Designations for the 2008 Ozone NAAQS'' as a direct final rule on October 6, 2008, 73 FR 58042. The direct final rule revises the schedule for the flagging and submission of documentation of data impacted by exceptional events that may be used for designations under the 2008 ozone National Ambient Air Quality Standards (NAAQS). For a detailed description of the ozone NAAQS and the Exceptional Events Rule, please see the rulemaking actions which are available at EPA's Web sites at *http://www.epa.gov/groundlevelozone/actions.html* and *http://www.epa.gov/EPA-AIR/2008/October/Day-06/a23520.htm* and also in the **Federal Register** at 73 FR 16436 and 73 FR 58042.

We stated in the direct final rule amendments that if we received adverse comment by November 20, 2008, we would publish a timely notice of withdrawal in the **Federal Register**. We received an adverse comment on the direct final rule amendments on November 20, 2008. Because EPA received adverse comment, we are withdrawing the direct final rule amendments to ''The Treatment of Data Influenced by Exceptional Events (Exceptional Event Rule): Revised Exceptional Event Data Flagging Submittal and Documentation Schedule to Support Initial Area Designations for the 2008 Ozone NAAQS'' published in the **Federal Register** on October 6, 2008 (73 FR 58042), as of December 16, 2008. EPA will address adverse comments received in a subsequent final action based on the parallel proposal also published on October 6, 2008. As stated in the parallel proposal, we will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 50

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: December 10, 2008.

Robert J. Meyers,

Principal Deputy Assistant Administrator.

PART 50—[AMENDED]

■ Accordingly, the amendments to the rule published in the **Federal Register** on October 6, 2008 (73 FR 58042) on pages 58042–58047 are withdrawn as of December 16, 2008.

[FR Doc. E8–29747 Filed 12–15–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2007–0211; FRL–8752–5]

RIN 2060–AO16

National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins (Polysulfide Rubber Production, Ethylene Propylene Rubber Production, Butyl Rubber Production, Neoprene Production); National Emission Standards for Hazardous Air Pollutants for Epoxy Resins Production and Non-Nylon Polyamides Production; National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards (Acetal Resins Production and Hydrogen Fluoride Production) (Risk and Technology Review)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule responds to public comments received on the proposed rule and announces our decision not to revise four national emission standards for hazardous air pollutants that regulate eight industrial source categories evaluated in our risk and technology review. The four national emission standards and eight industrial source categories are: National Emissions Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins (Polysulfide Rubber Production, Ethylene Propylene Rubber Production, Butyl Rubber Production, and Neoprene Rubber Production); National Emission Standards for Hazardous Air Pollutants for Epoxy Resins Production and Non-nylon Polyamides Production; National Emission Standards for Hazardous Air Pollutants for Acetal Resins Production and National Emission Standards for Hazardous Air Pollutants for Hydrogen Fluoride Production. The underlying national emission standards that were reviewed in this action limit and control hazardous air pollutants.

On December 12, 2007, we proposed not to revise the national emission standards based on our residual risk assessment and technology review. After conducting risk and technology reviews, and after considering public comments on the proposed rule, we conclude no additional control requirements are warranted under section 112(f)(2) or 112(d)(6) of the Clean Air Act at this time.

DATES: This final action is effective on December 16, 2008.

ADDRESSES: We have established a docket for this action under Docket ID No. EPA–HQ–OAR–2007–0211. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, 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 *www.regulations.gov* or in hard copy at the EPA Docket Center, Docket ID No. EPA–HQ–OAR–2007–0211, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact Ms. Mary Tom Kissell, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–4516; *fax number:* (919) 685–3219; and *e-mail address: kissell.mary@epa.gov.* For specific information regarding the modeling methodology, contact Ms. Elaine Manning, Office of Air Quality Planning and Standards, Health and Environmental Impacts Division, Sector Based Assessment Group (C539–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number:* (919) 541–5499; *fax number:* (919) 541–0840; and *e-mail address: manning.elaine@epa.gov.* For information about the applicability of these four national emission standards for hazardous air pollutants (NESHAP) to a particular entity, contact the appropriate person listed in Table 1 to this preamble.

TABLE 1—LIST OF EPA CONTACTS FOR GROUP I POLYMERS AND RESINS, GROUP II POLYMERS AND RESINS, ACETAL RESINS PRODUCTION, AND HYDROGEN FLUORIDE PRODUCTION

NESHAP for:	OECA contact [1]	OAQPS contact [2]
Polymers and Resins, Group I	Scott Throwe (202) 564–7013 *throwe.scott@epa.gov*	David Markwordt (919) 541–0837 *markwordt.david@epa.gov*.
Polymers and Resins, Group II ...	Scott Throwe (202) 564–7013 *throwe.scott@epa.gov*	Randy McDonald (919) 541–5402 *Mcdonald.randy@epa.gov*.
Acetal Resins Production	Marcia Mia (202) 564–7042 *mia.marcia@epa.gov*	David Markwordt (919) 541–0837 *markwordt.david@epa.gov*.
Hydrogen Fluoride Production	Marcia Mia (202) 564–7042 *mia.marcia@epa.gov*	Bill Neuffer (919) 541–5435 *neuffer.bill@epa.gov*.

[1] OECA stands for the EPA's Office of Enforcement and Compliance Assurance.
[2] OAQPS stands for EPA's Office of Air Quality Planning and Standards.

SUPPLEMENTARY INFORMATION: *Regulated Entities*. The eight regulated industrial source categories that are the subject of this final action are listed in Table 2 to this preamble.

TABLE 2—EIGHT INDUSTRIAL SOURCE CATEGORIES

Category	NAICS [1] code	MACT [2] code
Butyl Rubber Production	325212	1307
Ethylene-Propylene Rubber Production	325212	1313
Polysulfide Rubber Production	325212	1332
Neoprene Production	325212	1320
Epoxy Resins Production	325211	1312
Non-nylon Polyamides Production	325211	1322
Acetal Resins Production	325211	1301
Hydrogen Fluoride Production	325120	1409

[1] North American Industry Classification System.
[2] Maximum Achievable Control Technology.

Table 2 is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the final action for the source categories listed. To determine whether your facility would be affected, you should examine the applicability criteria in the appropriate NESHAP. If you have any questions regarding the applicability of any of these NESHAP, please contact the appropriate person listed in Table 1 of this preamble in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of publication of this action in the **Federal Register**, *i.e.*, by February 17, 2009. Under section 307(b)(2) of the CAA, the requirements established by this final action may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce the requirements.

Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides that EPA shall convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Outline. The information presented in this preamble is organized as follows:

I. Background
A. What is the statutory authority for this action?
B. Overview of the Four NESHAP
C. What was the proposed action?
D. What are the conclusions of the residual risk assessment?
E. What are the conclusions of the technology review?
II. Summary of Comments and Responses
A. Emissions Data
B. Risk Assessment Methodology
III. Risk and Technology Review Final Decision
IV. Statutory and Executive Order Reviews
A. Executive Order 12866, Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132, Federalism
F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

H. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background

A. What is the statutory authority for this action?

Section 112 of the CAA establishes a two-stage regulatory process to address emissions of hazardous air pollutants (HAP) from stationary sources. In the first stage, after EPA has identified categories of sources emitting one or more of the HAP listed in section 112(b) of the CAA, section 112(d) of the CAA calls for us to promulgate NESHAP for those sources. ''Major sources'' are those that emit or have the potential to emit any single HAP at a rate of 10 tons or more per year of a single HAP or 25 tons per year of any combination of HAP. For major sources, these technology-based standards must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts) and are commonly referred to as maximum achievable control technology (MACT) standards.

The MACT ''floor'' is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3). For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, we must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of the cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements.

EPA is then required to review these technology-based standards and to revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less frequently than every 8 years, under CAA section 112(d)(6). In this final rule, we are publishing the results of our 8-year technology review for the eight industrial source categories listed in Table 3, which we have collectively termed ''Group 1.''

The second stage in standard-setting focuses on reducing any remaining ''residual'' risk according to CAA section 112(f). This provision requires, first, that EPA prepare a Report to Congress discussing (among other things) methods of calculating risk posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, the means and costs of controlling them, actual health effects to persons in proximity of emitting sources, and recommendations as to legislation regarding such remaining risk. EPA prepared and submitted this report (Residual Risk Report to Congress, EPA–453/R–99–001) in March 1999. Congress did not act in response to the report, thereby triggering EPA's obligation under CAA section 112(f)(2) to analyze and address residual risk.

CAA section 112(f)(2) requires us to determine for source categories subject to certain CAA section 112(d) standards whether the emissions limitations provide an ample margin of safety to protect public health. If the MACT standards for HAP ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than 1-in-1 million,'' EPA must promulgate residual risk standards for the source category (or subcategory) as necessary to provide an ample margin of safety to protect public health. In doing so, EPA may adopt standards equal to existing MACT standards (*NRDC* v. *EPA,* No. 07–1053, slip op. at 11, District of Columbia Circuit, decided June 6, 2008). EPA must also adopt more stringent standards, if necessary, to prevent an adverse environmental effect,[1] but must consider cost, energy, safety, and other relevant factors in doing so. Section 112(f)(2) of the CAA expressly preserves our use of a two-step process for developing standards to address any residual risk and our interpretation of ''ample margin of safety'' developed in the National Emission Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989).

The first step in this process is the determination of acceptable risk. The second step provides for an ample margin of safety to protect public health, which is the level at which the standards are set (unless a more stringent standard is required to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect).

The terms ''individual most exposed,'' ''acceptable level,'' and ''ample margin of safety'' are not specifically defined in the CAA. However, CAA section 112(f)(2)(B) directs us to use the interpretation set out in the Benzene NESHAP. See also, A Legislative History of the Clean Air Act Amendments of 1990, volume 1, p. 877 (Senate debate on Conference Report). We notified Congress in the Residual Risk Report to Congress that we intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11).

In the Benzene NESHAP, we stated as an overall objective:

> * * * in protecting public health with an ample margin of safety, we strive to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million; and (2) limiting to no higher than approximately 1-in-10 thousand [i.e. , 100-in-1 million] the estimated risk that a person living near a facility would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The Agency also stated that, ''The EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risk to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population.'' The Agency went on to conclude that ''estimated incidence would be weighed along with other health risk information in judging acceptability.'' As explained more fully in our Residual Risk Report to Congress, EPA does not define ''rigid line[s] of acceptability,'' but considers rather broad objectives to be weighed with a

[1] ''Adverse environmental effect'' is defined in CAA section 112(a)(7) as any significant and widespread adverse effect, which may reasonably be anticiipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

series of other health measures and factors (EPA–453/R–99–001, p. ES–11). The determination of what represents an ''acceptable'' risk is based on a judgment of ''what risks are acceptable in the world in which we live'' (Residual Risk Report to Congress, p. 178, quoting the *Vinyl Chloride* decision at 824 F.2d 1165) recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that ''EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately 1-in-10 thousand, that risk level is considered acceptable.'' 54 FR at 38045. We discussed the maximum individual lifetime cancer risk (MIR) as being ''the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.'' Id. We explained that this measure of risk ''is an estimate of the upperbound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years.'' Id. We acknowledge that MIR ''does not necessarily reflect the true risk, but displays a conservative risk level which is an upperbound that is unlikely to be exceeded.'' Id.

Understanding that there are both benefits and limitations to using MIR as a metric for determining acceptability, we acknowledged in the 1989 Benzene NESHAP that ''consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk.'' Id. Consequently, the presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of MIR, but does not constitute a rigid line for making that determination.

The Agency also explained in the 1989 Benzene NESHAP the following: ''In establishing a presumption for MIR, rather than rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 kilometer (km) exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants.'' Id.

In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by MIR alone.

As explained in the Benzene NESHAP, ''[e]ven though the risks judged ''acceptable'' by EPA in the first step of the Vinyl Chloride inquiry are already low, the second step of the inquiry, determining an ''ample margin of safety,'' again includes consideration of all of the health factors, and whether to reduce the risks even further. In the second step, EPA strives to provide protection to the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million. In the ample margin decision, the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by section 112.'' 54 FR 38046.

B. Overview of the Four NESHAP

The eight industrial source categories and four NESHAP that are the subject of this action are listed in Table 3 to this preamble. The NESHAP limit and control HAP that are known or suspected to cause cancer or have other serious human health or environmental effects. The NESHAP for these eight source categories generally required implementation of technologies such as steam strippers and incineration.

TABLE 3—LIST OF NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS (NESHAP) AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS FINAL ACTION

Title of NESHAP	Source categories affected by this final action	Promulgated rule reference and code of federal regulations citation	Compliance date	NESHAP as referred to in this preamble
NESHAP for Group I Polymers and Resins [1].	Polysulfide Rubber Production	61 FR 46905 (09/05/1996)	07/31/1997	Polymers and Resins I.
	Ethylene Propylene Rubber Production.	40 CFR part 63, subpart U		
	Butyl Rubber Production.			
	Neoprene Production.			
NESHAP for Epoxy Resins Production and Non-nylon Polyamides Production.	Epoxy Resins Production	60 FR 12670 (03/08/1995)	03/03/1998	Polymers and Resins II.
	Non-nylon Polyamides Production	40 CFR part 63, subpart SS		
NESHAP for GMACT [2]	Acetal Resins Production	64 FR 34853 (06/29/1999)	06/29/2002	GMACT.
	Hydrogen Fluoride Production	40 CFR part 63, subparts TT, UU, WW, and YY.		

[1] The Polymers and Resins I NESHAP regulates nine source categories. We performed the residual risk and technology review (RTR) for four of them for this action. We will address the remaining five source categories in a separate RTR rulemaking.

[2] The source categories subject to the standards in the generic maximum achievable control technology (GMACT) NESHAP are Acetal Resins Production and Hydrogen Fluoride Production.

1. Polymers and Resins I

The Polymers and Resins I NESHAP regulates HAP emissions from major sources in nine source categories. In this action, we address four of the Polymer and Resins I sources categories—Polysulfide Rubber Production, Ethylene Propylene Rubber Production, Butyl Rubber Production, and Neoprene Production. The other five source categories are addressed in RTR Group 2A (73 FR 60432, October 10, 2008). HAP emissions from these processes can be released from storage tanks, process vents, equipment leaks, and wastewater operations.

a. *Polysulfide Rubber Production.* Polysulfide rubber is a synthetic rubber

produced by the reaction of sodium sulfide and p-dichlorobenzene (1,4-dichlorobenzene) at an elevated temperature in a polar solvent. Polysulfide rubber is resilient, resistant to solvents, and has low temperature flexibility, facilitating its use in seals, caulks, automotive parts, rubber molds for casting sculpture, and other products.

b. *Ethylene Propylene Rubber Production.* Ethylene propylene elastomer is an elastomer prepared from ethylene and propylene monomers. Common uses for these elastomers include radiator and heater hoses, weather stripping, door and window seals for cars, construction plastics blending, wire and cable insulation and jackets, and single-ply roofing membranes.

c. *Butyl Rubber Production.* Butyl rubber is comprised of copolymers of isobutylene and isoprene and is very impermeable to common gases and resists oxidation. A specialty group of butyl rubbers are halogenated butyl rubbers, which are produced commercially by dissolving butyl rubber in hydrocarbon solvent and contacting the solution with gaseous or liquid elemental halogens such as chlorine or bromine. Halogenated butyl rubber resists aging to a higher degree than the nonhalogenated type and is more compatible with other types of rubber. Uses for butyl rubber include tires, tubes, and tire products; automotive mechanical goods; adhesives, caulks, and sealants; and pharmaceutical uses.

d. *Neoprene Production.* Neoprene is a polymer of chloroprene. Neoprene was originally developed as an oil-resistant substitute for natural rubber, and its properties allow its use in a wide variety of applications, including wetsuits, gaskets and seals, hoses and tubing, plumbing fixtures, adhesives, and other products.

2. Polymers and Resins II

The Polymers and Resins II NESHAP regulates HAP emissions from major sources in two source categories—epoxy resins and non-nylon polyamides production. In this action, we address both of the Polymer and Resins II sources categories—Epoxy Resins Production and Non-nylon Polyamides Production. HAP emissions from these source categories can be released from storage tanks, process vents, equipment leaks, and wastewater operations.

a. *Epoxy Resins Production.* The Epoxy Resins Production source category involves the manufacture of basic liquid epoxy resins used in the production of glues, adhesives, plastic parts, and surface coatings. This source category does not include specialty or modified epoxy resins.

b. *Non-Nylon Polyamides Production.* The Non-Nylon Polyamides Production source category involves the manufacture of epichlorohydrin cross-linked non-nylon polyamides used primarily by the paper industry as an additive to paper products. Natural polymers, such as those contained in paper products, have little cross-linking, which allows their fibers to change position or separate completely when in contact with water. The addition of epichlorohydrin cross-linked non-nylon polyamides to these polymers causes the formation of a stable polymeric web among the natural fibers. Because the polymeric web holds the fibers in place even in the presence of water, epichlorohydrin cross-linked non-nylon polyamides are also referred to as wet-strength resins.

3. GMACT—Acetal Resins Production

The GMACT set national emission standards for certain source categories consisting of five or fewer facilities. The basic purpose of the GMACT approach was to use public and private sector resources efficiently, and to promote regulatory consistency and predictability in the MACT standards development.

Acetal resins are characterized by the use of formaldehyde in the polymerization process to manufacture homopolymers or copolymers of alternating oxymethylene units. Acetal resins, also known as polyoxymethylenes, polyacetals, or aldehyde resins, are a type of plastic possessing relatively high strength and rigidity without being brittle. They have good frictional properties and are resistant to moisture, heat, fatigue, and solvents. Acetal resins are used as parts in a variety of industrial applications, e.g., gears, bearings, bushings, and various other moving parts in appliances and machines, and in a range of consumer products, e.g., automotive door handles, seat belt components, plumbing fixtures, shaver cartridges, zippers, and gas tank caps.

4. GMACT—Hydrogen Fluoride Production

The Hydrogen Fluoride Production source category includes any facility engaged in the production and recovery of hydrogen fluoride by reacting calcium fluoride with sulfuric acid. Hydrogen fluoride is used in the production of other compounds, including pharmaceuticals and polymers. In aqueous solution hydrogen fluoride can be a strong acid.

C. What was the proposed action?

On December 12, 2007 [2], based on the findings from our RTR, we proposed no revisions to the four NESHAP regulating the eight source categories listed in Table 3 and requested public comment.

D. What are the conclusions of the residual risk assessment?

As required by section 112(f)(2) of the CAA, we prepared a risk assessment for each of the eight source categories addressed in this action to determine the residual risk posed after implementation of the respective NESHAP. To evaluate the residual risk for each source category, EPA conducted an inhalation risk assessment [3] that provided estimates of MIR, cancer risk distribution within the exposed populations, cancer incidence, hazard indices (HI) for chronic exposures to HAP with non-cancer health effects, and hazard quotients (HQ) for acute exposures to HAP with non-cancer health effects. The risk assessment consisted of six primary activities: (1) Establishing the nature and magnitude of emissions from the sources of interest, (2) identifying the emissions release characteristics (e.g., stack parameters), (3) conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (4) estimating long-term and short-term inhalation exposures to individuals residing within 50 km of the modeled sources, (5) estimating individual and population-level risks using the exposure estimates and quantitative dose-response information, and (6) characterizing risk. In general, the risk assessment followed a tiered, iterative approach, beginning with a conservative (worst case) screening-level analysis and, where the screening analysis indicated the potential for non-negligible risks, following that with more refined analyses.

[2] *See* 72 FR 70543.

[3] For more information on the risk assessment inputs and models, *see* ''Residual Risk Assessment for Eight Source Categories,'' available in the docket.

The human health risks estimated for the eight source categories are summarized in Table 4.

TABLE 4—SUMMARY OF ESTIMATED INHALATION RISKS FOR THE EIGHT SOURCE CATEGORIES

Source category	Number of facilities [1]	Maximum individual cancer risk (in 1 million) [2] (and HAP contributing most to estimate)	Estimated annual cancer incidence (and HAP contributing most to estimate)	Maximum chronic HI [3] (and HAP contributing most to estimate)	Maximum off-site acute HQ and HAP for which HQ was calculated [4]
Polysulfide Rubber Production.	1	0 [6]	0 [6]	<0.01 (MDI [5])	HQ_{ERPG-1}=0.0004 (MDI [4]).
Ethylene Propylene Rubber Production.	5	0 [6]	0 [6]	0.5 (hexane)	HQ_{REL}=0.3 (toluene).
Butyl Rubber Production	2	0 [6]	0 [6]	0.2 (methyl chloride)	HQ_{ERPG-2}=0.1 (methyl chloride [7]).
Neoprene Production	1	0 [6]	0 [6]	0.8 (chloroprene)	HQ_{REL}=0.4 (toluene).
Epoxy Resins Production.	3	0.1 (epichlorohydrin)	0.00002 (epichlorohydrin).	0.08 (epichlorohydrin)	HQ_{REL}=0.6 (epichlorohydrin).
Non-nylon Polyamides Production.	4	0.4 (epichlorohydrin)	0.00003 (epichlorohydrin).	0.3 (epichlorohydrin)	HQ_{REL}=0.2 (epichlorohydrin).
Acetal Resins Production.	3	0.3 (allyl chloride)	0.00004 (allyl chloride)	0.2 (chlorine)	HQ_{REL}=2 HQ_{AEGL-1}=0.1 (formaldehyde).
Hydrogen Fluoride Production.	2	0 [6]	0 [6]	<0.01 (hydrofluoric acid).	HQ_{REL}=0.3 (hydrofluoric acid).

[1] Number of facilities believed to be in the source category and used in the risk analysis.
[2] Maximum individual excess lifetime cancer risk.
[3] Maximum hazard index (HI) is maximum respiratory HI for all except two source categories. Maximum HI for butyl rubber production is based on neurological effects. Maximum HI for hydrogen fluoride production is based on skeletal effects.
[4] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop an array of hazard quotient (HQ) values. These include reference exposure level (REL) and ERPG–1 and ERPG–2 values. The superscript indicates the value to which the acute exposure estimate was compared. The acute REL is defined by CalEPA as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration is termed the reference exposure level (REL). REL are based on the most sensitive, relevant, adverse health effect reported in the medical and toxicological literature. REL are designed to protect the most sensitive individuals in the population by the inclusion of margins of safety. Since margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.'' The American Industrial Hygiene Association defines the ERPG–1 as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor'', and the ERPG–2 as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' The National Advisory Committee for Acute Exposure Guidelines defines AEGL–1 as ''AEGL–1 is the airborne concentration (expressed as ppm or mg/m3) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.''
[5] MDI is methylene diphenyl diisocyanate.
[6] No HAP that are known, probable, or possible human carcinogens are emitted from sources in the category.
[7] For methyl chloride, REL, and AEGL–1 were not available.

As shown in Table 4, we estimate that the HAP emissions from the eight source categories affected by this final action do not pose cancer risks equal to or greater than 1-in-1 million to the individual most exposed, do not result in meaningful rates of cancer incidence, and do not result in a concern regarding either chronic or acute noncancer health effects for the individual most exposed.

In addition, no chronic inhalation human health thresholds were exceeded at environmental receptors for any of the eight source categories. As we stated in the preamble to the proposal, we generally believe that when exposure levels are not anticipated to adversely affect human health, they also are not anticipated to adversely affect the environment. Only hydrogen fluoride among those emitted by these facilities has a potential concern for adverse environmental effects, based on a consideration of studies in the literature. Accordingly, we posed the question in the preamble to the proposal whether hydrogen fluoride emissions impacted vegetation in the vicinity of the two facilities in the hydrogen fluoride category. No comments were received. We have concluded that for all facilities in categories addressed in this rulemaking, there is low potential for adverse environmental effects due to direct airborne exposures. We also believe that there is no potential for an adverse effect on threatened or endangered species or on their critical habitat within the meaning of 50 CFR 402.13(a) because our screening analyses indicate no potential for any adverse ecological impacts.

Human health multipathway risks were determined not to be a concern for the eight source categories addressed in this action due to the absence of persistent and bioaccumulative (PB) [4] HAP emissions at all of these sources. The lack of PB HAP emissions also provides assurance that there will be no potential for adverse ecological effects due to indirect ecological exposures (*i.e.*, exposures resulting from the deposition of PB HAP from the atmosphere).

As a result of these findings, we proposed no additional controls under the residual risk review requirements of CAA section 112(f)(2). As EPA has not received evidence which would alter our proposed decision, we conclude in this rulemaking, as proposed, that no additional control is required because

[4] Persistent and bioaccumulative (PB) HAP are the list of 14 HAP that have the ability to persist in the environment for long periods of time and may also have the ability to build up in the food chain to levels that are harmful to human health and the environment.

the four NESHAP regulating the eight source categories addressed in this action provide an ample margin of safety to protect public health and to prevent an adverse environmental effect.

E. What are the conclusions of the technology review?

Section 112(d)(6) of the CAA requires EPA to review and revise, as necessary (taking into account developments in practices, processes, and control technologies), emissions standards promulgated under CAA section 112 no less often than every 8 years. As we explained in our CAA section 112(d)(6) determination for the HON (71 FR 34437 and affirmed at 71 FR 76606),

> [a]lthough the language of section 112(d)(6) is nondiscretionary regarding periodic review, it grants EPA much discretion to revise the standards ''as necessary.'' Thus, although the specifically enumerated factors that EPA should consider all relate to technology (*e.g.*, developments in practices, processes and control technologies), the instruction to revise ''as necessary'' indicates that EPA is to exercise its judgment in this regulatory decision, and is not precluded from considering additional relevant factors, such as costs and risk. EPA has substantial discretion in weighing all of the relevant factors in arriving at the best balance of costs and emissions reduction and determining what further controls, if any, are necessary. This interpretation is consistent with numerous rulings by the U.S. Court of Appeals for the DC Circuit regarding EPA's approach to weighing similar enumerated factors under statutory provisions directing the Agency to issue technology-based standards. See, *e.g.*, *Husqvarna AB* v. *EPA*, 254 F.3d 195 (DC Cir. 2001). For example, when a section 112(d)(2) MACT standard alone obtains protection of public health with an ample margin of safety and prevents adverse environmental effects, it is unlikely that it would be ''necessary'' to revise the standard further, regardless of possible developments in control options.[5] Thus, the section 112(d)(6) review would not need to entail a robust technology assessment.

We completed the CAA section 112(d)(6) review for the eight RTR Group 1 source categories, and, as in our proposal, we concluded that there have been no significant developments in practices, processes, or control technologies since promulgation of the MACT standards for the eight RTR Group 1 source categories. Thus, we proposed no additional controls were required under the technology review requirements of CAA section 112(d)(6).

We have not received information that controverts that conclusion. Therefore, we conclude, as we did in the proposed rule, that no revisions are required per the provisions of CAA section 112(d)(6).

II. Summary of Comments and Responses

In the proposed action, we requested public comment on our residual risk reviews and our technology reviews for the eight source categories listed in Table 3. We received comments from four commenters. The commenters included one state and local agency association, two industry trade associations, and representatives of one individual company. The comments are summarized and our responses to adverse comments are provided below.[6] After considering the public comments, we concluded it was unnecessary to change our risk or technology reviews or analyses or our determination that the existing MACT standards for these eight source categories are sufficient under sections 112(d)(6) and (f)(2) of the CAA.

A. Emissions Data

Comment: One commenter expressed concern over the emissions and emissions release characteristic data the Agency used in its analyses, noting that the proposal did not explain why state and local air agency data were not included for source categories where EPA primarily relied upon industry-supplied data. The commenter recommends that EPA consider expanding the data set to include state and local information. The other three commenters believe the data are representative for the RTR Group 1 source categories, although one of them suggested EPA should discount the value of emissions inventory data that have not undergone a quality assurance review.

Response: For the residual risk assessments, we use the best information available to perform our analyses. The EPA collects facility-specific emissions and emissions release characteristic information from state and local agencies periodically, which is then put into a database called the National Emissions Inventory (NEI). This information is reviewed by EPA engineers. The information contained in this database is often the best source of information available to us and it typically provides the essential parameters for our residual risk analyses. However, there are limitations to this database, in that the quality of the data submitted by state and local air agencies varies. Some parameters in the NEI are not provided by all state and local air agencies, which means that these parameters are sometimes blank or are filled in with default values. In addition, if process or other changes occur at facilities that do not affect their permits, state or local air agencies may not be aware of these changes, and subsequently do not submit changes or updates to the emissions for those facilities.

To analyze risk for these eight source categories, we were able to use emissions and emissions release characteristic data obtained directly from industry except for the hydrogen fluoride source category for which the data were obtained directly from industry and from the State of Louisiana. Based on our own technical review of these data, we believe these data are the most accurate data available, and where available, we used them for our analyses. All of the emissions and emissions release characteristic data were made available for public review at the time of the proposal. State and local air agencies, as well as other members of the public, were invited to provide comments on the data. We would have considered any substantive comments regarding the accuracy of the data before promulgating today's decision not to require new or additional standards; however, other than the data from Louisiana and one minor comment, addressed below, no such comments were received from any of the state or local air agencies, or from any other commenter. Therefore, no significant changes to the data have been made.

On June 6, 2008, the United States Court of Appeals for the District of Columbia (the Court) upheld as reasonable EPA's use of industry data, in that case, where EPA demonstrated that such data enabled the Agency to assess risk remaining after application of the National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry (HON)[7], and noted that ''EPA has wide latitude in determining the extent of data-gathering necessary to solve a problem.''[8]

Comment: One commenter recommended that EPA include emissions from startup/shutdown and

[5] Although EPA might still consider developments that could substantially reduce or eliminate risk in a cost-effective manner.

[6] *See* ''Summary of Public Comments and Responses for RTR Group 1'' for other comment summaries and responses.

[7] Proposed and final National Emission Standards for Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry (HON) residual risk rules (71 FR 34421, June 14, 2006, and 71 FR 76603, December 21, 2006, respectively).

[8] *See* page 17 of the Court Opinion. The Court's opinion was issued in response to petition received on the final HON RTR. The Court's opinion, the proposal and final HON RTR rules, and EPA's Brief for the Respondent are in the RTR Group 1 docket (Docket ID No. EPA–HQ–OAR–2007–0211).

malfunctions (SSM) in its analysis, as they are the cause of significant HAP emissions and not including them underestimates true risks.

Response: Emission releases from SSM events are typically infrequent and of short duration compared to annual emissions. Startup and shutdown events[9] usually coincide with routine equipment maintenance or upset conditions, or with an initial startup of a process. Malfunction events are sudden and infrequent and must be corrected as soon as practicable after their occurrence. 40 CFR 63.6(e), which generally applies to all MACT rules in part 63, requires the owner or operator of a facility to reduce emissions from the affected source during periods of SSM to the greatest extent which is consistent with safety and good air pollution control practices.

We believe SSM events do not contribute significantly to cancer or chronic noncancer risks for the RTR Group 1 source categories because SSM events are inherently short-term and infrequent relative to annual operations and emissions. The commenter did not supply data. In addition, cancer and chronic noncancer risk for the RTR Group 1 source categories are low. All the RTR Group 1 source categories have a MIR less than 1-in-1 million and an HI less than 1: emissions from SSM events would have to be greater than double the annual emission levels to result in MIR greater than 1-in-1 million or HI greater than 1, and this is improbable.

To better assess SSM emissions, we analyzed SSM emissions of HAP from all major industries (primarily petroleum refineries and chemical manufacturers) in five counties in southeast Texas.[10] Our analysis of these data indicates that multiplying the annual average hourly emission rate by a factor of 10 to estimate the worst-case hourly emission rate would account for 99 percent of the reported SSM emission rates. As a result, we apply this default factor of 10 to screen for potential acute impacts of concern for all RTR source categories. In this case, use of this factor screened out potential acute impacts from all RTR Group 1 source categories except for a few facilities from the Acetal Resins Production and Hydrogen Fluoride Production source categories.

For acetal resins production and hydrogen fluoride production, we applied a source category-specific factor of 2 times the average hourly rate for hydrogen fluoride production and 1.5 times the average hourly rate for acetal resins production to estimate the worst-case hourly emission rate. These factors are derived from industry data and one state that show the peak hourly emissions that have been recorded. Applying these multipliers to our screening scenario eliminated concern for the Hydrogen Fluoride Production source category and reduced the estimated maximum projected acute impact of 1-hour formaldehyde concentrations at any acetal resins production facility to approximately twice the reference exposure level (HQ_{REL}=2), and approximately one-tenth the Acute Exposure Guideline Level (HQ_{AEGL-1}=0.1). The REL is a ''concentration level at or below which no adverse health effects are anticipated for a specified exposure duration,'' and ''exceeding the REL does not automatically indicate an adverse health impact.'' Furthermore, we believe that the likelihood of worst-case meteorological conditions occurring at the same time as a significant upset event and at the location where human exposure is the greatest is improbable. Therefore, considering the value of the maximum HQ along with the improbability of the convergence of worst-case SSM emissions (which we believe to be infrequent events), worst-case meteorological conditions and worst-case human exposure, we determined that this outcome did not warrant cause for concern.

Comment: One commenter noted that they had provided minor updates to emissions and modeling parameters for three facilities on November 19, 2004, and again in the fall of 2007, but noticed that these updates were not included in the documentation. The commenter noted that the updates will have no effect on the cancer MIR modeling and only a minor impact on the HI, and requested that EPA use the updated information if it determines additional modeling runs are necessary.

Response: We regret this error and have incorporated these changes into the datasets for these source categories. As these changes were very minor, we did not re-model with the updated versions of the data, as a review of the updated data showed that the risk results would not be affected to any appreciable degree.

Comment: We received comment both in favor of and objecting to the use of reported ''actual'' emissions in our analyses. The commenters in favor of this approach felt actual emissions provide more realistic estimates of risk. In contrast, one commenter thought actual emissions and associated impacts could increase over time, and analyses based on these emissions underestimate residual risk and are inconsistent with the applicability sections of the MACT standards.

Response: We have discussed the use of both MACT allowable emissions and actual emissions in previous actions, including the final National Emission Standards for Coke Oven Batteries residual risk rule and the proposed and final HON residual risk rules.[11] In those previous actions, we noted that modeling the MACT allowable levels of emissions (i.e., the highest emission levels that could be emitted while still complying with the NESHAP requirements) is inherently reasonable since they reflect the maximum level sources could emit and still comply with national emission standards. But we also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP. We recognize that facilities strive to achieve greater emissions reductions than required by MACT to allow for process variability and to prevent exceedances of standards due to emissions increases on individual days. Thus, failure to consider actual emissions estimates in

[9] All three terms are defined in 40 CFR 63.2. ''Malfunction'' means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused, in part, by poor maintenance or careless operation are not malfunctions. ''Shutdown'' means the cessation of operation of an affected source or portion of an affected source for any purpose. ''Startup'' means the setting in operation of an affected source or portion of an affected source for any purpose. And from the 2002 General Provisions for 40 CFR Part 63 BID for Promulgated Amendments [EPA–453/R–02–002], ''shutdown'' specifically means only the process of shutting off equipment or a process, and does not refer to the period of non-operation. Thus, during this period when a process is offline or between production runs, the source must meet the standard, including emission limits, as well as monitoring, recordkeeping, and reporting requirements.

[10] Our analysis of the SSM data on upset emissions (reported over an 11 month period in 2001) from the Houston, Texas area showed that SSM emissions for facilities in this area typically total significantly less than 15 percent of annual routine emissions, thereby minimizing their potential to increase chronic health risks to any significant degree. See Appendix 4 to ''Residual Risk Assessment for Eight Source Categories: Polysulfide Rubber Production, Ethylene Propylene Rubber Production, Butyl Rubber Production, Neoprene Production, Epoxy Resins Production, Non-nylon Polyamides Production, Hydrogen Fluoride Production, Acetal Resins Production'' (July 2008), which is available in the RTR Group 1 docket.

[11] *See* final National Emission Standards for Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and the proposed and final HON residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76603, December 21, 2006, respectively.

risk assessments could unrealistically inflate estimated risk levels because actual emissions estimates represent the typical practices of a facility.

We followed this approach for our analysis for the eight source categories. As explained in the preamble to the proposed rule, we evaluated whether allowable emissions would significantly vary from actual emissions. We concluded that actual emissions approximated allowable levels for all eight source categories and, thus, were sufficient for our review. 72 FR 70549–50. We received no comments that suggested or provided data indicating that actual emissions do not approximate the allowable levels for these eight source categories.

B. Risk Assessment Methodology

Comment: Comments were received arguing that the Agency's proposed quantified risks are over-estimated due to the conservative approach used in predicting risks, which included the use of upper bound unit risk estimates (URE) for cancer and a 70-year exposure assumption.

Response: We acknowledge that the use of upper bound URE and 70-year exposure duration are sources of uncertainty in our analyses that tend to overestimate risk. In general, EPA considers the URE to be an upper bound estimate based on the method of extrapolation, meaning it represents a plausible upper limit to the true value. The true risk is, therefore, likely to be less, though it could be greater, and could be as low as zero. With regard to exposure duration, we acknowledge that we did not address long-term population mobility (residence time or exposure duration) in this assessment or population growth or decline over 70 years, instead basing our assessment on the assumption that each person's predicted exposure is constant over the course of a 70-year lifetime.

As explained in our risk assessment, three metrics are generally estimated in assessing cancer risk: the MIR, the population risk distribution, and the cancer incidence. Our failure to consider short- or long-term population mobility does not bias our estimate of the theoretical MIR. (Note that the Benzene NESHAP states that the MIR ''does not necessarily reflect the true risk, but displays a conservative risk level which is an upperbound that is unlikely to be exceeded.'' [12]) Our estimates of cancer incidence also are not influenced by our population mobility assumptions, although both the length of time that modeled emissions sources at facilities actually operate (i.e., more or less than 70 years), and the domestic growth or decline of the modeled industry (i.e., the increase or decrease in the number or size of United States facilities), will influence the cancer incidence associated with a given source category.

Our population mobility (residence time or exposure duration) assumption does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby biasing the risk estimates high.

While the approach we use for our screening analysis is conservative, we note that where our screening analysis indicates a potential for risk, we then perform additional, more refined analyses that more closely approximate the true risk from sources that do not ''screen-out.''

Comment: We received comments both in favor of and objecting to the use of census block centroids in the analysis of chronic exposure and risk. One commenter argued that the use of the census block centroid dilutes the effect of sources' emissions, as the maximum point of impact can be far from the centroid and may be at or near a facility's property line, and suggested that the risks for a source category be based on concentrations at the fenceline and beyond and include risks to the maximally exposed individual. In contrast, other commenters felt the use of the census block centroids was appropriate for these source categories, and one commenter added that using the fenceline as a location to estimate risk is inappropriate in risk assessment because people do not generally live at the fenceline, and this approach would overstate risk.

Response: As we have noted in the development of previous residual risk rulemakings, such as the HON, EPA contends that, in a national-scale assessment of lifetime (chronic) inhalation exposures and health risks from facilities in a source category, it is appropriate to identify exposure locations where it may be reasonably expected that an individual will spend a majority of his or her lifetime, such as a census block centroid. Thus, EPA asserts that it is appropriate to use census block information where people actually reside rather than points on a fence-line, to estimate exposure and risk to individuals living near such facilities when assessing chronic risks. Census blocks are the finest resolution available in the nationwide population data (as developed by the United States Census Bureau); each is typically comprised of approximately 40 people or about 10 households. In EPA risk assessments, the geographic centroid of each census block containing at least one person is used to represent the location where all the people in that census block live. The census block centroid with the highest estimated exposure then becomes the location of maximum exposure, and the entire population of that census block experiences the maximum individual risk. In some cases, because actual residence locations may be closer to or farther from facility emission points than is the census block centroid, this may result in an overestimate or underestimate of the actual annual exposure. Given the relatively small dimensions of census blocks in densely-populated areas, there is little uncertainty introduced by using the census block centroids. There is more uncertainty when census blocks are larger. Recently, EPA used aerial photographs of several facilities to examine the locations of census block centroids and actual residences, and to assess the impact on maximum individual risk of using the census block centroid.[13] In cases where census blocks were small, there was no significant difference in estimated risk. In cases where the census blocks were relatively large, the centroid generally was found to be nearer the facility than the residential locations. Consequently, the risks at the census block centroid typically were higher than the risks at any actual residence. In most of these cases, the census block contained a portion of the facility property, thereby almost necessitating that actual residences be more distant than the block centroid. This result indicates that, if anything, using census block centroids is more likely to overestimate actual maximum individual risks than to underestimate them, although the differences are generally small. EPA believes it is appropriate to estimate chronic exposures and risks based on census block centroids because: (1) Census blocks are the finest resolution available in the national census data, (2) facility fencelines do not typically

[12] National Emission Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38045, September 14, 1989).

[13] *See* ''Sensitivity analysis of uncertainty in risk estimates resulting from estimating exposures at census block centroids near industrial facilities'' in RTR Group 1 docket.

represent locations where chronic exposures are likely, and (3) any bias introduced by using census block centroids may overestimate maximum individual risks.

III. Risk and Technology Review Final Decision

This final rule responds to public comments received on the proposed rule and announces our final decision not to revise the standards of the four NESHAP as they apply to the eight RTR Group 1 source categories. We conclude that the NESHAP applicable to each of the eight source categories evaluated in RTR Group 1— Polysulfide Rubber Production, Ethylene Propylene Rubber Production, Butyl Rubber Production, Neoprene Production, Epoxy Resins Production, Non-Nylon Polyamides Production, Acetal Resins Production, and Hydrogen Fluoride Production— provides an ample margin of safety to protect public health and prevents adverse environmental effects. Therefore, we are re-adopting each of the four RTR Group 1 MACT standards for purposes of meeting the requirements of CAA section 112(f)(2). In addition, we conclude that there have been no developments in practices, processes, or control technologies that support revision of the four MACT standards pursuant to CAA section 112(d)(6) for the eight source categories.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' This action is a significant regulatory action because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action makes no changes to the existing regulations affecting the eight source categories included in this final action and will impose no additional information collection burden.

C. Regulatory Flexibility Act

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

For purposes of assessing the impact of this action on small entities, small entity is defined as: (1) A small business whose parent company has fewer than 750 to 1,000 employees, depending on the size definition for the affected NAICS code (as defined by Small Business Administration (SBA) regulations at 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final decision does not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

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

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action makes no changes to the existing regulations affecting the eight source categories included in this final action; and, therefore, contains no requirements that apply to such governments or impose obligations upon them.

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'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This final decision 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. Thus, Executive Order 13132 does not apply to this action.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effect on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Discussion of this action's health and risk assessments are contained in Section I of this preamble.

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

This final decision is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this final decision is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

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 (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

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

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule would not relax the control measures on sources regulated by the rule and, therefore, would not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing these final rules and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the final rules in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register** . This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This final rule will be effective on December 16, 2008.

List of Subjects for 40 CFR Part 63

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 10, 2008.

Stephen L. Johnson,

Administrator.

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified BFEs will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below of the modified BFEs for each community listed. These modified BFEs have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of FEMA resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this final rule includes the address of the Chief Executive Officer of the community where the modified BFEs determinations are available for inspection.

The modified BFEs are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These 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 modified BFEs 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. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This final 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.

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 final rule involves no policies that

have federalism implications under Executive Order 13132, Federalism.

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

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 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.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
California: San Diego (FEMA Docket No.: B–1001.	City of San Diego (08–09–1015P).	July 10, 2008; July 17, 2008; *San Diego Transcript*.	The Honorable Jerry Sanders, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, CA 92101.	June 30, 2008	060295
Colorado: Arapahoe (FEMA Docket No.: B–1001).	City of Cherry Hills Village (08–08–0414P).	July 4, 2008; July 11, 2008; *The Englewood Herald*.	The Honorable Mike Wozniak, Mayor, City of Cherry Hills Village, 2450 East Quincy Avenue, Cherry Hills Village, CO 80113.	November 11, 2008	080013
Florida:					
Charlotte (FEMA Docket No.: B–1001).	City of Punta Gorda (08–04–4040P).	July 17, 2008; July 24, 2008; *Charlotte Sun*.	The Honorable Larry Friedman, Mayor, City of Punta Gorda, 326 West Marion Avenue, Punta Gorda, FL 33950.	June 30, 2008	120062
Monroe (FEMA Docket No.: B–1001).	Unincorporated areas of Monroe County (08–04–0421P).	July 10, 2008; July 17, 2008; *Key West Citizen*.	The Honorable Mario DiGennaro, Mayor, Monroe County, Florida Keys Marathon Airport, 9400 Overseas Highway, Suite 210, Marathon, FL 33050.	June 30, 2008	125129
Monroe (FEMA Docket No.: B–1001).	Unincorporated areas of Monroe County (08–04–3795P).	July 10, 2008; July 17, 2008; *Key West Citizen*.	The Honorable Mario DiGennaro, Mayor, Monroe County, Florida Keys Marathon Airport, 9400 Overseas Highway, Suite 210, Marathon, FL 33050.	June 30, 2008	125129
Sumter (FEMA Docket No.: B–1001).	City of Wildwood (08–04–0921P).	July 17, 2008; July 24, 2008; *Sumter County Times*.	The Honorable Ed Wolf, Mayor, City of Wildwood ,100 North Main Street, Wildwood, FL 34785.	June 30, 2008	120299
Kansas: Johnson (FEMA Docket No.: B–1001).	City of Overland Park (08–07–0908P).	July 9, 2008; July 16, 2008; *The Overland Park Sun*.	The Honorable Carl R. Gerlach, Mayor, City of Overland Park, 10084 Hemlock Drive, Overland Park, KS 66212.	June 30, 2008	200174
Michigan: Macomb (FEMA Docket No.: B–1001).	Township of Macomb (08–05–1867P).	July 16, 2008; July 23, 2008; *The Macomb Daily* and *Daily Tribune*.	The Honorable John D. Brennan, Township Supervisor, Township of Macomb, 54111 Broughton Road, Macomb, MI 48042.	July 2, 2008	260445
Mississippi: DeSoto (FEMA Docket No.: B–1001).	City of Olive Branch (08–04–2647P).	July 31, 2008; August 7, 2008; *DeSoto Times Today*.	The Honorable Samuel P. Rikard, Mayor, City of Olive Branch, 9200 Pigeon Roost Road, Olive Branch, MS 38654.	July 18, 2008	280286
Missouri:					
St. Charles (FEMA Docket No.: B–7797).	Unincorporated areas of St. Charles County (08–07–0068P).	June 25, 2008; July 2, 2008; *St. Charles Journal*.	The Honorable Steve Ehlmann, County Executive, St. Charles County, St. Charles County Courthouse, 100 North Third Street, St. Charles, MO 63301.	October 30, 2008	290315
St. Charles (FEMA Docket No.: B–7797).	City of St. Peters (08–07–0068P).	June 25, 2008; July 2, 2008; *St. Charles Journal*.	The Honorable Len Pagano, Mayor, City of St. Peters, One St. Peters Centre Boulevard, St. Peters, MO 63376.	October 30, 2008	290319
Nevada: Clark (FEMA Docket No.: B–7797).	Unincorporated areas of Clark County (07–09–1612P).	July 8, 2008; July 15, 2008; *Las Vegas Review-Journal*.	The Honorable Rory Reid, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89106.	November 12, 2008	320003
New York:					
New York (FEMA Docket No.: B–1001).	City of New York (08–02–0948P).	July 17, 2008; July 24, 2008; *New York Times*.	The Honorable Michael R. Bloomberg, Mayor, City of New York, One Centre Street, New York, NY 10007.	September 29, 2008	360497
Rockland (FEMA Docket No.: B–7788).	Town of Clarkstown (08–02–0127P).	May 22, 2008; May 29, 2008; *Rockland County Times*.	The Honorable Alexander J. Gromack, Supervisor, Town of Clarkstown, Ten Maple Avenue, New City, NY 10956.	November 18, 2008	360679
North Carolina: Onslow (FEMA Docket No.: B–7793).	City of Jacksonville (08–04–0469P).	June 13, 2008; June 20, 2008; *The Daily News*.	The Honorable Sammy Phillips, Mayor, City of Jacksonville, P.O. Box 128, Jacksonville, NC 28541.	June 6, 2008	370178
Oklahoma:					
Oklahoma (FEMA Docket No.: B–1001).	City of Edmond (08–06–0227P).	July 16, 2008; July 23, 2008; *The Edmond Sun*.	The Honorable Daniel R O'Neil, Mayor, City of Edmond, P.O. Box 2970, Edmond, OK 73083.	July 30, 2008	400252
Tulsa (FEMA Docket No.: B–1001).	City of Tulsa (08–06–1820P).	June 26, 2008; July 3, 2008; *Tulsa World*.	The Honorable Kathryn L. Taylor, Mayor, City of Tulsa, 200 Civic Center, Tulsa, OK 74103.	October 31, 2008	405381

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Tulsa (FEMA Docket No.: B–1008).	City of Tulsa (08–06–1865P).	July 31, 2008; August 7, 2008; *Tulsa World*.	The Honorable Kathryn L. Taylor, Mayor, City of Tulsa, 200 Civic Center, Tulsa, OK 74103.	July 17, 2008	405381
South Dakota: Pennington (FEMA Docket No.: B–1001).	City of Rapid City (08–08–0211P).	June 25, 2008; July 2, 2008; *Hill City Prevailer-News*.	The Honorable Alan Hanks, Mayor, City of Rapid City, 300 Sixth Street, Rapid City, SD 57701.	October 30, 2008	465420
Texas:					
Bexar (FEMA Docket No.: B–7797).	City of San Antonio (07–06–0823P).	June 26, 2008; July 3, 2008; *San Antonio Express News*.	The Honorable Phil Hardberger, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	October 31, 2008	480045
Bexar (FEMA Docket No.: B–1015).	City of San Antonio (07–06–0824P).	June 26, 2008; July 3, 2008; *San Antonio Express News*.	The Honorable Phil Hardberger, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	June 19, 2008	480045
Collin (FEMA Docket No.: B–7797).	City of McKinney (07–06–1407P).	June 26, 2008; July 3, 2008; *McKinney Courier Gazette*.	The Honorable Bill Whitfield, Mayor, City of McKinney, 222 North Tennessee Street, McKinney, TX 75069.	October 31, 2008	480135
Harris (FEMA Docket No.: B–7797).	Unincorporated areas of Harris County (07–06–2077P).	July 2, 2008; July 9, 2008; *Houston Chronicle*.	The Honorable Ed Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	October 30, 2008	480287
Tarrant (FEMA Docket No.: B–1011).	City of Euless (08–06–0770P).	April 4, 2008; April 11, 2008; *Colleyville Courier*.	The Honorable Mary Saleh, Mayor, City of Euless, 201 North Ector Drive, Euless, TX 76039.	August 11, 2008	480593
Virginia: Independent City (FEMA Docket No.: B–1001).	City of Winchester (08–03–0972P).	July 3, 2008; July 10, 2008; *The Winchester Star*.	The Honorable Elizabeth Minor, Mayor, City of Winchester, 231 East Piccadilly Street, Suite 310, Winchester, VA 22601.	October 31, 2008	510173
Wisconsin:					
Dodge (FEMA Docket No.: B–7797).	Unincorporated areas of Dodge County (07–05–4832P).	June 19, 2008; June 26, 2008; *Watertown Daily Times*.	The Honorable Russell E. Kottke, Chairman, Dodge County Board of Supervisors, 127 East Oak Street, Beaver Dam, WI 53039.	October 24, 2008	550094
Dodge (FEMA Docket No.: B–7797).	City of Watertown (07–05–4832P).	June 19, 2008; June 26, 2008; *Watertown Daily Times*.	The Honorable Ron Krueger, Mayor, City of Watertown, P.O. Box 477, Watertown, WI 53094.	October 24, 2008	550107

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29777 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–B–1023]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Assistant Administrator of FEMA reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These 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 the other Federal, State, or regional entities. The changed BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim 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.

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

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

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 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.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arizona:					
Pinal	City of Maricopa (07–09–1819P).	October 26, 2008; November 2, 2008; *Casa Grande Dispatch*.	The Honorable Anthony Smith, Major, City of Maricopa, P.O. Box 610, Maricopa, AZ 85239.	March 3, 2009	040052
Pinal	Unincorporated areas of Pinal County (07–09–1819P).	October 26, 2008; November 2, 2008; *Casa Grande Dispatch*.	The Honorable Lionel D. Ruiz, Chairman, Pinal County, Board of Supervisors, P.O. Box 827, Florence, AZ 85232.	March 3, 2009	040077
Arkansas: Pulaski	City of Little Rock (08–06–2112P).	November 4, 2008; November 11, 2008; *Arkansas Democrat Gazette*.	The Honorable Mark Stodola, Mayor, City of Little Rock, 500 West Markham Street, Suite 203, Little Rock, AR 72201.	October 29, 2008	050181
Colorado:.					
Arapahoe	Unincorporated areas of Arapahoe County (08–08–0760P).	November 14, 2008; November 21, 2008; *Rocky Mountain News*.	The Honorable Susan Beckman, Chairman, Arapahoe County, Board of Commissioners, 5334 South Prince Street, Littleton, CO 80166–0001.	March 23, 2009	080011
Boulder	City of Boulder (08–08–0701P).	October 24, 2008; October 31, 2008; *The Daily Camera*.	The Honorable Shaun McGrath, Mayor, City of Boulder, P.O. Box 791, Boulder, CO 80306.	October 10, 2008	080024
Boulder	Unincorporated areas of Boulder County (08–08–0701P).	October 24, 2008; October 31, 2008; *The Daily Camera*.	The Honorable Ben Pearlman, Chairman, Boulder County, Board of Commissioners, P.O. Box 471, Boulder, CO 80306.	October 10, 2008	080023
Denver	City and County of Denver (08–08–0760P).	November 14, 2008; November 21, 2008; *Rocky Mountain News*.	The Honorable John W. Hickenlooper, Mayor, City and County of Denver, 1437 Bannock Street, Suite 350, Denver, CO 80202.	March 23, 2009	080046
Douglas	Town of Parker (08–08–0810P).	October 30, 2008; November 6, 2008; *Douglas County News Press*.	The Honorable David Casiano, Mayor, Town of Parker, 20120 East Main Street, Parker, CO 80138–7334.	March 6, 2009	080310
Connecticut: New Haven.	Town of Branford (08–01–1042P).	November 13, 2008; November 20, 2008; *The Sound*.	The Honorable Anthony DaRos, First Selectman, Town of Branford, 1019 Main Street, Branford, CT 06405.	October 31, 2008	090073
Delaware:					
New Castle	Unincorporated areas of New Castle County (08–03–0143P).	November 12, 2008; November 19, 2008; *The News Journal*.	The Honorable Christopher Coons, County Executive, New Castle County, 87 Read's Way, New Castle, DE 19720.	October 31, 2008	105085
New Castle	City of Wilmington (08–03–0143P).	November 12, 2008; November 19, 2008; *The News Journal*.	The Honorable James M. Baker, Mayor, City of Wilmington, 800 North French Street, Wilmington, DE 19801.	October 31, 2008	100028
Florida:					
Bay	Unincorporated areas of Bay County (08–04–2649P).	October 31, 2008; November 7, 2008; *The News Herald*.	The Honorable Jerry L. Girvin, Chairman, Bay County Board of Commissioners, 810 West Eleventh Street, Panama City, FL 32401.	March 9, 2009	120004
Bay	City of Panama City Beach (08–04–2649P).	October 31, 2008; November 7, 2008; *The News Herald*.	The Honorable Gayle Oberst, Mayor, City of Panama City Beach, 110 South Arnold Road, Panama City Beach, FL 32413.	March 9, 2009	120013
Collier	City of Naples (08–04–4493P).	October 22, 2008; October 29, 2008; *Naples Daily News*.	The Honorable Bill Barnett, Mayor, City of Naples, 735 Eighth Street South, Naples, FL 34102.	October 15, 2008	125130
Georgia: Muscogee County Consolidated Government.	City of Columbus—Muscogee County Consolidated Government (08–04–3155P).	May 21, 2008; May 29, 2008; *The Columbus Times*.	The Honorable Jim Wetherington, Mayor, City of Columbus—Muscogee County Consolidated Government, P.O. Box 1340, Columbus, GA 31902.	August 25, 2008	135158

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Minnesota: Olmsted	City of Oronoco (08–05–3390P).	November 12, 2008; November 19, 2008; *The News Record*.	The Honorable Scott Keigley, Mayor, City of Oronoco, P.O. Box 195, Oronoco, MN 55960.	October 31, 2008	270330
Nevada: Elko	City of Elko (08–09–0345P).	October 24, 2008; October 31, 2008; *Elko Daily Free Press*.	The Honorable Michael J. Franzoia, Mayor, City of Elko, 1751 College Avenue, Elko, NV 89801.	March 2, 2009	320010
New Jersey: Passaic	Township of Little Falls (08–02–0616P).	April 4, 2008; April 11, 2008; *Herald News*.	The Honorable Eugene Kulick, Mayor, Township of Little Falls, 225 Main Street, Little Falls, NJ 07424.	August 11, 2008	340401
South Carolina: Lexington.	Unincorporated areas of Lexington County (08–04–1961P).	October 29, 2008; November 5, 2008; *The State*.	The Honorable William C. Derrik, Chairman, Lexington County Council, 2241 Ridge Road, Leesville, SC 29070.	March 5, 2009	450129
Texas:					
Bell	City of Killeen (07–06–1831P).	October 30, 2008; November 6, 2008; *Killeen Daily Herald*.	The Honorable Timothy L. Hancock, Mayor, City of Killeen, P.O. Box 1329, Killeen, TX 76540.	March 6, 2009	480031
Bexar	Unincorporated areas of Bexar County (07–06–2018P).	October 31, 2008; November 7, 2008; *San Antonio Express News*.	The Honorable Nelson W. Wolff, Bexar County Judge, 100 Dolorosa Street, Suite 120, San Antonio, TX 78205.	March 9, 2009	480035
Bexar	City of San Antonio (07–06–2018P).	October 31, 2008; November 7, 2008; *San Antonio Express News*.	The Honorable Phil Hardberger, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	March 9, 2009	480045
Johnson	City of Burleson (08–06–0984P).	November 5, 2008; November 12, 2008; *Burleson Star*.	The Honorable Kenneth Shetter, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	March 12, 2009	485459
Kendall	City of Boerne (08–06–1974P).	October 14, 2008; October 21, 2008; *The Boerne Star*.	The Honorable Dan Heckler, Mayor, City of Boerne, P.O. Box 1677, Boerne, TX 78006.	September 24, 2008	480418
Travis	City of Austin (08–06–2992P).	November 12, 2008; November 19, 2008; *Austin American Statesman*.	The Honorable Will Wynn, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767.	October 31, 2008	480624
Webb	City of Laredo (08–06–0322P).	July 4, 2008; July 11, 2008; *Laredo Morning Times*.	The Honorable Raul G. Salinas, Mayor, City of Laredo, 1110 Houston Street, Laredo, TX 78040.	November 10, 2008	480651
Utah: Washington	City of St. George (08–08–0509P).	July 3, 2008; July 10, 2008; *The Spectrum*.	The Honorable Daniel D. McArthur, Mayor, City of St. George, 175 East 200 North, St. George, UT 84770.	November 7, 2008	490177

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29776 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final 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.

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 final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final 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 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.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Santa Clara County, California, and Incorporated Areas FEMA Docket No.: B–7764			
San Tomas Aquino Creek	Approximately 20 feet downstream of Quito Road	+376	City of Monte Sereno.
	Approximately 460 feet upstream of Quito Road	+439	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Monte Sereno

Maps are available for inspection at City of Monte Sereno Engineering Department, 18041 Saratoga-Los Gatos Road, Monte Sereno, CA.

Walton County, Georgia, and Incorporated Areas FEMA Docket No.: B–7764			
Alcovy River	Approximately 525 feet downstream of confluence of Cedar Creek Southeast.	+782	Unincorporated Areas of Walton County.
	Approximately 1,740 feet upstream of confluence of Cedar Creek Southeast.	+784	
Apalachee River	Approximately 2,600 feet downstream of upstream county boundary with Gwinnett County.	+820	Unincorporated Areas of Walton County.
	At upstream county boundary with Gwinnett County	+823	
Bay Creek	Approximately 345 feet downstream of county boundary with Gwinnett County.	+792	Unincorporated Areas of Walton County.
	Approximately 670 feet upstream of county boundary with Gwinnett County.	+796	
Big Haynes Creek	At downstream county boundary with Rockdale County	+846	Unincorporated Areas of Walton County.
	At upstream county boundary with Gwinnett County	+849	
Brushy Fork Creek	Approximately 1,740 feet downstream of Centerville Rosebud Road.	+862	Unincorporated Areas of Walton County, City of Loganville.
	Approximately 2,550 feet upstream of Old Loganville Road	+906	
Cedar Creek Southeast	At confluence with Alcovy River	+782	Unincorporated Areas of Walton County.
	Approximately 2,840 feet upstream of confluence with Alcovy River.	+796	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Loganville

Maps are available for inspection at 4385 Pecan Street, Loganville, GA 30052.

Unincorporated Areas of Walton County

Maps are available for inspection at 303 South Hammond Drive, Suite 330, Monroe, GA 30655.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Miller County, Missouri, and Incorporated Areas FEMA Docket No.: B–7759			
Grand Glaize Creek	Approximately 1 mile downstream of County Road 42–18	+672	Unincorporated Areas of Miller County.
	Approximately 3,000 feet upstream of County Road 42–18	+680	
Lake of the Ozarks (Osage River and tributaries).	At Bagnell Dam	+664	City of Lake Ozark, Town of Lakeside, Unincorporated Areas of Miller County.
	Approximately 1 mile upstream of Bagnell Dam	+664	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Lake Ozark
Maps are available for inspection at City Office, 2624 Bagnell Dam Boulevard, Lake Ozark, MO 65049.

Town of Lakeside
Maps are available for inspection at Ameran UE, 617 River Road, Lake Ozark, MO 65049.

Unincorporated Areas of Miller County
Maps are available for inspection at County Office, 2001 Highway 52, Tuscumbia, MO 65082.

Yadkin County, North Carolina and Incorporated Areas Docket Nos.: FEMA–B–7770 and FEMA–B–7779			
Arnold Branch	At the confluence with South Deep Creek	+1,030	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of Rena Road (State Road 1316).	+1,113	
Beaverdam Creek	At the confluence with Cobb Creek and Jonesville Creek	+909	Unincorporated Areas of Yadkin County, Town of Jonesville.
	Approximately 1,190 feet upstream of Haynes Road (State Road 1312).	+1,030	
Big Kennedy Creek	At the Iredell/Yadkin County boundary	+847	Unincorporated Areas of Yadkin County.
	Approximately 160 feet upstream of the Iredell/Yadkin County boundary.	+849	
Cain Mill Branch	At the Davie/Yadkin County boundary	+795	Unincorporated Areas of Yadkin County.
	Approximately 1,590 feet upstream of Snow Road (State Road 1160).	+858	
Chinquapin Creek	At the Davie/Yadkin County boundary	+788	Unincorporated Areas of Yadkin County.
	Approximately 90 feet downstream of Baity Road (State Road 1723).	+805	
Cobb Creek	At the confluence with Beaverdam Ceek and Jonesville Creek.	+909	Unincorporated Areas of Yadkin County, Town of Jonesville.
	Approximately 1.2 miles upstream of Swaim Road	+951	
Cranberry Creek	At the confluence with South Deep Creek	+844	Unincorporated Areas of Yadkin County.
	Approximately 1.9 miles upstream of Whitaker Road (State Road 1334).	+1,019	
Deep Creek	At the confluence with Yadkin River	+718	Unincorporated Areas of Yadkin County.
	Approximately 1,150 feet downstream of Speer Bridge Road (State Road 1711).	+731	
Dobbins Creek	At the confluence with North Little Hunting Creek	+977	Unincorporated Areas of Yadkin County.
	Approximately 0.6 mile upstream of Twin Creek Road (State Road 1319).	+1,060	
Dobbins Creek Tributary	At the confluence with Dobbins Creek	+1,040	Unincorporated Areas of Yadkin County.
	At the downstream side of Sandy Creek Drive	+1,051	
Fall Creek	At the confluence with Yadkin River	+833	Unincorporated Areas of Yadkin County.
	Approximately 1,575 feet upstream of NC Highway 67	+960	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Fisher Creek	At the confluence with South Deep Creek	+777	Unincorporated Areas of Yadkin County.
	Approximately 910 feet upstream of Brandon Hills Road (State Road 1153).	+798	
Flat Rock Branch	At the confluence with North Little Hunting Ceek	+839	Unincorporated Areas of Yadkin County.
	Approximately 810 feet downstream of Flat Rock Church Road.	+941	
Forbush Creek	At the confluence with Yadkin River	+720	Unincorporated Areas of Yadkin County.
	Approximately 400 feet upstream of Union Grove Church Road (State Road 1585).	+922	
Forbush Creek Tributary 1	At the confluence with Forbush Creek	+747	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of the confluence with Forbush Creek.	+762	
Forbush Creek Tributary 2	At the confluence with Forbush Creek	+748	Unincorporated Areas of Yadkin County.
	Approximately 1.1 miles upstream of the confluence with Forbush Creek.	+795	
Forbush Creek Tributary 3	At the confluence with Forbush Creek	+809	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of the confluence with Foxbrush Creek.	+836	
Forbush Creek Tributary 4	At the confluence with Forbush Creek	+830	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of Griffin Road (State Road 1591).	+852	
Forbush Creek Tributary 5	At the confluence with Forbush Creek	+889	Unincorporated Areas of Yadkin County.
	Approximately 0.8 mile upstream of Bovendertown Road (State Road 1584).	+942	
Hall Creek	At the confluence with Yadkin River	+778	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of the confluence of Hall Creek Tributary 2.	+902	
Hall Creek Tributary 1	At the confluence with Hall Creek	+853	Unincorporated Areas of Yadkin County.
	Approximately 0.6 mile upstream of the confluence with Hall Creek.	+875	
Hall Creek Tributary 2	At the confluence with Hall Creek	+874	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of the confluence with Hall Creek.	+901	
Harmon Creek	Approximately 0.5 mile upstream of the confluence with South Deep Creek.	+741	Unincorporated Areas of Yadkin County.
	Approximately 1,990 feet upstream of Ray T Moore Road (State Road 1725).	+812	
Hauser Creek	At the confluence with Yadkin River	+711	Unincorporated Areas of Yadkin County.
	At the Davie/Yadkin County boundary	+711	
Haw Branch	At the confluence with North Deep Creek	+800	Unincorporated Areas of Yadkin County, Town of Yadkinville.
	Approximately 1.1 miles upstream of the confluence with North Deep Creek.	+825	
Jonesville Creek	At the confluence with Sandyberry Creek	+896	Town of Jonesville.
	At the confluence of Cobb Creek and Beaverdam Creek	+909	
Lineberry Creek	At the confluence with Yadkin River	+883	Unincorporated Areas of Yadkin County.
	Approximately 1.2 miles upstream of NC Highway 67	+900	
Little Forbrush Creek	At the confluence with Forbrush Creek	+769	Unincorporated Areas of Yadkin County.
	Approximately 1.3 miles upstream of the confluence of Little Forbrush Creek Tributary 1.	+956	
Little Forbush Creek Tributary 1	At the confluence witih Little Forbush Creek	+880	Unincorporated Areas of Yadkin County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.9 mile upstream of the confluence with Little Forbush Creek.	+956	
Logan Creek	At the confluence with Forbush Creek	+720	Unincorporated Areas of Yadkin County.
	Approximately 1,180 feet downstream of NC Highway 67	+959	
Logan Creek Tributary 1	At the confluence with Logan Creek	+813	Unincorporated Areas of Yadkin County.
	Approximately 2.2 miles upstream of the confluence with Logan Creek.	+883	
Logan Creek Tributary 2	At the confluence with Logan Creek	+850	Unincorporated Areas of Yadkin County.
	Approximately 1,800 feet upstream of Dal Road (State Road 1581).	+906	
Logan Creek Tributary 3	At the confluence with Logan Creek	+912	Unincorporated Areas of Yadkin County.
	Approximately 1.5 miles upstream of Mill Hill Road (State Road 1542).	+987	
Loney Creek	At the confluence with Logan Creek	+739	Unincorporated Areas of Yadkin County.
	Approximately 1.7 miles upstream of the confluence with Logan Creek.	+786	
Long Branch	At the Iredell/Yadkin County boundary	+898	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of Barron Hill Road (State Road 1102).	+948	
Long Branch North	At the confluence with North Little Hunting Creek	+938	Unincorporated Areas of Yadkin County.
	Approximately 1,350 feet upstream of Wells Hollow Drive	+1,075	
Mill Branch	At the confluence with Logan Creek	+722	Unincorporated Areas of Yadkin County.
	Approximately 1.2 miles upstream of Bloomtown Road (State Road 1569).	+758	
Miller Creek	At the confluence with Yadkin River	+757	Unincorporated Areas of Yadkin County.
	Approximately 60 feet downstream of Apperson Road (State Road 1557).	+766	
North Deep Creek	Approximately 250 feet upstream of the confluence with Deep Creek and South Deep Creek.	+739	Unincorporated Areas of Yadkin County, Town of Yadkinville.
	Approximately 1.2 miles upstream of Spencer Road (State Road 1385).	+1,065	
North Deep Creek Tributary 1	At the confluence with North Deep Creek	+831	Unincorporated Areas of Yadkin County.
	Approximately 1.5 miles upstream of the confluence with North Deep Creek.	+872	
North Deep Creek Tributary 2	At the confluence with North Deep Creek	+835	Unincorporated Areas of Yadkin County, Town of Yadkinville.
	Approximately 1.1 miles upstream of U.S. Highway 601	+897	
North Deep Creek Tributary 2A	At the confluence with North Deep Creek Tributary 2	+860	Town of Yadkinville, Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of the confluence with North Deep Creek Tributary 2.	+877	
North Deep Creek Tributary 3	At the confluence with North Deep Creek	+840	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of Shugarts Mill Road (State Road 1379).	+873	
North Deep Creek Tributary 4	At the confluence with North Deep Creek	+847	Unincorporated Areas of Yadkin County, Town of Boonville.
	Approximately 1.0 mile upstream of Baptist Church Road	+941	
North Deep Creek Tributary 4A	At the confluence with North Deep Creek Tributary 4	+854	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of the confluence with North Deep Creek Tributary 4.	+875	
North Deep Creek Tributary 4B	At the confluence with North Deep Creek Tributary 4	+884	Unincorporated Areas of Yadkin County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.4 mile upstream of Abraham Road (State Road 1512).	+921	
North Little Hunting Creek	At the Iredell/Yadkin County boundary	+813	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of Union Church Road (State Road 1109).	+1,025	
North Little Hunting Creek Tributary 1.	At the confluence with North Little Hunting Creek	+825	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of the confluence with North Little Hunting Creek.	+836	
North Little Hunting Creek Tributary 2.	At the confluence with North Little Hunting Creek	+947	Unincorporated Areas of Yadkin County.
	Approximately 210 feet downstream of Old U.S. Highway 421 West.	+1,091	
Roby Creek	At the confluence with Turner Creek	+712	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of Georgia Road (State Road 1717).	+761	
Rocky Branch	At the confluence with North Little Hunting Creek	+887	Unincorporated Areas of Yadkin County.
	Approximately 630 feet downstream of Rocky Branch Road.	+1,027	
Sandyberry Creek	At the upstream side of Center Road	+948	Unincorporated Areas of Yadkin County, Town of Jonesville.
	Approximately 140 feet downstream of Interstate 77	+1,062	
South Deep Creek	At Old Stage Road (State Road 1733)	+741	Unincorporated Areas of Yadkin County, Town of Yadkinville.
	Approximately 1,700 feet downstream of Rock House Mountain Road (State Road 1349).	+1,043	
South Deep Creek Tributary 1	At the confluence with South Deep Creek	+763	Unincorporated Areas of Yadkin County, Town of Yadkinville.
	Approximately 1,580 feet upstream of Billy Reynolds Road (State Road 1134).	+932	
South Deep Creek Tributary 3	At the confluence with South Deep Creek	+780	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of Merry Acres Drive	+818	
South Deep Creek Tributary 3A	At the confluence with South Deep Creek Tributary 3	+784	Unincorporated Areas of Yadkin County.
	Approximately 780 feet upstream of Helton Road (State Road 1136).	+802	
South Deep Creek Tributary 3B	At the confluence with South Deep Creek Tributary 3	+794	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of Arnold Road (State Road 1132).	+827	
South Deep Creek Tributary 4	At the confluence with South Deep Creek	+885	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of Cranberry Road (State Road 1343).	+1,078	
South Deep Creek Tributary 4A	At the confluence with South Deep Creek Tributary 4	+1,051	Unincorporated Areas of Yadkin County.
	Approximately 550 feet downstream of Longtown Road (State Road 1338).	+1,075	
South Deep Creek Tributary 5	At the confluence with South Deep Creek	+930	Unincorporated Areas of Yadkin County.
	Approximately 900 feet upstream of Marler Road (State Road 1103).	+1,076	
South Deep Creek Tributary 5A	At the confluence with South Deep Creek Tributary 5	+954	Unincorporated Areas of Yadkin County.
	Approximately 360 feet downstream of Marler Road (State Road 1103).	+1,043	
South Deep Creek Tributary 6	At the confluence with South Deep Creek	+1,007	Unincorporated Areas of Yadkin County.
	Approximately 160 feet downstream of U.S. Highway 21	+1,017	
South Deep Tributary 7	At the confluence with South Deep Creek	+1,020	Unincorporated Areas of Yadkin County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 1,100 feet downstream of Swaims Church Road (State Road 1347).	+1,035	
Steelman Creek	At the Davie/Yadkin County boundary	+795	Unincorporated Areas of Yadkin County.
	Approximately 0.9 mile upstream of Else Road (State Road 1163).	+829	
Tanyard Creek	At the confluence with Yadkin River	+840	Unincorporated Areas of Yadkin County, Town of Boonville.
	Approximately 1.4 miles upstream of River Road (State Road 1367).	+909	
Turner Creek	At the confluence with Yadkin River	+712	Unincorporated Areas of Yadkin County.
	Approximately 0.4 mile upstream of Turners Creek Road (State Road 1728).	+824	
Turner Creek Tributary 1	At the confluence with Turner Creek	+712	Unincorporated Areas of Yadkin County.
	Approximately 0.7 mile upstream of the confluence with Turner Creek.	+719	
Walkers Branch	At the confluence with North Little Hunting Creek	+880	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of Buck Shoals Road (State Road 1103).	+1,006	
Williams Creek	At the confluence with Yadkin River	+882	Unincorporated Areas of Yadkin County.
	Approximately 180 feet upstream of Hailey Drive	+899	
Yadkin River	At the Davie/Forsyth/Yadkin County boundary	+711	Unincorporated Areas of Yadkin County, Town of Jonesville.
	Approximately 500 feet downstream of the Surry/Wilkes/Yadkin County boundary.	+903	
Yadkin River Tributary 10	At the confluence with Yadkin River	+748	Unincorporated Areas of Yadkin County.
	Approximately 90 feet downstream of Hauser Road	+784	
Yadkin River Tributary 11	At the confluence with Yadkin River	+854	Unincorporated Areas of Yadkin County, Town of Boonville.
	Approximately 1.0 mile upstream of U.S. Highway 601	+964	
Yadkin River Tributary 15	At the confluence with Yadkin River	+815	Unincorporated Areas of Yadkin County.
	Approximately 475 feet upstream of Limerock Road (State Road 1529).	+826	
Yadkin River Tributary 17	At the confluence with Yadkin River	+827	Unincorporated Areas of Yadkin County.
	Approximately 0.5 mile upstream of Doe Run Drive	+849	
Yadkin River Tributary 27	At the confluence with Yadkin River	+771	Unincorporated Areas of Yadkin County, Town of East Bend.
	Approximately 3.2 miles upstream of the confluence with Yadkin River.	+951	
Yadkin River Tributary 9	At the confluence with Yadkin River	+741	Unincorporated Areas of Yadkin County.
	Approximately 1.8 miles upstream of Butner Mill Road (State Road 1562).	+847	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Town of Boonville

Maps are available for inspection at Boonville Town Hall, 110 North Carolina Avenue, Boonville, North Carolina.

Town of East Bend

Maps are available for inspection at East Bend Town Hall, 108 West Main Street, East Bend, North Carolina.

Town of Jonesville

Maps are available for inspection at Jonesville Town Hall, 136 West Main Street, Jonesville, North Carolina.

Town of Yadkinville

Maps are available for inspection at Yadkinville Town Hall, 213 Van Buren Street, Yadkinville, North Carolina.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Unincorporated Areas of Yadkin County			
Maps are available for inspection at Yadkin County Manager's Office, 217 East Willow Street, Yadkinville, North Carolina.			
Creek County, Oklahoma, and Incorporated Areas FEMA Docket No.: B–7752			
Nickel Creek	Approximately 2800 feet upstream of W 91st Street intersection.	+640	City of Sapulpa, Unincorporated Areas of Creek County.
	At intersection with Land Road	+670	
Polecat Creek	Approximately 75 feet upstream of Creek Turnpike Intersection.	+654	City of Sapulpa, Unincorporated Areas of Creek County.
	Approximately 200 feet upstream of Highway 75A intersection.	+671	
Polecat Creek Tributary 2	Confluence with Polecat Creek	+645	City of Sapulpa, Unincorporated Areas of Creek County.
	Approximately 5,000 feet upstream of Albert Lewis Ward Road intersection.	+676	
Polecat Creek Tributary 4	Approximately 340 feet downstream from Tulsa Sapulpa and Union Railroad (BFE remains constant).	+656	City of Sapulpa, Unincorporated Areas of Creek County.
	Approximately 200 feet upstream of W 91st Street Intersection (BFE remains constant).	+656	
Polecat Creek Tributary 4–1	Approximately 970 feet downstream of Tulsa Sapulpa and Union Railroad.	+656	City of Sapulpa, Unincorporated Areas of Creek County.
	Approximately 175 feet upstream of intersection with W 91st Street.	+706	
Rock Creek	Confluence with Polecat Creek	+669	City of Sapulpa, Unincorporated Areas of Creek County.
	Approximately 80 feet upstream of intersection with IH–44	+685	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Sapulpa

Maps are available for inspection at 425 East Dewey, Sapulpa, OK 74066.

Unincorporated Areas of Creek County

Maps are available for inspection at 317 East Lee, Sapulpa, OK 74066.

Sevier County, Tennessee, and Incorporated Areas FEMA Docket No.: B–7752			
East Fork Little Pigeon River	840 feet upstream of the Confluence with Little Pigeon River.	+939	Unincorporated Areas of Sevier County, City of Sevierville.
	1,007 feet upstream of Oma Lee Drive	+1019	
French Broad River	1,456 feet downstream of Confluence with Dry Branch	+856	Unincorporated Areas of Sevier County, City of Sevierville.
	2,179 feet upstream of State Highway 338	+885	
Gists Creek	3,066 feet upstream of Confluence with Little Pigeon River.	+886	Unincorporated Areas of Sevier County, City of Sevierville.
	1,489 feet upstream of Chapman Highway	+906	
Little Pigeon River	1,441 feet downstream of Boyds Creek Road	+879	City of Sevierville, Unincorporated Areas of Sevier County.
	1,220 feet downstream of Confluence with Lone Branch	+948	
Middle Creek	575 feet upstream of River Place	+905	City of Sevierville, City of Pigeon Forge.
	2,200 feet downstream of Upper Middle Creek Road	+1010	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Mill Creek	342 feet upstream of Confluence with West Prong Little Pigeon River.	+965	City of Pigeon Forge, Unincorporated Areas of Sevier County.
	524 feet upstream of Mill Creek Road	+1121	
Walden Creek	220 feet upstream of Confluence with West Prong Little Pigeon River.	+965	City of Pigeon Forge, Unincorporated Areas of Sevier County.
	276 feet downstream of Little Valley Road	+1006	
West Prong Little Pigeon River	160 feet downstream of West Main Street	+901	City of Sevierville, City of Pigeon Forge, Unincorporated Areas of Sevier County.
	1,467 feet upstream of 321	+1057	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Pigeon Forge

Maps are available for inspection at Public Works, 225 Pine Mountain Road, Pigeon Forge, TN 37863.

City of Sevierville

Maps are available for inspection at Sevierville City Hall, 120 Gary Wade Blvd., Sevierville, TN 37862.

Unincorporated Areas of Sevier County

Maps are available for inspection at Sevierville County Emergency Management, 245 Bruce Street, Sevierville, TN 37862.

Travis County, Texas and Incorporated Areas
FEMA Docket No.: B–7464

Blunn Creek	Confluence with Colorado River	+440	City of Austin.
	Approximately 1,570 feet upstream from the intersection with Alpine Drive.	+648	
Boggy Creek North	Confluence with Colorado River	+432	City of Austin.
	Intersection with Airport Blvd	+590	
Boggy Creek Tributary 1	Confluence with Boggy Creek North	+446	City of Austin.
	Intersection with Airport Blvd	+458	
Carson Creek	Confluence with Colorado River	+423	City of Austin, Unincorporated Areas of Travis County.
	Approximately 4,100 feet upstream from the intersection with Metro Center Drive.	+570	
Carson Creek Tributary 2	Confluence with Carson Creek	+440	City of Austin.
	Approximately 1,500 feet upstream from the intersection with State Hwy 71.	+458	
Carson Creek Tributary 3	Confluence with Carson Creek	+432	City of Austin.
	Intersection with Thornberry Road	+478	
Carson Creek Tributary 4	Confluence with Carson Creek	+432	City of Austin.
	Approximately 1,000 feet downstream from the intersection with Dalton Lane.	+440	
Clarkson Branch	Confluence with Boggy Creek North	+548	City of Austin.
	Intersection with 38th 1/2 Street	+576	
Colorado River	Confluence with unnamed tributary	+391	City of Austin, City of Jonestown, City of Lago Vista, City of Lakeway, City of Rollingwood, City of Round Rock, City of Webberville, City of West Lake Hills, Unincorporated Areas of Travis County, Village of Briarcliff, Village of Point Venture.
	Downstream face of Mansfield Dam	+722	
Country Club Creek East (Old Country Club Creek).	Confluence with Colorado River	+437	City of Austin.
	Approximately 3,100 feet upstream from the intersection with Riverside Drive.	+565	
Country Club Creek East Tributary 1.	Confluence with Country Club Creek East	+449	City of Austin.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Intersection with Fairway Street	+493	
Country Club Creek East Tributary 2 (Old Country Club Creek).	Confluence with Country Club Creek East	+453	City of Austin.
	Approximately 220 feet downstream from the intersection with Crossing Place.	+457	
Country Club Creek East Tributary 3.	Confluence with Country Club Creek East	+466	City of Austin.
	Approximately 380 feet upstream from the intersection with Riverside Drive.	+502	
Country Club Creek East Tributary 4.	Confluence with Country Club Creek East	+497	City of Austin.
	Approximately 430 feet downstream from the intersection with Grove Blvd.	+536	
Country Club Creek West (New Country Club Creek).	Confluence with Colorado River	+438	City of Austin.
	Approximately 2,340 feet upstream from the intersection with Metcalfe Road.	+612	
Country Club Creek West Tributary 1.	Confluence with Country Club Creek West	+465	City of Austin.
	Approximately 750 feet upstream from the intersection with Riverside Drive.	+542	
Country Club Creek West Tributary 2.	Confluence with Country Club Creek West	+485	City of Austin.
	Approximately 1,290 feet upstream from the intersection with Oltorf Street.	+599	
Country Club Creek West Tributary 3.	Confluence with Country Club Creek West	+501	City of Austin.
	Intersection with State Hwy 71/Ben White Blvd	+612	
Country Club Creek West Tributary 3A.	Confluence with Country Club Creek West Tributary 3	+550	City of Austin.
	Approximately 1,460 feet upstream from the confluence with Country Club Creek West Tributary 3.	+610	
Country Club Creek West Tributary 4.	Confluence with Country Club Creek West	+523	City of Austin.
	Intersection with Burleson Road	+575	
Country Club Creek West Tributary 5.	Confluence with Country Club Creek West	+553	City of Austin.
	Approximately 680 feet upstream from the intersection with Granada Drive.	+608	
Danz Creek	Confluence with Slaughter Creek	+746	City of Austin.
	Intersection with FM 1826	+989	
Danz Creek Split	Confluence with Danz Creek	+783	City of Austin.
	Divergence from Danz Creek	+844	
Danz Creek Tributary 1	Confluence with Danz Creek	+766	City of Austin.
	Approximately 1 mile upstream from the confluence with Danz Creek.	+787	
Danz Creek Tributary 2	Confluence with Danz Creek	+860	City of Austin.
	Approximately 1 mile upstream from the confluence with Danz Creek.	+894	
Dry Creek North	Confluence with Colorado River	+494	City of Austin.
	Approximately 1,050 feet upstream from the intersection with Laurel Valley Drive.	+761	
Dry Creek North Tributary 1	Confluence with Dry Creek North	+556	City of Austin.
	Approximately 940 feet upstream from the intersection with FM 2222.	+613	
Dry Creek North Tributary 2	Confluence with Dry Creek North	+573	City of Austin.
	Intersection with Berry Hill Drive	+623	
Dry Creek North Tributary 3	Confluence with Dry Creek North	+582	City of Austin.
	Approximately 870 feet upstream from the confluence with Dry Creek North.	+602	
Dry Creek North Tributary 4	Confluence with Dry Creek North	+602	City of Austin.
	Approximately 640 feet upstream from the intersection with Dry Creek Drive.	+641	
East Bouldin Creek	Confluence with Colorado River	+440	City of Austin.
	Intersection with Ben White Blvd	+655	
East Branch of Fort Branch Creek Tributary 1.	Confluence with Fort Branch Creek Tributary 1	+557	City of Austin.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 400 feet upstream from the intersection with Rogge Lane.	+575	
Fort Branch Creek	Confluence with Boggy Creek North	+440	City of Austin.
	Approximately 160 feet upstream from the intersection with Glencrest Drive.	+640	
Fort Branch Creek Tributary 1	Confluence with Fort Branch	+532	City of Austin.
	Approximately 400 feet upstream from the intersection with Rogge Lane.	+591	
Fort Branch Creek Tributary 2	Confluence with Fort Branch	+584	City of Austin.
	Approximately 900 feet upstream from the intersection with Gaston Place.	+605	
Grayson Branch	Confluence with Boggy Creek North	+547	City of Austin.
	Intersection with 39th Street	+557	
Harris Branch	Approximately 3,000 feet upstream of the confluence with Gilleland Creek.	+537	City of Austin, Unincorporated Areas of Travis Country.
	Approximately 300 feet upstream from the intersection with Park Crossing.	+743	
Harris Branch Tributary 4	Confluence with Harris Branch	+602	City of Austin, Unincorporated Areas of Travis Country.
	Intersection with Harris Ridge Blvd	+723	
Harris Branch Tributary 6	Confluence with Harris Branch	+597	City of Austin, Unincorporated Areas of Travis County.
	Approximately 1 mile upstream from the confluence with Harris Branch.	+628	
Kincheon Creek	Confluence with Williamson Creek	+679	City of Austin.
	Approximately 750 feet upstream from the intersection with Abilene Trail.	+838	
Little Walnut Creek	Confluence with Walnut Creek	+470	City of Austin.
	Intersection with Metric Blvd	+731	
Little Walnut Creek Tributary 1	Confluence with Little Walnut Creek	+537	City of Austin.
	Intersection with Chevy Chase Drive	+684	
Little Walnut Creek Tributary 3	Confluence with Little Walnut Creek	+669	City of Austin.
	Approximately 740 feet upstream from the intersection with Northgate Blvd.	+716	
Montopolis Tributary	Confluence with Carson Creek	+450	City of Austin.
	Approximately 1 mile upstream from the intersection with Dalton Lane.	+472	
North Fork West Bouldin Creek	Confluence with West Bouldin Creek	+564	City of Austin.
	Approximately 300 feet upstream from the instersection with Manchaca Road.	+641	
Onion Creek	Confluence with the Colorado River	+408	City of Austin, Unincorporated Areas of Travis County.
	Approximately 5,500 feet upstream from the confluence of Garlic Creek and Onion Creek (Travis and Hays County Line).	+646	
Pleasant Hill Tributary	Confluence with Williamson Creek	+575	City of Austin.
	Intersection with South Congress Road	+654	
Poquito Branch	Confluence with Boggy Creek North	+489	City of Austin.
	Intersection with Poquito Street	+494	
Possum Trot Branch	Intersection of 11th Street and Possum Trot Branch	+480	City of Austin.
	Approximately 350 feet upstream from the intersection with Woodmont Avenue,.	+560	
Shoal Creek	Confluence with the Colorado River (Town Lake)	+440	City of Austin.
	Approximately 1,650 feet upstream from the intersection with the Union Pacific Railroad.	+776	
Slaughter Creek	Intersection of the Union Pacific Railroad and Slaughter Creek.	+664	City of Austin, City of San Leanna, Unincorporated Areas of Travis County.
	Approximately 730 feet upstream from the intersection with Hwy 290.	+1074	
Slaughter Creek Tributary 1	Approximately 800 feet upstream from the confluence with Slaughter Creek.	+592	City of Austin.
	Approximately 1,000 feet upstream from the intersection with Manchaca Road.	+689	
Slaughter Creek Tributary 2	Confluence with Slaughter Creek	+673	City of Austin.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Intersection with Brodie Lane	+752	
Slaughter Creek Tributary 3	Confluence with Slaughter Creek	+743	Unincorporated Areas of Travis County.
	Approximately 1,050 feet upstream from the intersection with Lost Oasis Hollow.	+781	
Slaughter Creek Tributary 4	Confluence with Slaughter Creek	+776	City of Austin.
	Approximately 100 feet downstream from the intersection with Mo-Pac Expressway.	+815	
Slaughter Creek Tributary 5	Confluence with Slaughter Creek	+847	City of Austin.
	Approximately 2,550 feet upstream from the intersection with LaCrosse Avenue.	+897	
South Boggy Creek	Intersection of Bluff Springs Road and South Boggy Creek.	+559	City of Austin, Unincorporated Areas of Travis County.
	Approximately 650 feet upstream from the intersection with Westgate Blvd.	+771	
Sunset Valley Tributary	Approximately 600 feet downstream from the intersection with Jones Road.	+652	City of Austin, City of Sunset Valley.
	Approximately 2,050 feet upstream from the intersection with Monterey Oaks Drive.	+760	
Tar Branch	Confluence with Walnut Creek	+630	City of Austin.
	Approximately 1,200 feet upstream from the intersection with Metric Blvd.	+718	
Walnut Creek	Confluence with Colorado River	+431	City of Austin, Unincorporated Areas of Travis County.
	Approximately 50 feet downstream from the intersection with McNeil Drive.	+893	
Walnut Creek Tributary 1	Confluence with Walnut Creek	+432	City of Austin.
	Approximately 2,200 feet upstream from the intersection with Loyola Avenue.	+506	
Walnut Creek Tributary 10	Approximately 1,200 feet upstream from the confluence with Walnut Creek.	+764	City of Austin, Unincorporated Areas of Travis County.
	Intersection with Howard Lane	+809	
Walnut Creek Tributary 2	Intersection with railroad bed	+445	City of Austin.
	Interesection with Martin Luther King Blvd	+482	
Walnut Creek Tributary 3	Approximately 1,200 feet upstream from the confluence with Walnut Creek.	+494	City of Austin, Unincorporated Areas of Travis County.
	Intersection with Cameron Road	+576	
Walnut Creek Tributary 4	Confluence with Walnut Creek	+498	City of Austin.
	Approximately 80 feet upstream from the intersection with Springdale Road.	+543	
Walnut Creek Tributary 5	Confluence with Walnut Creek	+514	City of Austin.
	Approximately 2,200 feet upstream from the intersection with Sansom Road.	+556	
Walnut Creek Tributary 6	Confluence with Walnut Creek	+611	City of Austin.
	Approximately 1,030 feet upstream from the intersection with Canyon Ridge Drive.	+707	
Walnut Creek Tributary 7	Confluence with Walnut Creek	+694	City of Austin.
	Intersection with Research Blvd	+844	
Walnut Creek Tributary 7A	Approximately 650 feet upstream from the confluence with Walnut Creek Tributary 7.	+757	City of Austin.
	Approximately 3,500 feet upstream from the intersection with the railroad.	+821	
Walnut Creek Tributary 8	Confluence with Walnut Creek	+701	City of Austin.
	Intersection with Railroad	+796	
Walnut Creek Tributary 9	Confluence with Walnut Creek	+709	City of Austin.
	Approximately 730 feet upstream from the intersection with Howard Lane.	+786	
Wells Branch	Confluence with Walnut Creek	+629	City of Austin.
	Approximately 710 feet upstream from the intersection with Wells Branch Pkwy.	+772	
West Bouldin Creek	Confluence with Colorado River	+442	City of Austin.
	Approximately 240 feet upstream from the intersection with Clawson.	+641	
Williamson Creek	Confluence with Onion Creek	+522	City of Austin, City of Sunset Valley.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 200 feet upstream from the intersection with Mowinkle Drive.	+968	
Williamson Creek Tributary 1 ...	Confluence with Williamson Creek	+522	City of Austin.
	Approximately 50 feet upstream from the intersection with Nuckols Crossing Road.	+562	
Williamson Creek Tributary 2 ...	Confluence with Williamson Creek	+523	City of Austin.
	Approximately 250 feet upstream from the intersection with Nuckols Crossing.	+592	
Williamson Creek Tributary 3 ...	Intersection of Nuckols Crossing and Williamson Creek Tributary 3.	+541	City of Austin.
	Approximately 670 feet upstream from the intersection with Pino Street.	+567	
Williamson Creek Tributary 4 ...	Confluence with Williamson Creek	+596	City of Austin.
	Approximately 210 feet upstream from the intersection with South First Street.	+643	
Williamson Creek Tributary 5 ...	Confluence with Williamson Creek	+848	City of Austin.
	Approximately 500 feet upstream from the intersection with South Brook Drive.	+920	
Williamson Creek Tributary 6 ...	Approximately 5,000 feet upstream from the intersection with William Cannon Drive.	+864	City of Austin.
	Approximately 5,900 feet upstream from the intersection with William Cannon Drive.	+899	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Austin

Maps are available for inspection at 505 Barton Springs Road, 12th Floor, Austin, TX 78704.

City of Jonestown

Maps are available for inspection at 18649 FM 1431, Suite 4–A, Jonestown, TX 78645.

City of Lago Vista

Maps are available for inspection at 5803 Thunderbird, Lago Vista, TX 78645.

City of Lakeway

Maps are available for inspection at 1102 Lohmans Crossing, Lakeway, TX 78734.

City of Rollingwood

Maps are available for inspection at 403 Nixon Drive, Austin, TX 78746.

City of Round Rock

Maps are available for inspection at 2008 Enterprise, Round Rock, TX 78664.

City of San Leanna

Maps are available for inspection at 11906 Sleepy Hollow, Manchaca, TX 78652.

City of Sunset Valley

Maps are available for inspection at 3205 Jones Road, Sunset Valley, TX 78745.

City of Webberville

Maps are available for inspection at Webberville City Hall, 1701 Webberwood, Elgin, TX 78621.

City of West Lake Hills

Maps are available for inspection at 911 Westlake Drive, West Lake Hills, TX 78746.

Unincorporated Areas of Travis County

Maps are available for inspection at 411 13th Street, 8th Floor, Austin, TX 78767.

Village of Briarcliff

Maps are available for inspection at 402 Sleat Drive, Briarcliff, TX 78669.

Village of Point Venture

Maps are available for inspection at 549 Venture Blvd South, Point Venture, TX 78645.

Village of Volente

Maps are available for inspection at 15403 Hill Street, Volente, TX 78641.

Green County, Wisconsin, and Incorporated Areas
FEMA Docket No. B–7753

Allen Creek	At the confluence with Sugar River	+810	Unincorporated Areas of Green County.
	Approximately 250 feet downstream of County Highway E	+810	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Little Sugar River	At the mouth at Albany Lake	+806	Unincorporated Areas of Green County.
	Just upstream of Tin Can Road	+807	
Sugar River	Approximately 7,300 feet upstream of the Dam at Decatur Lake.	+793	Unincorporated Areas of Green County.
	Approximately 1,200 feet upstream of Remy Road	+856	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Unincorporated Areas of Green County

Maps are available for inspection at Government Services Building, N3150 Highway 81, Monroe, WI 53566.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29779 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 56

[Docket No. USCG–2003–16630]

RIN 1625–AA83

Review and Update of Standards for Marine Equipment; Correction

AGENCY: Coast Guard, DHS.

ACTION: Correcting amendment.

SUMMARY: The Coast Guard published a document in the **Federal Register** on October 31, 2008 (73 FR 65156), revising rules relating to standards for marine equipment. That document provided incorrect amendatory instruction for 46 CFR 56.30–10. This document corrects the final regulation by revising the amendatory instruction.

DATES: Effective December 16, 2008. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on January 15, 2009.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Thane Gilman, Project Manager, Office of Design and Engineering Standards (CG–521), U.S. Coast Guard, 2100 Second Street, SW., Washington, DC 20593–0001, telephone 202–372–1383. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published, the amendatory instruction for 46 CFR 56.30–10 was incorrect and could not be given effect in the Code of Federal Regulations.

List of Subjects in 46 CFR Part 56

Incorporation by reference, Reporting and recordkeeping requirements, Vessels.

■ Accordingly, 46 CFR part 56 is corrected by making the following correcting amendment:

PART 56—PIPING SYSTEMS AND APPURTENANCES

■ 1. The authority citation for part 56 continues to read as follows:

Authority: 33 U.S.C. 1321(j), 1509; 43 U.S.C. 1333; 46 U.S.C. 3306, 3703; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 56.30–10 by revising paragraph (b) to read as follows:

§ 56.30–10 Flanged joints (modifies 104.5.1(a)).

* * * * *

(b) Flanges may be attached by any method shown in Figure 56.30–10(b) or by any additional means that may be approved by the Marine Safety Center. Pressure temperature ratings of the appropriate ANSI/ASME standard must not be exceeded.

(1) *Figure 56.30–10(b), Method 1.* Flanges with screw threads may be used in accordance with 46 CFR 56.30–20, Table 56.30–20(c).

(2) *Figure 56.30–10(b), Method 2.* ASME B16.5 (incorporated by reference; see 46 CFR 56.01–2) Class 150 and Class 300 low-hubbed flanges with screw threads, plus the addition of a strength fillet weld of the size as shown, may be used in Class I systems not exceeding 750 °F or 4 NPS, in Class II systems without diameter limitations, and in Class II–L systems not exceeding 1 NPS. If 100 percent radiography is required by 46 CFR 56.95–10 for the class, diameter, wall thickness, and material of pipe being joined, the use of the threaded flanges is not permitted and buttwelding flanges must be provided. For Class II piping systems, the size of the strength fillet may be limited to a maximum of 0.525 inch instead of 1.4T.

(3) *Figure 56.30–10(b), Method 3.* Slip-on flanges meeting ASME B16.5 may be used in piping systems of Class I, Class II, or Class II–L not to exceed the service pressure-temperature ratings for flanges of class 300 and lower, within the temperature limitations of the material selected for use, and not to exceed 4-inch Nominal Pipe Size (NPS) in systems of Class I and Class II–L. If 100 percent radiography is required by 46 CFR 56.95–10 for the class, diameter, wall thickness, and material of the pipe being joined, then slip-on flanges are not permitted and butt-welding flanges are required. The configuration in Figure 127.4.4B(b) of ASME B31.1 (incorporated by reference; see 46 CFR 56.01–2), using a face and backweld, may be preferable where eliminating void spaces is desirable. For systems of Class II, the size of the strength fillet may be limited to a maximum of 0.525 inch instead of 1.4T, and the distance from the face of the flange to the end of the pipe may be a maximum of three-

eighths of an inch. Restrictions on the use of slip-on flanges appear in 46 CFR 56.50–105 for low-temperature piping systems.

(4) *Figure 56.30–10(b), Method 4.* ASME B16.5 socket welding flanges may be used in Class I or II–L systems not exceeding 3 NPS for class 600 and lower class flanges and 21/2NPS for class 900 and class 1500 flanges within the service pressure-temperature ratings of the standard. Whenever full radiography is required by 46 CFR 56.95–10 for the class, diameter, and wall thickness of the pipe being joined, the use of socket welding flanges is not permitted and a butt weld type connection must be provided. For Class II piping, socket welding flanges may be used without diameter limitation, and the size of the fillet weld may be limited to a maximum of 0.525 inch instead of 1.4T. Restrictions on the use of socket welds appear in 46 CFR 56.50–105 for low temperature piping systems.

(5) *Figure 56.30–10(b), Method 5.* Flanges fabricated from steel plate meeting the requirements of part 54 of this chapter may be used for Class II piping for pressures not exceeding 150 pounds per square inch and temperatures not exceeding 450 °F. Plate material listed in UCS–6(b) of section VIII of the ASME Boiler and Pressure Vessel Code (incorporated by reference; see 46 CFR 56.01–2) may not be used in this application, except that material meeting ASTM A 36 (incorporated by reference, see 46 CFR 56.01–2) may be used. The fabricated flanges must conform at least to the ASME B16.5 class 150 flange dimensions. The size of the strength fillet weld may be limited to a maximum of 0.525 inches instead of 1.4T and the distance from the face of the flange to the end of the pipe may be a maximum of three-eighths inch.

(6) *Figure 56.30–10 (b), Method 6.* Steel plate flanges meeting the material and construction requirements listed in paragraph (b)(5) of this section may be used for Class II piping for pressures not exceeding 150 pounds per square inch or temperatures not exceeding 650 °F. The flange shall be attached to the pipe as shown by Figure 56.30–10(b). Method 6. The pressure shall not exceed the American National Standard Service pressure temperature rating. The size of the strength fillet weld may be limited to a maximum of 0.525 inch instead of 1.4T and the distance from the face of the flange to the end of the pipe may be a maximum of three-eighths inch.

(7) *Figure 56.30–10 (b), Method 7.* Lap joint flanges (Van Stone) may be used for Class I and Class II piping. The Van Stone equipment must be operated by competent personnel. The ends of the pipe must be heated from 1,650° to 1,900 °F. dependent on the size of the pipe prior to the flanging operation. The foregoing temperatures must be carefully adhered to in order to prevent excess scaling of the pipe. The extra thickness of metal built up in the end of the pipe during the forming operation must be machined to restore the pipe to its original diameter. The machined surface must be free from surface defects and the back of the Van Stone lap must be machined to a fine tool finish to furnish a line contact with the mating surface on the flange for the full circumference as close as possible to the fillet of the flange. The number of heats to be used in forming a flange must be determined by the size of the pipe and not more than two pushups per heat are permitted. The width of the lap flange must be at least three times the thickness of the pipe wall and the end of the pipe must be properly stress relieved after the flanging operation is completed. Manufacturers desiring to produce this type of joint must demonstrate to a marine inspector that they have the proper equipment and personnel to produce an acceptable joint.

(8) *Figure 56.30–10 (b), Method 8.* Welding neck flanges may be used on any piping provided the flanges are butt-welded to the pipe. The joint must be welded as indicated by Figure 56.30–10(b), Method 8, and a backing ring employed which will permit complete penetration of the weld metal. If a backing ring is not used, refer to 46 CFR 56.30–5(b) for requirements.

(9) *Figure 56.30–10 (b), Method 9.* Welding neck flanges may also be attached to pipe by a double-welded butt joint as shown by Figure 56.30–10(b), Method 9.

(10) *Figure 56.30–10 (b), Method 10.* Flanges may be attached by shrinking the flange on to the end of the pipe and flaring the end of the pipe to an angle of not less than 20°. A fillet weld of the size shown by Figure 56.30–10(b), Method 10, must be used to attach the hub to the pipe. This type of flange is limited to a maximum pressure of 300 pounds per square inch at temperatures not exceeding 500 °F.

(11) *Figure 56.30–10(b), Method 11.* The flange of the type described and illustrated by Figure 56.30–10(b), Method 10, except with the fillet weld omitted, may be used for Class II piping for pressures not exceeding 150 pounds per square inch and temperatures not exceeding 450 °F.

(12) *Figure 56.30–10(b), Method 12.* High-hub bronze flanges may be used for temperatures not exceeding 425 °F. The hub of the flange must be bored to a depth not less than that required for a threaded connection of the same diameter leaving a shoulder for the pipe to butt against. A preinserted ring of silver brazing alloy having a melting point not less than 1,000 °F and of sufficient quantity to fill the annular clearance between the flange and the pipe must be inserted in the groove. The pipe must then be inserted in the flange and sufficient heat applied externally to melt the brazing alloy until it completely fills the clearance between the hub and the flange of the pipe. A suitable flux must be applied to the surfaces to be joined to produce a satisfactory joint.

(13) *Figure 56.30–10(b), Method 13.* The type of flange as described for Figure 56.30–10(b), Method 12, may be employed and in lieu of an annular groove being machined in the hub of the flange for the preinserted ring of silver brazing alloy, a bevel may be machined on the end of the hub and the silver brazing alloy introduced from the end of the hub to attach the pipe to the flange.

(14) *Figure 56.30–10(b), Method 14.* Flanges may be attached to nonferrous pipe by inserting the pipe in the flange and flanging the end of the pipe into the recess machined in the face of the flange to receive it. The width of the flange must be not less than three times the pipe wall thickness. In addition, the pipe must be securely brazed to the wall of the flange.

(15) *Figure 56.30–10(b), Method 15.* The flange of the type described and illustrated by Figure 56.30–10(b), Method 14, except with the brazing omitted, may be used for Class II piping and where the temperature does not exceed 250 °F.

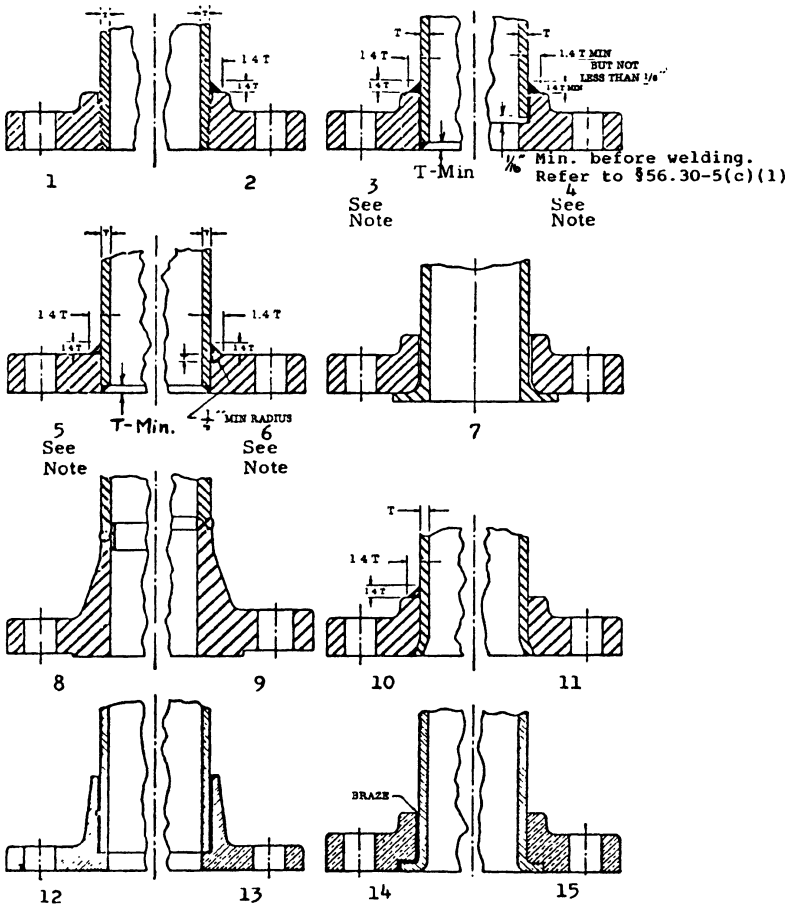

Figure 56.30–10(b)—Methods of Attachment

Note to Fig. 56.30–10(b): ''T'' is the nominal pipe wall thickness used. Consult the text of paragraph (b) for modifications on Class II piping systems. Fillet weld leg size need not exceed the thickness of the applicable ASME hub.

Dated: December 4, 2008.

Steve G. Venckus,

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

[FR Doc. E8–29587 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R7–ES–2008–0027; MO–9221050083–B2]

RIN 1018–AV79

Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), amend the regulations at 50 CFR part 17, which implement the Endangered Species Act, as amended (ESA), to create a final special rule under authority of section 4(d) of the ESA that provides measures that are necessary and advisable to provide for the conservation of the polar bear (*Ursus maritimus*). The special rule, in most instances, adopts the existing conservation regulatory requirements under the Marine Mammal Protection Act of 1972, as amended (MMPA), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as the appropriate regulatory provisions for this threatened species. Nonetheless, if an activity is not authorized or exempted under the MMPA or CITES and would result in an act that would be otherwise prohibited under the general prohibitions under the ESA for threatened species (50 CFR 17.31), then the prohibitions at 50 CFR 17.31 apply, and we would require authorization under 50 CFR 17.32. In addition, this special rule provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA. This special rule does not affect any existing requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurs inside or outside the current range of the polar bear. Further, nothing in this special rule affects the consultation requirements under section 7 of the ESA.

DATES: This final rule becomes effective January 15, 2009.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and *http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0IJ*. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the Marine Mammal Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Geoffrey Haskett, Regional Director, Region 7, U.S. Fish and Wildlife

Service, 1011 East Tudor Road, Anchorage, AK 99503 telephone 907–786–3309. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On May 15, 2008, we published the final rule to list the polar bear as a threatened species (73 FR 28212) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Additional information regarding previous Federal actions for the polar bear can be found in the combined 12-month petition finding and proposed listing rule (72 FR 1064; January 9, 2007) or by consulting the species' regulatory profile found at: *http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0IJ*.

Concurrent with the listing rule, we issued an interim final special rule (73 FR 28306; May 15, 2008). In the interim final rule, we opened a 60-day public comment period for all interested parties to submit comments that might contribute to the development of the final determination on the special rule. The interim rule with applicable modifications is finalized with the publication of this final special rule.

Background

Applicable Laws

In the United States, the polar bear is protected and managed under three laws: the ESA, the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; 27 U.S.T. 1087). A brief description of these laws, as they apply to polar bear conservation, is provided below.

The purposes of the ESA are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the ESA. The ESA is implemented through regulations found in the Code of Federal Regulations (CFR). When a species is listed as endangered, certain actions are prohibited under section 9 of the ESA, as specified in § 17.21 of title 50 of the Code of Federal Regulations (50 CFR). These include, among others, take within the United States, within the territorial seas of the United States, or upon the high seas; import; export; and shipment in interstate or foreign commerce in the course of a commercial activity. Additionally, the consultation process under section 7 of the ESA requires that Federal agencies ensure actions they authorize, fund, permit, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species.

The ESA does not specify particular prohibitions and exemptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA, the Secretary of the Interior (Secretary) was given the discretion to specify the prohibitions and any exceptions to those prohibitions that are appropriate for the species, provided that those prohibitions and exceptions are necessary and advisable to provide for the conservation of the species. Exercising this discretion, the Service has developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the ESA (i.e., provisions) that apply to most threatened species. Under § 17.32, permits may be issued to allow persons to engage in otherwise prohibited acts.

Alternately, for other threatened species we develop specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the special rule under section 4(d) of the ESA, but the special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and which may be more or less restrictive than the general provisions at 50 CFR 17.31.

The MMPA was enacted to protect and conserve marine mammal species or population stocks of those species so that they continue to be significant functioning elements in the ecosystem of which they are a part. Consistent with this objective, management should have a goal to maintain or return marine mammals to their optimum sustainable population. The MMPA provides a moratorium on the taking and importation of marine mammals and their products, unless exempted or authorized under the MMPA. Prohibitions also restrict:

- Take of marine mammals on the high seas;
- Take of any marine mammal in waters or on lands under the jurisdiction of the United States;
- Use of any port, harbor, or other place under the jurisdiction of the United States to take or import a marine mammal;
- Possession of any marine mammal or product taken in violation of the MMPA;
- Transport, purchase, sale, export, or offer to purchase, sell, or export any marine mammal or product taken in violation of the MMPA or for any purpose other than public display, scientific research, or enhancing the survival of the species or stock; and
- Import of certain categories of animals.

Authorizations and exemptions from these prohibitions are available for certain specified purposes. Any marine mammal listed as threatened or endangered under the ESA automatically has depleted status under the MMPA, which adds further restrictions.

Signed in 1973, CITES protects species at risk from international trade and is implemented by more than 170 countries, including the United States. The CITES regulates commercial and noncommercial international trade in selected animals and plants, including parts and items made from the species, through a system of permits. Under CITES, a species is listed at one of three levels of protection, each of which have different document requirements. Appendix I species are threatened with extinction and are or may be affected by trade; CITES directs its most stringent controls at activities involving these species. Appendix II species are not necessarily threatened with extinction now, but may become so if not regulated. Appendix III species are listed by a range country to obtain international cooperation in regulating and monitoring international trade. Polar bears were listed in Appendix II of CITES on July 7, 1975. Trade in CITES species is prohibited unless exempted or accompanied by the required CITES documents, and CITES documents cannot be issued until specific conservation and legal findings have been made. The CITES does not itself regulate take or domestic trade of polar bears; however, it contributes to the conservation of the species by monitoring international trade in polar bears and polar bear parts or products.

Provisions of the Special Rule Under Section 4(d) of the ESA for the Polar Bear

We assessed the conservation needs of the polar bear in light of the extensive protections already provided to the species under the MMPA and CITES. This final special rule, in most instances, synchronizes the management of the polar bear under the

ESA with management provisions under the MMPA and CITES. A special rule under section 4(d) of the ESA can only specify ESA prohibitions and available authorizations for this species. All other applicable provisions of the ESA and other statutes such as the MMPA and CITES are unaffected by this special rule.

Under this final special rule, if an activity is authorized or exempted under the MMPA or CITES, we will not require any additional authorization under the ESA regulations associated with that activity. However, if the activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under the ESA regulations at 50 CFR 17.31, the prohibitions of § 17.31 apply, and permits would be required under 50 CFR 17.32 of our ESA regulations. The special rule further provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA.

Finally, the special rule does not remove or alter in any way the consultation requirements under section 7 of the ESA.

Necessary and Advisable Finding

This rulemaking revises our May 15, 2008, special rule at 50 CFR 17.40 that, in most instances, adopts the conservation provisions of the MMPA and CITES as the appropriate regulatory provisions for this threatened species. These MMPA and CITES provisions regulate incidental take, non-incidental take (including take for self-defense or welfare of the animal), import, export, transport, purchase and sale or offer for sale or purchase, pre-Act specimens, and subsistence handicraft trade and cultural exchanges. The special rule further provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA. Finally, we have also clarified the operation of the consultation process under section 7 of the ESA and how it will continue to contribute to the conservation of the polar bears.

In the following sections, we provide explanation of how the various provisions of the ESA, MMPA, and CITES interrelate and how the regulatory provisions of this special rule are deemed necessary and advisable to provide for the conservation of the polar bear.

Definitions of Take

Take of protected species is prohibited under both the ESA and MMPA; however, the definition of ''take'' differs somewhat between the two Acts. Take is defined in the ESA as meaning to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. The MMPA defines take as meaning to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal. A number of terms appear in both definitions; however, the terms harm, pursue, shoot, wound, trap, and collect are included in the ESA definition but not in the MMPA definition. Nonetheless, the ESA prohibitions on pursue, shoot, wound, trap, and collect are covered within the scope of the MMPA definition. A person who pursues, shoots, wounds, traps, or collects an animal, or attempts to do any of these acts, has harassed (which includes injury), hunted, captured, or killed—or attempted to harass, hunt, capture, or kill—the animal in violation of the MMPA.

The term ''harm'' is also included in the ESA definition, but is less obviously related to take under the MMPA definition. Under our ESA regulations, harm is defined at 50 CFR 17.3 as ''significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.'' While the term harm in the take definition addresses negative effects through habitat modifications, it requires evidence that the habitat modification or degradation will result in specific effects on identifiable wildlife: Actual death or injury. As noted by Supreme Court Justice O'Connor in her concurrence in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), application of the definition requires actual, as opposed to hypothetical or speculative, death or injury to identifiable animals. Thus, the definition of harm under the ESA requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the species.

The term ''harass'' is also defined in the MMPA and our ESA regulations. Under our ESA regulations, harass refers to an ''intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.'' With the exception of the activities mentioned below, harassment under the MMPA means any act of pursuit, torment, or annoyance that ''has the potential to injure a marine mammal or marine mammal stock in the wild'' (Level A harassment), or ''has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering'' (Level B harassment).

Section 319 of the National Defense Authorization Act for Fiscal Year 2004 (NDAA; Pub. L. 108–136) revised the definition of harassment under section 3(18) of the MMPA as it applies to military readiness or scientific research conducted by or on behalf of the Federal Government. Section 319 defined harassment for these purposes as ''(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.''

In most cases, the definitions of ''harassment'' under the MMPA encompass more activities than the same term under the Service's ESA regulations. While the statutory definition of harassment under the MMPA that applies to all activities other than military readiness and scientific research conducted by or on behalf of the Federal Government includes any act of pursuit, torment, or annoyance that has the ''potential to injure'' or the ''potential to disturb'' marine mammals in the wild by causing disruption of key behavioral patterns, the Service's ESA definition of harassment applies only to an act or omission that creates the ''likelihood of injury'' by annoying the wildlife to such an extent as to significantly disrupt key behavioral patterns. Even the more narrow definition of harassment for military readiness activities or research by or on behalf of the Federal Government includes an act that injures or has ''the significant potential to injure'' or an act that disturbs or is ''likely to disturb,'' compared to the ''likelihood of injury'' standard under the ESA. The potential to injure or disturb is a stricter standard than the likelihood of injury. The one area where the ESA definition is broader than the MMPA definition is that the ESA definition includes acts or omissions whereas the MMPA definition includes only acts. However,

we cannot foresee circumstances under which the management of polar bears would differ due to this difference in the two definitions.

In addition, although the ESA includes ''harm'' in the definition of take and the MMPA does not, the differing definitions of take do not result in a difference in management of polar bears. As discussed earlier, application of the harm definition requires evidence of demonstrable injury or death to actual, individual polar bears. The breadth of the MMPA harassment definition requires only potential injury or potential disturbance, or, in the case of military readiness activities, likely disturbance causing disruption of key behavioral patterns. Thus, the evidence required for harm under the ESA would provide the evidence to show potential injury or potential or likely disturbance that causes disruption of key behavioral patterns under the MMPA.

In summary, the definitions of take under the MMPA and ESA differ in terminology; however, they are similar in application. We find the definitions of take under the Acts to be comparable and where they differ, due to the breadth of the MMPA's definitions of harassment, the MMPA definitions of take are, overall, more protective. Therefore managing polar bears under the MMPA definition provides for the conservation of polar bears. Where a person or entity does not have authorization for an activity that causes take under the MMPA, or is not in compliance with their MMPA take authorization, the definition of take under the ESA will be applied.

Incidental Take

The take restrictions under the MMPA and those typically provided for threatened species under the ESA through our regulations at 50 CFR 17.31 or a special rule under section 4(d) of the ESA also apply to incidental take. Take restrictions under both Acts have the same geographic scope. Incidental take refers to the take of a protected species that is incidental to, but not the purpose of, an otherwise lawful activity. This special rule under section 4(d) of the ESA aligns the ESA incidental take provisions for polar bears with the incidental take provisions of the MMPA and its implementing regulations as those necessary and advisable to provide for the conservation of the species.

Section 7(a)(2) of the ESA requires Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Regulations that implement section 7(a)(2) of the ESA (50 CFR part 402) define ''jeopardize the continued existence of'' as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service, subject to the exceptions set out in 50 CFR 402.14(b) and the provisions of 402.03. It is through the consultation process under section 7 of the ESA that incidental take is identified and Federal agencies receive authorization for incidental take. The section 7 consultation requirements also apply to the Service and require that we consult with ourselves to ensure actions we authorize, fund, or carry out are not likely to result in jeopardy to the species. This type of consultation, known as intra-Service consultation, would, for example, be applied to the Service's issuance of authorizations under the MMPA and ESA. Further, regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). These requirements under the ESA remain unchanged under this rule regardless of whether the action occurs inside or outside the current range of the polar bear. This special rule does not negate the need for a Federal action agency to consult with the Service to ensure that any action being authorized, funded, or carried out is not likely to jeopardize the continued existence of the polar bear. Further, in the event critical habitat is designated for the polar bear in the future, nothing in this special rule affects the prohibition against destruction or adverse modification of any critical habitat through a Federal action, and Federal agencies would be required to consider the destruction or adverse modification standard in the consultation process under section 7 of the ESA.

As a result of consultation, we document compliance with the requirements of section 7(a)(2) of the ESA through our issuance of a concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat, or issuance of a biological opinion for Federal actions that may adversely affect listed species or critical habitat. In those cases where the Service determines an action that is likely to adversely affect polar bears will not likely result in jeopardy but is anticipated to result in incidental take, the biological opinion will describe the amount and nature of incidental take that is reasonably certain to occur. Under section 7(b)(4) of the ESA, an incidental take statement for a marine mammal such as the polar bear cannot be issued until the applicant has received incidental take authorization under the MMPA. If such authorization is in place, the Service will also issue a statement that specifies the amount or extent of such take; any reasonable and prudent measures considered appropriate to minimize such effects; terms and conditions to implement the measures necessary to minimize effects; and procedures for handling any animals actually taken. Nothing in this special rule affects the issuance or contents of the biological opinions for polar bears or the issuance of an incidental take statement, although incidental take resulting from activities that occur outside of the current range of the polar bear is not subject to the taking prohibition of the ESA.

The regulations at 50 CFR 17.32(b) provide a mechanism for non-Federal parties to obtain authorization for the incidental take of threatened wildlife. This process requires that an applicant specify effects to the species and steps to minimize and mitigate such effects. If the Service determines that the mitigation measures will minimize effects of any potential incidental take, and that take will not appreciably reduce the likelihood of survival and recovery of the species, we may grant incidental take authorization. This authorization would include terms and conditions deemed necessary or appropriate to insure minimization of take, as well as monitoring and reporting requirements. Incidental take restrictions both inside and outside the current range of the polar bear under this special rule are described below.

Activities Within Current Range

Under this special rule, if incidental take has been authorized under section 101(a)(5) of the MMPA for take of a polar bear by commercial fisheries, or by the issuance of an Incidental Harassment Authorization (IHA) or through incidental take regulations for all other activities, we will not require

an additional incidental take permit under the ESA issued in accordance with 50 CFR 17.32(b) for non-Federal parties since we have determined that the MMPA restrictions are more protective or as protective as permits issued under 50 CFR 17.32(b). In addition, while an incidental take statement under section 7 of the ESA will be issued, any take will be covered through the MMPA authorization. However, any incidental take that does occur from activities within the current range of the polar bear that has not been authorized under the MMPA, or is not in compliance with the MMPA authorization, remains prohibited under 50 CFR 17.31 and subject to full penalties under both the ESA and MMPA. Further, the ESA's citizen suit provision is unaffected by this special rule anywhere within the current range of the species. Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the range of the species without appropriate MMPA authorization can be challenged through this provision as that would be a violation of 50 CFR 17.31. The ESA citizen suit provision also remains available for alleged failure to consult under section 7 of the ESA regardless of whether the agency action occurs inside or outside the current range of the polar bear.

Sections 101(a)(5)(A) and (D) of the MMPA give the Service the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens (as defined in 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region. Incidental take cannot be authorized under the MMPA unless the Service finds that the total of such taking will have no more than a negligible impact on the species or stock.

If any take that is likely to occur will be limited to nonlethal harassment of the species, the Service may issue an Incidental Harassment Authorization (IHA) under section 101(a)(5)(D) of the MMPA. The IHAs cannot be issued for a period longer than 1 year. If the taking may result in more than harassment, regulations under section 101(a)(5)(A) of the MMPA must be issued, which may be in place for no longer than 5 years. Once regulations making the required findings are in place, we issue Letters of Authorization (LOAs) that authorize the incidental take for specific projects that fall under the provisions covered in the regulations. The LOAs expire after 1 year and contain activity-specific monitoring and mitigation measures that ensure that any take remains at the negligible level. In either case, the IHA or the regulations must set forth: (1) Permissible methods of taking; (2) means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting.

While a determination of negligible impact is made at the time the regulations are issued based on the best information available, each request for an LOA is also evaluated to ensure it is consistent with this determination. The evaluation consists of the type and scope of the individual project and an analysis of all current species information, including the required monitoring reports from previously issued LOAs, and considers the effects of the individual project when added to all current LOAs in the geographic area. Through these means, the type and level of take of polar bears is continuously evaluated throughout the life of the regulations in order to ensure that any take remains at the level of negligible impact.

Incidental take of threatened or endangered marine mammals, such as the polar bear, that results from commercial fishery operations is regulated separately under the MMPA through sections 101(a)(5)(E) and 118. Section 101(a)(5)(E) requires that for marine mammals from a species or stock designated as depleted because of its listing as an endangered or threatened species under the ESA, a finding must be made that any incidental mortality or serious injury from commercial fisheries will have a negligible impact on such species or stock. In essence, section 101(a)(5)(E) applies the same ''negligible impact'' standard to the authorization of incidental take due to commercial fishery activities that is applied to incidental take from other activities. In addition, an ESA recovery plan must be developed, unless otherwise excepted, and all requirements of MMPA section 118 must be met. These authorizations may be in place for no longer than 3 years, when new findings must be made.

Negligible impact under the MMPA, as defined at 50 CFR 18.27(c), is an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. This is a more protective standard than standards for issuing incidental take under the ESA, which are: (1) For non-Federal actions, that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and, (2) for Federal actions, that the activity is not likely to jeopardize the continued existence of the species. In addition, the authorizations under the MMPA are limited to 3 years for commercial fisheries authorizations, 1 year for IHAs, and 5 years for incidental take regulations, thus ensuring that activities that are likely to cause incidental take of polar bears are periodically reviewed and mitigation measures that ensure that take remains at the negligible level can be updated. Incidental take permits and statements under the ESA have no such statutory time limits. Incidental take statements remain in effect for the life of the Federal action, unless reinitiation of consultation is triggered. Incidental take permits for non-Federal activities can be for various durations (*see* 50 CFR 17.32(b)(4)), with some permits valid for up to 50 years. Therefore, the incidental take standards under the MMPA because of their stricter standards and mandatory periodic re-evaluation, provide a greater level of protection for the polar bear than adoption of the standards under the ESA at 50 CFR 17.31 and 17.32. As such, this special rule adopts the MMPA standards for authorizing Federal and non-Federal incidental take as necessary and advisable to provide for the conservation of the polar bear.

As stated above, when the Service issues authorizations for otherwise prohibited incidental take under the MMPA, we must determine that those activities will result in no more than a negligible impact on the species or stock. The distinction of conducting the analysis at the species or stock level may be an important one in some cases. Under the ESA, the ''jeopardy'' standard, for Federal incidental take, and ''appreciably reduce the likelihood of survival and recovery'' standard, for non-Federal take, are always applied to the listed entity (i.e., the listed species, subspecies, or distinct population segment). The Service is not given the discretion under the ESA to assess ''jeopardy'' and ''appreciably reduce the likelihood of survival and recovery'' at a smaller scale (e.g., stock) unless the listed entity is in fact smaller than the entire species or subspecies (e.g., a discrete population segment). Therefore, because avoiding greater than negligible impact to a stock is tighter than avoiding greater than negligible impact to an entire species, the MMPA may be much more protective than the ESA for activities that occur only within one stock of a listed species. In the case of the polar bear, it is listed as a threatened species throughout its range under the

ESA, while multiple stocks are recognized under the MMPA. Therefore, a variety of activities that may impact polar bears will be assessed at a finer scale under the MMPA than they would have been otherwise under the ESA.

In addition, during the process of authorizing any MMPA incidental take under section 101(a)(5), we must conduct an intra-Service consultation under section 7(a)(2) of the ESA to ensure that providing an MMPA incidental take authorization to an applicant is an act that is not likely to jeopardize the continued existence of the polar bear. Since the standard for approval under MMPA section 101(a)(5) is no more than ''negligible impact'' to the affected marine mammal species or stock, we believe that any MMPA-compliant authorization or regulation would meet the ESA section 7(a)(2) standards of avoiding jeopardy to the species. Under this special rule, any incidental take that could not be authorized under section 101(a)(5) of the MMPA would remain subject to the prohibitions of 50 CFR 17.31.

To the extent that any Federal actions are found to comport with the standards for MMPA incidental take authorization, we fully anticipate that any such section 7 consultation under the ESA would result in a finding that the proposed action is not likely to jeopardize the continued existence of the polar bear. In addition, we anticipate that any such proposed actions would augment protection and enhance agency management of the polar bear through the application of site-specific mitigation measures contained in an authorization issued under the MMPA. Therefore, we do not anticipate, in light of the ESA jeopardy standard and the maximum duration of these MMPA authorizations that there could be a conservation basis for requiring any entity holding incidental take authorization under the MMPA and in compliance with all measures under that authorization (e.g., mitigation) to implement further measures under the ESA section 7 process, as long as the action does not go beyond the scope and duration of the MMPA take authorization.

For example, affiliates of the oil and gas industry have requested, and we have issued regulations since 1991 for, incidental take authorization for activities in occupied polar bear habitat. This includes regulations issued for incidental take in the Beaufort Sea from 1993 to the present, and regulations issued for incidental take in the Chukchi Sea for the period 1991–1996 and, more recently, regulations for similar activities and potential incidental take in the Chukchi Sea for the period 2008–2013. A detailed history of our past regulations for the Beaufort Sea region can be found in the final regulations published on November 28, 2003 (68 FR 66744), August 2, 2006 (71 FR 43926), and June 11, 2008 (73 FR 33212).

The mitigation measures that we have required for all oil and gas projects include a site-specific plan of operation and a site-specific polar bear interaction plan. Site-specific plans outline the steps the applicant will take to minimize effects on polar bears, such as garbage disposal and snow management procedures to reduce the attraction of polar bears, an outlined chain-of-command for responding to any polar bear sighting, and polar bear awareness training for employees. The training program is designed to educate field personnel about the dangers of bear encounters and to implement safety procedures in the event of a bear sighting. Most often, the appropriate response involves merely monitoring the animal's activities until they move out of the area. However, personnel may be instructed to leave an area where bears are seen. When necessary, and under specific authorization separate from the incidental take authorization, bears can be displaced by using forms of deterrents, such as vehicles, vehicle horns, vehicle sirens, vehicle lights, spot lights, or, if necessary, pyrotechnics (e.g., cracker shells). The intent of the interaction plan and training activities is to allow for the early detection and appropriate response to polar bears that may be encountered during operations, which eliminates the potential for injury or lethal take of bears in defense of human life. By requiring such steps be taken, we ensure that any impacts to polar bears will be minimized and will remain negligible.

Additional mitigation measures are also required on a case-by-case basis depending on the location, timing, and specific activity. For example, we may require trained marine mammal observers for offshore activities; pre-activity surveys (e.g., aerial surveys, infra-red thermal aerial surveys, or polar bear scent-trained dogs) to determine the presence or absence of dens or denning activity; measures to protect pregnant polar bears during denning activities (den selection, birthing, and maturation of cubs), including incorporation of a 1-mile (1.6-kilometer) buffer surrounding known dens; and enhanced monitoring or flight restrictions. These mitigation measures are implemented to limit human-bear interactions and disturbances to bears and have ensured that industry effects on polar bears have remained at the negligible level.

Data provided by the required monitoring and reporting programs in the Beaufort Sea and in the Chukchi Sea show that mitigation measures successfully minimized effects on polar bears. For example, since 1991, when the incidental take regulations became effective in the Chukchi and Beaufort Seas, there has been no known instance of a polar bear being killed or of personnel being injured by a bear as a result of oil and gas industry activities in the areas covered by the incidental take regulations.

Activities Outside Current Range

This special rule includes a separate provision (paragraph (4)) that addresses take under the ESA that is incidental to an otherwise lawful activity that occurs outside the current range of the polar bear. Under paragraph (4), incidental take of polar bears that results from activities that occur outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31. This provision has been modified from the version of paragraph (4) that appeared in the interim final rule to more precisely delineate where the ESA prohibition against incidental take is necessary and advisable to provide for the conservation of the polar bear.

Under paragraph (4), any incidental take that results from activities within the current range of the polar bear remains subject to the prohibitions found at 50 CFR 17.31, although, as explained in the previous section, any such incidental take that has already been authorized under the MMPA will not require additional ESA authorization.

Any incidental take of a polar bear caused by an activity that occurs outside of the current range of the species, however, would not be a prohibited act under the ESA, regardless of whether a causal connection has been made between the conduct of the activity and effects on the species. But nothing in paragraph (4) modifies the prohibitions against taking, including incidental taking, under the MMPA, which continue to apply regardless of where the activity occurs. If it is shown that a particular activity conducted outside the current range of the species is reasonably likely to cause the incidental taking of a polar bear, whether lethal or nonlethal, any incidental take that occurs is a violation of the MMPA unless authorization for the take under the MMPA has been issued by the Service.

Any incidental take caused by an activity outside the current range of the polar bear and covered by the MMPA would be a violation of that law and subject to the full array of the statute's civil and criminal penalties unless it was authorized. Any person, which includes businesses, States, and Federal agencies as well as individuals, who violates the MMPA's takings prohibition or any regulation may be assessed a civil penalty of up to $10,000 for each violation. A person or entity that knowingly violates the MMPA's takings prohibition or any regulation will, upon conviction, be fined for each violation, imprisoned for up to 1 year, or both. Please refer to the ''Penalties'' discussion below for additional discussion of the penalties under the ESA and the MMPA.

Any individual, business, State government, or Federal agency subject to the jurisdiction of the United States that is likely to cause the incidental taking of a polar bear under the MMPA, regardless of the location of their activity, must therefore seek incidental take authorization under the MMPA or risk such civil or criminal penalties. As explained earlier, while the Service will work with any person or entity that seeks incidental take authorization, such authorization can only be granted if any take that is likely to occur will have no more than a negligible impact on the species. If the negligible impact standard cannot be met, the person or entity will have to modify their activities to meet the standard, modify their activities to avoid the taking altogether, or risk civil or criminal penalties.

In addition, nothing in paragraph (4) of this final rule affects section 7 consultation requirements outside the current range of the polar bear. Any Federal agency that intends to engage in an agency action that ''may affect'' polar bears must comply with 50 CFR part 402, regardless of the location of the agency action. This includes, but is not limited to, intra-Service consultation on any MMPA incidental take authorization proposed for activities located outside the current range. Paragraph (4) does not affect in any way the standards for issuing a biological opinion at the end of that consultation or the contents of the biological opinion, including an assessment of the nature and amount of take that is likely to occur. An incidental take statement would also be issued under any opinion where the Service finds that the agency action and the incidental taking are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of any polar bear critical habitat that may be designated, provided that the incidental taking has already been authorized under the MMPA, as required under section 7(b)(4) of the ESA. The Service will, however, inform the Federal agency and any applicants in the biological opinion and any incidental take statement that the take identified in the biological opinion and the statement is not a prohibited act under the ESA, although any incidental take that actually occurs and that has not been authorized under the MMPA would remain a violation of the MMPA.

One difference between the MMPA and the ESA is the applicability of the ESA citizen suit provision. Under section 11 of the ESA, any person may commence a civil suit against a person, business entity, State government, or Federal agency that is allegedly in violation of the ESA. Such lawsuits have been brought by private citizens and citizen groups where it is alleged that a person or entity is taking a listed species in violation of the ESA. The MMPA does not have a similar provision. So while any unauthorized incidental take caused by an activity outside the current range of the polar bear would be a violation of the MMPA, legal action against the person or entity causing the take could only be brought by the United States and not by a private citizen or citizen group. However, operation of the citizen suit provision remains unaffected for any restricted act other than incidental take, such as non-incidental take, import, export, sale, and transport, regardless of whether the activity occurs outside the current range of the polar bear. Further, the ESA's citizen suit provision is unaffected by this special rule when the activity causing incidental take is anywhere within the current range of the species. Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the range of the species without appropriate MMPA authorization can be challenged through the citizen suit provision as that would be a violation of the ESA implementing regulations at 50 CFR 17.31. The ESA citizen suit provision also remains available for alleged failure to consult under section 7 of the ESA regardless of whether the agency action occurs inside or outside the current range of the polar bear. Further, any incidental taking caused by an activity outside the current range of the polar bear that is connected, either directly or in certain instances indirectly, to an action by a Federal agency could be pursued under the Administrative Procedure Act of 1946 (5 U.S.C. 706), which allows challenges to final agency actions.

Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase

When setting restrictions for threatened species, the Service has generally adopted prohibitions on their import; export; take; transport in interstate or foreign commerce in the course of a commercial activity; sale or offer for sale in interstate or foreign commerce; and possession, sale, delivery, carrying, transportation, or shipping of unlawfully taken species, either through a special rule or through the provisions of 50 CFR 17.31. For the polar bear, these same activities are already strictly regulated under the MMPA. Section 101 of the MMPA provides a moratorium on the taking and importation of marine mammals and their products. Section 102 of the MMPA further prohibits activities unless exempted or authorized under subsequent sections.

Prohibitions in section 102(a) include take of any marine mammal on the high seas; take of any marine mammal in waters or on lands under the jurisdiction of the United States; use of any port, harbor, or other place under the jurisdiction of the United States to take or import a marine mammal; possession of any marine mammal or product taken in violation of the MMPA; and transport, purchase, sale, export, or offer to purchase, sell, or export any marine mammal or product taken in violation of the MMPA or for any purpose other than public display, scientific research, or enhancing the survival of the species or stock. Under sections 102(b) and (c) of the MMPA, it is unlawful to import a pregnant or nursing marine mammal; an individual taken from a depleted species or population stock; an individual taken in a manner deemed inhumane; any marine mammal taken in violation of the MMPA or in violation of the law of another country; or any marine mammal product if it was made from any marine mammal taken in violation of the MMPA or in violation of the law of another country, or if it was illegal to sell in the country of origin.

The MMPA then provides specific exceptions to these prohibitions under which certain acts are allowed only if all statutory requirements are met. Under section 104 of the MMPA, these otherwise prohibited activities may be authorized for purposes of public display (section 104(c)(2)), scientific research (section 104(c)(3)), enhancing the survival or recovery of a species (section 104(c)(4)), or photography

(where there is level B harassment only; section 104(c)(6)). In addition, section 104(c)(8) specifically addresses the possession, sale, purchase, transport, export, or offer for sale of the progeny of any marine mammal taken or imported under section 104, and section 104(c)(9) sets strict standards for the export of any marine mammal from the United States. In all of these sections of the MMPA, strict criteria have been established to ensure that the impact of an authorized activity, if a permit were to be issued, would successfully meet Congress's finding in the MMPA that species ''should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.''

Under the general threatened species regulations at 50 CFR 17.31 and 17.32, authorizations are available for a wider range of activities than under the MMPA, including permits for any special purpose consistent with the ESA. In addition, for those activities that are available under both the MMPA and the general threatened species regulations, the MMPA issuance criteria are often more strict. For example, in order to issue a permit under the general threatened species regulations at 50 CFR 17.32, the Service must consider, among other things:

(1) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(2) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife;

(3) Whether the permit would in any way directly or indirectly conflict with any known program intended to enhance the survival probabilities of the population; and

(4) Whether the activities would be likely to reduce the threat of extinction facing the species of wildlife.

These are all ''considerations'' during the process of evaluating an application, but none set a standard that requires denial of the permit under any particular set of facts. However, in order to obtain an enhancement permit under the MMPA, the Service must find that any taking or importation: (1) Is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock, and (2) is consistent with any conservation plan or ESA recovery plan for the species or stock or, if no conservation or ESA recovery plan is in place, with the Service's evaluation of actions required to enhance the survival or recovery of the species or stock in light of factors that would be addressed in a conservation plan or ESA recovery plan. In order to issue a scientific research permit under the MMPA, in addition to meeting the requirements that the taking is required to further a bona fide scientific purpose, any lethal taking cannot be authorized unless a nonlethal method of conducting the research is not feasible. In addition, for depleted species such as the polar bear, permits shall not be issued for any lethal taking unless the results of the research will directly benefit the species, or fulfill a critically important research need.

Further, all permits issued under the MMPA must be consistent with the purposes and policies of the Act, which includes maintaining or returning marine mammals to their optimum sustainable population. Also, now that polar bears have depleted status under the MMPA, no MMPA permit may be issued for taking or importation for the purpose of public display, whereas § 17.32 allows issuance of permits for zoological exhibition and educational purposes. As the MMPA does not contain a provision similar to a special rule under section 4(d) of the ESA, the more restrictive requirements of the MMPA apply.

Thus, the existing statutory provisions of the MMPA allow fewer types of activities than does 50 CFR 17.32 for threatened species, and the MMPA's standards are generally stricter for those activities that are allowed than standards for comparable activities under 50 CFR 17.32. Because, for polar bears, an applicant must obtain authorization under the MMPA to engage in an act that would otherwise be prohibited, and because both the allowable types of activities and standards for those activities are generally stricter under the MMPA than the general standards under 50 CFR 17.32, we find that the MMPA provisions are necessary and advisable to provide for the conservation of the species and adopt these provisions as appropriate conservation protections under the ESA. Therefore, under this special rule, as long as an activity is authorized or exempted under the MMPA, and the appropriate requirements of the MMPA are met, then the activity does not require any additional authorization under the ESA. All authorizations issued under section 104 of the MMPA will continue to be subject to section 7 consultation requirements of the ESA.

CITES

In addition to the MMPA restrictions on import and export discussed above, CITES provisions that apply to the polar bear also ensure that import into or export from the United States is carefully regulated. Under CITES and the U.S. regulations that implement CITES at 50 CFR part 23, the United States is required to regulate and monitor the trade in legally possessed CITES specimens over an international border. Thus, for example, CITES would apply to tourists driving from Alaska through Canada with polar bear handicrafts to a destination elsewhere in the United States. As an Appendix II species, the export of any polar bear, either live or dead, and any polar bear parts or products requires an export permit supported by a finding that the specimen was legally acquired under international and domestic laws. Prior to issuance of the permit, the exporting country must also find that export will not be detrimental to the survival of the species. A valid export document issued by the exporting country must be presented to the officials of the importing country before the polar bear specimen will be cleared for importation.

Some limited exceptions to this permit requirement exist. For example, consistent with CITES, the United States provides an exemption from the permitting requirements for personal and household effects made of dead specimens. Personal and household effects must be personally owned for noncommercial purposes, and the quantity must be necessary or appropriate for the nature of the trip or stay or for household use. Not all CITES countries have adopted this exemption, so persons who may cross an international border with a polar bear specimen should check with the Service and the country of transit or destination in advance as to applicable requirements. Because for polar bears any person importing or exporting any live or dead animal, part, or product into or from the United States must comply with the strict provisions of CITES as well as the strict import and export provisions under the MMPA, we find that additional authorizations under the ESA to engage in these activities would not be necessary and advisable to provide for the conservation of the species. Thus, under this rule, if an import or export activity is authorized or exempted under the MMPA and the appropriate requirements under CITES have been met, no additional authorization under the ESA is required. All export

authorizations issued by the Service under CITES will continue to be subject to the consultation requirements under section 7 of the ESA.

Take for Self-Defense or Welfare of the Animal

Both the MMPA and the ESA prohibit take of protected species. However, both statutes provide exceptions when the take is either exempted or can be authorized for self-defense or welfare of the animal.

In the interest of public safety, both the MMPA and the ESA include provisions to allow for take, including lethal take, when this take is necessary for self-defense or to protect another person. Section 101(c) of the MMPA states that it shall not be a violation to take a marine mammal if such taking is imminently necessary for self-defense or to save the life of another person who is in immediate danger. Any such incident must be reported to the Service within 48 hours of occurrence. Section 11(a)(3) of the ESA similarly provides that no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an otherwise prohibited act based on a good faith belief that he or she was protecting himself or herself, a member of his or her family, or any other individual from bodily harm. Section 11(b)(3) of the ESA provides that it shall be a defense to prosecution if the defendant committed an offense based on a good faith belief that he or she was protecting himself or herself, a member of his or her family, or any other individual from bodily harm. The ESA regulations in 50 CFR 17.21(c)(2), which reiterate that any person may take listed wildlife in defense of life, clarify this exemption. Reporting of the incident is required under 50 CFR 17.21(c)(4). Thus, the self-defense provisions of the ESA and MMPA are comparable. However, under this special rule, where unforeseen differences between these provisions may arise in the future, any activity that is authorized or exempted under the MMPA does not require additional authorization under the ESA.

Concerning take for defense of property and for the welfare of the animal, the provisions in the ESA and MMPA are not clearly comparable. The provisions provided under the ESA regulations at 50 CFR 17.21(c)(3) authorize any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service (NMFS), or a State conservation agency, who is designated by the agency for such purposes, to take listed wildlife when acting in the course of official duties if the action is necessary to: (i) Aid a sick, injured, or orphaned specimen; (ii) dispose of a dead specimen; (iii) salvage a dead specimen for scientific study; or (iv) remove a specimen that may constitute a threat to human safety, provided that the taking is humane or, if lethal take or injury is necessary, that there is no other reasonable possibility to eliminate the threat. Further, the ESA regulations at 50 CFR 17.31(b) allow any employee or agent of the Service, of NMFS, or of a State conservation agency which is operating a conservation program under the terms of a Cooperative Agreement with the Service in accord with section 6 of the ESA, when acting in the course of official duty, to take those species of threatened wildlife which are covered by an approved cooperative agreement to carry out conservation programs.

Provisions for similar activities are found under sections 101(a), 101(d), and 109(h) of the MMPA. Section 101(a)(4)(A) of the MMPA provides that a marine mammal may be deterred from damaging fishing gear or catch (by the owner or an agent or employee of the owner of that gear or catch), other private property (by the owner or an agent or employee of the owner of that property), and, if done by a government employee, public property so long as the deterrence measures do not result in death or serious injury of the marine mammal. This section also allows for any person to deter a marine mammal from endangering personal safety. Section 101(a)(4)(D) clarifies that this authority to deter marine mammals applies to depleted stocks, which would include the polar bear. The nonlethal deterrence of a polar bear from fishing gear or other property is not a provision that is included under the ESA; however, this provision would not result in injury to the bear or removal of the bear from the population and could, instead, prevent serious injury or death to the bear by preventing escalation of an incident to the point where the bear is killed in self-defense. Therefore, we find it necessary and advisable to continue to manage polar bears under this provision of the MMPA and, as such, an activity conducted pursuant to this provision under the MMPA does not require additional authorization under the ESA.

Section 101(d) of the MMPA provides that it is not a violation of the MMPA for any person to take a marine mammal if the taking is necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris, and care is taken to prevent further injury and ensure safe release. The incident must be reported to the Service within 48 hours of occurrence. If entangled, the safe release of a polar bear from fishing gear or other debris could prevent further injury or death of the animal. Therefore, by adopting this provision of the MMPA, this special rule provides for the conservation of polar bears in the event of entanglement with fishing gear or other debris and could prevent further injury or death of the bear. The provisions under the ESA at 50 CFR 17.31 provide for similar activities; however, the ESA provision only applies to an employee or agent of the Service, any other Federal land management agency, NMFS, or a State conservation agency, who is designated by the agency for such purposes. The provisions under section 101(d) apply to any individual, including private individuals. Although the provisions under the MMPA are broader in this case, we find them necessary and advisable to provide for the conservation of the polar bear; therefore, an activity conducted pursuant to this provision of the MMPA does not require additional authorization under the ESA.

Further, section 109(h) of the MMPA allows the humane taking of a marine mammal by specific categories of people (i.e., Federal, State, or local government officials or employees or a person designated under section 112(c) of the MMPA) in the course of their official duties provided that one of three criteria is met—the taking is for: (1) The protection or welfare of the mammal; (2) the protection of the public health and welfare; or (3) the nonlethal removal of nuisance animals. The MMPA regulations at 50 CFR 18.22 provide the specific requirements of the exception. Section 112(c) of the MMPA allows the Service to enter into cooperative agreements with other Federal or State agencies and public or private institutions or other persons to carry out the purposes of section 109(h) of the MMPA. The ability to designate non-Federal, non-State ''cooperators,'' as allowed under sections 112(c) and 109(h) of the MMPA but not provided for under the ESA, has allowed the Service to work with private groups to retrieve carcasses, respond to injured animals, and provide care and maintenance for stranded or orphaned animals. This has provided benefits by drawing on the expertise and allowing the use of facilities of non-Federal and non-State scientists, aquaria, veterinarians, and other private entities. Additionally, the ability for non-Federal, non-State cooperators to haze polar bears from oil and gas facilities in

Alaska has provided for the conservation of the polar bear by allowing nonlethal techniques to deter them from property and away from people before situations escalate, thereby preventing unnecessary injury to, or lethal take of, polar bears. Therefore, the adoption of these MMPA provisions is necessary and advisable to provide for the conservation of the polar bear.

Pre-Act Specimens

The ESA, MMPA, and CITES all have provisions for the regulation of specimens, both live and dead, that were acquired or removed from the wild prior to application of the law or the listing of the species, but the laws treat these specimens somewhat differently. Section 9(b)(1) of the ESA provides an exemption for threatened species held in a controlled environment as of the date of publication of their listing provided that the holding and any subsequent holding or use is not in the course of a commercial activity. Additionally, section 10(h) of the ESA provides an exemption for certain antique articles. Polar bears held in captivity prior to the listing of the polar bear as a threatened species under the ESA and not used or subsequently held or used in the course of a commercial activity, and all items containing polar bear parts that qualify as antiques under the ESA, would qualify for these exemptions.

Section 102(e) of the MMPA contains a pre-MMPA exemption that provides that none of the restrictions shall apply to any marine mammal or marine mammal product composed from an animal taken prior to December 21, 1972. In addition, Article VII(2) of CITES provides a pre-Convention exception that exempts a pre-Convention specimen from standard permitting requirements in Articles III, IV, and V of CITES when the exporting or re-exporting country is satisfied that the specimen was acquired before the provisions of CITES applied to it and issues a CITES document to that effect (see 50 CFR 23.45). The special rule does not affect requirements under CITES, therefore, these specimens continue to require this pre-Convention documentation for any international movement. Pre-Convention certificates required by CITES and pre-MMPA affidavits and supporting documentation required under the Service's regulations at 50 CFR 18.14 ensure that trade in pre-MMPA and pre-Convention specimens meet the requirements of the exemptions.

This rule adopts the pre-Act provisions of the MMPA and CITES. The MMPA has been in force since 1972 and CITES since 1975. In that time, there has never been a conservation problem identified regarding pre-Act polar bear specimens. While under this special rule, polar bear specimens that were obtained prior to the date that the MMPA went into effect (December 21, 1972) are not subject to the same restrictions as other threatened species under the general regulations at §§ 17.31 and 17.32, the number of specimens and the nature of the activities to which these restrictions would apply is limited. There are very few live polar bears, either in a controlled environment within the United States or elsewhere, that would qualify as ''pre-Act'' under the MMPA. Therefore, the standard MMPA restrictions apply to virtually all live polar bears. Of the dead specimens that would qualify as ''pre-Act'' under the MMPA, very few of these specimens would likely be subject to activities due to the age and probable poor physical quality of these specimens. Furthermore, under CITES these specimens would continue to require documentation for any international movement, which would verify that the specimen was acquired before CITES went into effect in 1975 for polar bears. While the general ESA regulations would provide some additional restrictions, such activities have not been identified as a threat in any way to the polar bear. Thus, CITES and the MMPA provide appropriate protections that are necessary and advisable to provide for the conservation of the polar bear in this regard, and additional restrictions under the ESA are not necessary.

Subsistence, Handicraft Trade, and Cultural Exchanges

Section 10(e) of the ESA provides an exemption for Alaska Natives for the taking and importation of listed species if such taking is primarily for subsistence purposes. Nonedible by-products of species taken in accordance with the exemption, when made into authentic native articles of handicraft and clothing, may be transported, exchanged, or sold in interstate commerce. The ESA defines authentic native articles of handicraft and clothing as items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices (section 10(e)(3)(ii)). That definition also provides that traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. Further details on what qualifies as authentic native articles of handicrafts and clothing are provided at 50 CFR 17.3. This exemption is similar to one in section 101(b) of the MMPA, which provides an exemption from the moratorium on take for subsistence harvest and the creation and sale of authentic native articles of handicrafts or clothing by Alaska Natives. The definition of authentic native articles of handicrafts and clothing in the MMPA is identical to the ESA definition, and our MMPA definition in our regulations at 50 CFR 18.3 is identical to the ESA definition at 50 CFR 17.3. Both statutes require that the taking may not be accomplished in a wasteful manner.

Under this special rule, any exempt activities under the MMPA associated with handicrafts or clothing or cultural exchange using subsistence-taken polar bears will not require additional authorization under the ESA, including the limited, noncommercial import and export of authentic native articles of handicrafts and clothing that are created from polar bears taken by Alaska Natives. Under this special rule, all such imports and exports involving polar bear parts and products will need to conform to what is currently allowed under the MMPA, comply with our import and export regulations found at 50 CFR parts 14 and 23, and be noncommercial in nature. The ESA regulations at 50 CFR 14.4 define commercial as related to the offering for sale or resale, purchase, trade, barter, or the actual or intended transfer in the pursuit of gain or profit, of any item of wildlife and includes the use of any wildlife article as an exhibit for the purpose of soliciting sales, without regard to the quantity or weight.

Another activity covered by the special rule is cultural exchange between Alaska Natives and Native inhabitants of Russia, Canada, and Greenland with whom Alaska Natives share a common heritage. The MMPA allows the import and export of marine mammal parts and products that are components of a cultural exchange, which is defined under the MMPA as the sharing or exchange of ideas, information, gifts, clothing, or handicrafts. Cultural exchange has been an important exemption for Alaska Natives under the MMPA, and this special rule ensures that such exchanges will not be interrupted.

This special rule also adopts the registered agent and tannery process from the current MMPA regulations. In order to assist Alaska Natives in the creation of authentic native articles of handicrafts and clothing, the Service's

MMPA implementing regulations at 50 CFR 18.23(b) and (d) allow persons who are not Alaska Natives to register as an agent or tannery. Once registered, agents are authorized to receive or acquire marine mammal parts or products from Alaskan Natives or other registered agents. They are also authorized to transfer (not sell) hides to registered tanners for further processing. A registered tannery may receive untanned hides from Alaska Natives or registered agents for tanning and return. The tanned skins may then be made into authentic articles of clothing or handicrafts. Registered agents and tanneries must maintain strict inventory control and accounting methods for any marine mammal part, including skins; they provide accountings of such activities and inventories to the Service. These restrictions and requirements for agents and tanners allow the Service to monitor the processing of such items while ensuring that Alaska Natives can exercise their rights under the exemption. Adopting the registered agent and tannery process aligns ESA provisions relating to the creation of handicrafts and clothing by Alaska Natives with the current process under the MMPA and allows Alaska Natives to engage in the subsistence practices provided under the ESA's section 10(e) exemptions.

Nonetheless, the provisions in this special rule regarding creation, shipment, and sale of authentic native articles of handicrafts and clothing apply only to items to which the subsistence harvest exemption applies under the MMPA. The exemption in section 10(e)(1) of the ESA applies to ''any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska'' but also applies to ''any non-native permanent resident of an Alaskan native village.'' However, the exemption under section 101 of the MMPA is limited to only an ''Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean.'' Because the MMPA is more restrictive, only a person who qualifies under the MMPA Alaska Native exemption may legally take polar bears for subsistence purposes, as a take by nonnative permanent residents of Alaska native villages under the broader ESA exemption is not allowed under the MMPA. Therefore, all persons, including those who qualify under the Alaska Native exemption of the ESA, should consult the MMPA and our regulations at 50 CFR part 18 before engaging in any activity that may result in a prohibited act to ensure that their activities will be consistent with both laws.

Although a few of these provisions of the MMPA may be less strict than the ESA provisions, these provisions are the appropriate regulatory mechanisms for the conservation of the polar bear. Both the ESA and the MMPA recognize the intrinsic role that marine mammals have played and continue to play in the subsistence, cultural, and economic lives of Alaska Natives. The Service, in turn, recognizes the important role that Alaska Natives play in the conservation of marine mammals. Amendments to the MMPA in 1994 acknowledged this role by authorizing the Service to enter into cooperative agreements with Alaska Natives for the conservation and co-management of subsistence use of marine mammals (section 119 of the MMPA). Through these cooperative agreements, the Service has worked with Alaska Native organizations to better understand the status and trends of polar bear throughout Alaska. For example, Alaska Natives collect and contribute biological specimens from subsistence-harvested animals for biological analysis. Analysis of these samples allows us to monitor the health and status of polar bear stocks.

Further, as discussed in our proposed and final rules to list the polar bear as a threatened species (72 FR 1064; January 9, 2007, and 73 FR 28212; May 15, 2008), the Service cooperates with the Alaska Nanuuq Commission, an Alaska Native organization that represents interests of Alaska Native villages whose members engage in the subsistence hunting of polar bears, to address polar bear subsistence harvest issues. In addition, for the Southern Beaufort Sea population, hunting is regulated voluntarily and effectively through an agreement between the Inuvialuit of Canada and the Inupiat of Alaska (implemented by the North Slope Borough) as well as being monitored by the Service's marking, tagging, and reporting program. In addition, in the Chukchi Sea, the Service will be working with Alaska Natives through the recently implemented Agreement between the United States of America and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population (Bilateral Agreement), under which one of two commissioners representing the United States will represent the Native people of Alaska and, in particular, the Native people for whom polar bears are an integral part of their culture. Thus, we recognize the unique contributions Alaska Natives provide to the Service's understanding of polar bears, and their interest in ensuring that polar bear stocks are conserved and managed to achieve and maintain healthy populations.

The Service recognizes the significant conservation benefits that Alaska Natives have already made to polar bears through the measures that they have voluntarily taken to self-regulate harvest that is otherwise exempt under the MMPA and the ESA and through their support of measures for regulation of harvest. This contribution has provided significant benefit to polar bears throughout Alaska, and will continue by maintaining and encouraging the involvement of the Alaska Native community in the conservation of the species. This special rule provides for the conservation of polar bears, while at the same time accommodating the subsistence, cultural, and economic interests of Alaska Natives, which are interests recognized by both the ESA and MMPA. Therefore, the Service finds that aligning provisions under the ESA relating to the creation, shipment, and sale of authentic native handicrafts and clothing by Alaska Natives with what is already allowed under the MMPA contributes to a regulation that is necessary and advisable to provide for the conservation of polar bears.

This aspect of the special rule is limited to activities that are not already exempted under the ESA. The ESA itself provides a statutory exemption to Alaska Natives under section 10(e) of the ESA for the harvesting of polar bears from the wild as long as the taking is for primarily subsistence purposes. The ESA then specifies that polar bears taken under this provision can be used to create handicrafts and clothing and that these items can be sold in interstate commerce. Thus, this rule does not regulate the taking or importation of polar bears or the sale in interstate commerce of authentic native articles of handicrafts and clothing by qualifying Alaska Natives; these have already been exempted by statute. This special rule addresses only activities relating to cultural exchange and limited types of travel, and to the creation and shipment of authentic native handicrafts and clothing that are currently allowed under section 101 of the MMPA that are not already clearly exempted under section 10(e) of the ESA.

In addition, in our final rule to list the polar bear as threatened (73 FR 28212; May 15, 2008), while we found that polar bear mortality from harvest and negative bear-human interactions may be approaching unsustainable levels for some populations, especially those experiencing nutritional stress or

declining population numbers as a consequence of habitat change, subsistence take by Alaska Natives does not currently threaten the polar bear throughout all or any significant portion of its range. Range-wide, continued harvest and increased mortality from bear-human encounters or other reasons are likely to become more significant threats in the future. The Polar Bear Specialist Group (Aars *et al.* 2006, p. 57), through resolution, urged that a precautionary approach be instituted when setting harvest limits in a warming Arctic environment, and continued efforts are necessary to ensure that harvest or other forms of removal do not exceed sustainable levels. However, the Service has found that standards for subsistence harvest in the United States under the MMPA and the voluntary measures taken by Alaska Natives to manage subsistence harvest in the United States have been effective, and that, range-wide, the lawful subsistence harvest of polar bears and the associated creation, sale, and shipment of authentic handicrafts and clothing currently do not threaten the polar bear throughout all or a significant portion of its range and are not affected by the provisions of this special rule.

National Defense Activities

Section 319 of the NDAA amended section 101 of the MMPA to provide a mechanism for the Department of Defense (DOD) to exempt actions or a category of actions necessary for national defense from requirements of the MMPA provided that DOD has conferred, for polar bears, with the Service. Such an exemption may be issued for no more than 2 years. This special rule provides that an exemption invoked as necessary for national defense under the MMPA will require no separate authorization under the ESA. The MMPA exemption requires DOD to confer with the Service, the exemptions are of limited duration and scope (only those actions ''necessary for national defense''), and no actions by the DOD have been identified as a threat to the polar bear throughout all or any significant portion of its range.

Penalties

As discussed earlier, the MMPA provides substantial civil and criminal penalties for violations of the law. These penalties, regardless of whether a violation occurs inside or outside the current range of the species, remain in place and are not affected by this rule. Because CITES is implemented through the ESA, any trade of polar bears or polar bear parts or products contrary to CITES and possession of any polar bear specimen that was traded contrary to the requirements of CITES is a violation of the ESA and remains subject to its penalties.

Under this special rule, however, certain acts not related to CITES violations also remain subject to the penalties of the ESA. Under paragraph (2) of this special rule, any act prohibited under the MMPA that would also be prohibited under the ESA regulations at 50 CFR 17.31 and that has not been authorized or exempted under the MMPA would be a violation of the ESA as well as the MMPA. In addition, even if an act is authorized or exempt under the MMPA, failure to comply with all applicable terms and conditions of the statute, the MMPA implementing regulations, or an MMPA permit or authorization issued by the Service would likewise constitute a violation of the ESA. Under paragraph (4) of this rule, the ESA penalties also remain applicable to any incidental take of polar bears that is caused by activities within the current range of the species, if that incidental take has not been authorized under the MMPA consistent with paragraph (2) of this rule. While ESA penalties would not apply to any incidental take caused by activities outside the current range, as explained above, all MMPA penalties remain in place in these areas. A civil penalty of $12,000 to $25,000 is available for a knowing violation (or any violation by a person engaged in business as an importer or exporter) of certain provisions of the ESA, the regulations, or permits, while civil penalties of up to $500 are available for any other violation. Criminal penalties and imprisonment for up to one year, or both, are also available for certain violations of the ESA. In addition, all fish and wildlife taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of the ESA or any ESA regulation or permit or certificate issued under the ESA are subject to forfeiture to the United States. There are also provisions for the forfeiture of vessels, vehicles, and other equipment used in committing unlawful acts under the ESA upon conviction of a criminal violation.

As discussed earlier, even where MMPA penalties provide the sole deterrence against unlawful activities under this rule, these penalties are substantial. A civil penalty of up to $10,000 for each violation may be assessed against any person, which includes businesses, States, and Federal agencies as well as private individuals, who violates the MMPA or any MMPA permit, authorization, or regulation. Any person or entity that knowingly violates any provision of the statute or any MMPA permit, authorization, or regulation will, upon conviction, be fined for each violation, be imprisoned for up to 1 year, or both. The MMPA also provides for the seizure and forfeiture of the cargo (or monetary value of the cargo) from any vessel that is employed in the unlawful taking of a polar bear, and additional penalties of up to $25,000 can be assessed against a vessel causing the unlawful taking of a polar bear. Finally, any polar bear or polar bear parts and products themselves can be seized and forfeited upon assessment of a civil penalty or a criminal conviction.

While there are differences between the penalty amounts in the ESA and the MMPA, the penalty amounts are comparable or stricter under the MMPA. The Alternative Fines Act (18 U.S.C. 3571) has removed the differences between the ESA and the MMPA for criminal penalties. Under this Act, unless a Federal statute has been exempted, any individual found guilty of a Class A misdemeanor may be fined up to $100,000. Any organization found guilty of a Class A misdemeanor may be fined up to $200,000. The criminal provisions of the ESA and the MMPA are both Class A misdemeanors and neither the ESA nor the MMPA are exempted from the Alternative Fines Act. Therefore, the maximum penalty amounts for a criminal violation under both statutes is the same: $100,000 for an individual and $200,000 for an organization.

While the maximum civil penalty amounts under the ESA are for the most part higher than the maximum civil penalty amounts under the MMPA, other elements in the penalty provisions mean that, on its face, the MMPA provides greater deterrence. Other than for a commercial importer or exporter of wildlife or plants, the highest civil penalty amounts under the ESA require a showing that the person ''knowingly'' violated the law. The penalty for other than a knowing violation is limited to $500. The MMPA civil penalty provision does not contain this requirement. Under section 105(a) of the MMPA, any person ''who violates'' any provision of the MMPA or any permit or regulation issued there under, with one exception for commercial fisheries, may be assessed a civil penalty of up to $10,000 for each violation.

Determination

Section 4(d) of the ESA states that the ''Secretary shall issue such regulations as he deems necessary and advisable to

provide for the conservation'' of species listed as threatened. Conservation is defined in the ESA to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' In *Webster* v. *Doe,* 486 U.S. 592 (1988), the U.S. Supreme Court noted that similar language ''fairly exudes deference'' to the agency when the court interpreted the authority to terminate an employee when the Director of the Central Intelligence Agency ''shall deem such termination necessary or advisable in the interests of the United States''.

Thus, the regulations promulgated under section 4(d) of the ESA provide the Secretary the discretion to determine what prohibitions, exemptions, or authorizations are necessary and advisable for a species, as long as the regulation provides for the conservation of that species. In such cases, some of the prohibitions and authorizations of the ESA implementing regulations at 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the special rule, but the special rule may also include provisions tailored to the specific conservation needs of the listed species, which may be more or less restrictive than the general provisions. Section 4(d) specifies that ''[t]he Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) * * * with respect to endangered species.''

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* and 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the ESA was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species,'' as long as the measures will ''serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).''

This special rule provides the appropriate prohibitions, and exceptions to those prohibitions, to provide for the conservation of the species. Many provisions provided under the MMPA and CITES are comparable to or stricter than similar provisions under the ESA, including the definitions of take, penalties for violations, and use of marine mammals. As an example, concerning the definitions of harm under the ESA and harassment under the MMPA, while the terminology of the definitions is not identical, we cannot foresee circumstances under which the management for polar bears under the two definitions would differ. In addition, the existing statutory exceptions that allow use of marine mammals under the MMPA (e.g., research, public display) allow fewer types of activities than does the ESA regulation at 50 CFR 17.32 for threatened species, and the MMPA's standards are generally stricter for those activities that are allowed than those standards for comparable activities under the ESA regulations at 50 CFR 17.32. Provisions for take for self-defense are comparable under the ESA and MMPA and clearly provided for under both statutes. Finally, due to the enactment of the Alternative Penalties Act and the provisions therein, the criminal penalties provided under the ESA and MMPA are equivalent.

Additionally, the process for authorization of incidental take under the MMPA is more restrictive than the process under the ESA. The standard for issuing incidental take under the MMPA is ''negligible impact.'' Negligible impact under the MMPA, as defined at 50 CFR 18.27(c), is an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. This is a more protective standard than standards for issuing incidental take under the ESA, which are, for non-Federal actions, that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild and, for Federal actions, that the activity is not likely to jeopardize the continued existence of the species. A proposed Federal action being independently evaluated under the MMPA and the ESA would have more than a negligible impact before, and in some cases well before, a jeopardy determination would be made.

Where the provisions of the MMPA and CITES are comparable to, or even more strict than, the provisions under the ESA, we find that it provides for the conservation of the polar bear to continue to manage the species under the provisions of the MMPA and CITES. As such, these mechanisms have a demonstrated record as being appropriate management provisions. Further, it would not contribute to the conservation of the polar bear and would be inappropriate for the Service to require people to obtain an ESA authorization (including paying application fees) for activities authorized under the MMPA or CITES where protective measures for polar bears under the ESA authorization would be equivalent or less restrictive than the MMPA or CITES requirements.

There are a few activities for which the prohibitions under the MMPA are less restrictive than the prohibitions for the same activities under the ESA, including use of pre-Act specimens, subsistence use, military readiness activities, and take for defense of property and welfare of the animal. Concerning use of pre-Act specimens and military readiness activities, the general ESA regulations would provide some additional restrictions beyond those provided by the MMPA; however, such activities have not been identified as a threat in any way to the polar bear or its conservation. Therefore, the additional restrictions under the ESA would not contribute to the conservation of the species. Concerning subsistence use and take for defense of property and welfare of the animal, the MMPA allows a greater breadth of activities than would be allowed under the general ESA regulations; however, these additional activities clearly provide for the conservation of the polar bear by fostering cooperative relationships with Alaska Natives who participate with us in conservation programs for the benefit of the species, limiting lethal bear-human interactions, and providing immediate benefits for the welfare of individual animals.

We find that for activities within the current range of the polar bear, overlay of the incidental take prohibitions under 50 CFR 17.31 is an important component of polar bear management because of the timing and proximity of potential take of polar bears. Within the range of the polar bear there are currently ongoing lawful activities that result in the incidental take of the species such as those associated with oil and gas exploration and development. Any incidental take from these activities is currently authorized under the MMPA. However, we recognize that

there may be future development or activities that may cause incidental take of the species. Because of this, we find that it is important to have the overlay of ESA incidental take prohibitions in place for several reasons. In the event that a person or entity was causing the incidental take of polar bears that has not been authorized under the MMPA, or they are not in compliance with the terms and conditions of their MMPA incidental take authorization, the overlay will provide that the person or entity is in violation of the ESA as well as the MMPA. In such circumstances, the person can alter his or her activities to eliminate the possibility of incidental take, seek or come into compliance with their MMPA authorization, or be subject to the penalties of the ESA as well as the MMPA. In this situation, the citizen suit provision of section 11 of the ESA would allow any citizen or citizen group to pursue an incidental take that has not been authorized under the MMPA. As such, we have determined that the overlay of the ESA incidental take prohibitions at 50 CFR 17.31 in the current range of the polar bear is important for the conservation of the species.

However, we find that for activities outside the current range of the polar bear, overlay of the incidental take prohibitions under 50 CFR 17.31 is not necessary for polar bear management and conservation. Even though incidental take of polar bears from activities outside the current range of the species is not prohibited under this special rule, the consultation requirements under section 7 of the ESA remain fully in effect. Any biological opinion associated with a consultation will identify any incidental take that is reasonably certain to occur. Any incidental take identified through a biological opinion or otherwise remains a violation of the MMPA unless appropriately authorized. In addition, the citizen suit provision under section 11 of the ESA is unaffected by this rule for challenges to Federal agencies that are alleged to be in violation of the consultation requirement under section 7 of the ESA. Further, the Service will pursue any violation under the MMPA for incidental take that has not been authorized, and all MMPA penalties would apply. As such, we have determined that not having the additional overlay of incidental take prohibitions under 50 CFR 17.31 resulting from activities outside the current range of the polar bear does not impede the conservation of the species.

Our 36-year history of implementation of the MMPA, 33-year history of implementation of CITES, and our analysis in the ESA final listing rule for the species, which shows that none of the activities currently regulated under the MMPA and CITES are factors that threaten the polar bear throughout all or a significant portion of its range, demonstrate that these laws provide appropriate regulatory protection to polar bears for activities that are regulated under these laws. In addition, the threat that has been identified in the final ESA listing rule—loss of habitat and related effects—would not be alleviated by the additional overlay of provisions in the general threatened species regulations at 50 CFR 17.31 and 17.32, or even the full application of the provisions in section 9 and 10 of the ESA. Nothing within our authority under section 4(d) of the ESA, above and beyond what we have already required in this final special rule, would provide the means to resolve this threat.

Therefore, this special rule under section 4(d) of the ESA adopts existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for this threatened species. Under this rule, if an activity is authorized or exempted under the MMPA or CITES, no additional authorization will be required. But if an activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under 50 CFR 17.31, the protections provided by the general threatened species regulations will apply. In such circumstances, the prohibitions of 50 CFR 17.31 would be in effect, and authorization under 50 CFR 17.32 would be required. In addition, any action authorized, funded, or carried out by the Service that may affect polar bears, including the Service's issuance of any permit or authorization described above, will require consultation under section 7 of the ESA to ensure that the action is not likely to jeopardize the continued existence of the species. Section 7 is a powerful tool in the conservation of listed species as it allows the Service to have a role in both the project-by-project planning and the larger development of regulations, guidelines, and restrictions that other Federal agencies may implement. The application of provisions in 50 CFR 17.31 provides an additional overlay of protection for the species. ESA civil and criminal penalties will continue to apply to any situation where a person has not obtained MMPA or CITES authorizations or has obtained their authorizations or is operating under an MMPA or CITES exemption or authorization but has failed to comply with all terms and conditions of the authorization or exemption.

We find that this final special rule is necessary and advisable to provide for the conservation of the polar bear because the MMPA and CITES have proven effective in managing polar bears for more than 30 years. The comparable or stricter provisions of the MMPA and CITES, along with the application of the ESA regulations at 50 CFR 17.31 and 17.32 for any activity that has not been authorized or exempted under the MMPA and CITES or for which a person or entity is not in compliance with the terms and conditions of any MMPA or CITES authorization or exemption, address those negative effects on polar bears that can foreseeably be addressed under sections 9 and 10 of the ESA. It would not contribute to the conservation of the polar bear to require an unnecessary overlay of redundant authorization processes that would otherwise be required under the general ESA threatened species regulations at 50 CFR 17.31 and 17.32.

Nothing in this special rule changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the ESA, including consideration of adverse modification to any critical habitat that may be designated in the future, or the ability of the Service to enter into domestic and international partnerships for the management and protection of the polar bear.

Summary of Changes From the Interim Final Rule

In preparing the final special rule for the polar bear, we reviewed and considered comments from the public on the May 15, 2008, interim final special rule (73 FR 28306). As a result of comments received, we made the following changes to the interim rule:

(1) Removed discussion of section 4(a)(3) of the ESA from the preamble to the special rule. This section discussed exemptions available to the Department of Defense in the ESA's critical habitat designation process that are not relevant to this rule-making.

(2) Revised paragraph (2) to more clearly define which activities are subject to the prohibitions under the ESA regulations at 50 CFR 17.31.

(3) Revised paragraph (4) to clarify that incidental take from activities located outside the current range of the polar bear is not prohibited, rather than incidental take from activities located outside the State of Alaska.

(4) Reorganized the preamble language and inserted clarifying

language to address substantive comments.

Summary of Comments and Recommendations

In our May 15, 2008, interim final rule to amend the 50 CFR part 17 regulations of the ESA to create a special rule under section 4(d) of the ESA for the polar bear, we opened a 60-day public comment period for all interested parties to submit comments that might contribute to the development of a final determination on the 4(d) rule. The public comment period closed on July 14, 2008.

In response to the public comment period, we received approximately 29,700 comments on our interim final 4(d) rule. To accurately review and incorporate the publicly provided information in our final rule, we worked with the eRulemaking Research Group, an academic research team at the University of Pittsburgh that has developed the Rule-Writer's Workbench analytical software. The Rule-Writer's Workbench enhanced our ability to review and consider the large numbers of comments, including large numbers of similar comments, on our interim final rule, allowing us to identify similar comments as well as unique ideas, data, recommendations, or suggestions on the interim final rule.

All substantive information provided during the public comment period has been considered and either incorporated directly into this final rule or consolidated into key issues in this section.

1. *Issue:* Several commenters expressed concerns about the appropriate listing status of the polar bear, causes of global climate change, the designation of critical habitat, and the development of a recovery plan.

Response: These issues are outside the scope and authority of this special rule. Please see the final listing rule (73 FR 2821; May 15, 2008) for discussion of these topics.

2. *Issue:* Several commenters indicate that the interim final special rule lacks justification for and does not meet the ''necessary and advisable to provide for the conservation'' of the species standard required in a special rule because it does not address the threats of loss of sea-ice habitat due to climate change or the potential for oil spills. Further, a new proposed rule should be published for additional public comments that includes provisions specific to these threats. Other commenters supportive of the special rule assert that the Secretary has the authority to issue such a rule and that the interim final special rule meets the appropriate standards. These commenters suggest that the Secretary has broad discretion through rulemaking to allow or not allow ''take'' of threatened species, without a conservation constraint.

Response: Section 4(d) of the ESA states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. For the reasons provided in the preamble, we find that this rule meets this standard. For example, all trade in polar bears or their parts and products made from polar bears will continue to be analyzed under CITES to ensure that the trade is not detrimental to the survival of the species. All activities that may cause incidental take of polar bears will continue to be reviewed and analyzed under the MMPA to ensure that they would not cause more than a ''negligible impact'' at the species or stock level before being authorized. This includes analysis of the potential for oil spills that may cause the taking of polar bears. Please see the ''Necessary and Advisable Finding'' section above for additional explanation of why this rule meets the legal standard.

Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea-ice habitat. Therefore, there is no need for additional rulemaking. In addition, nothing in this special rule, the MMPA, or CITES precludes us from developing and implementing a recovery plan or entering into a treaty or conservation agreement that addresses the specific threats to the polar bear as outlined in the listing rule (73 FR 28212).

3. *Issue:* Several commenters expressed concern that, by adopting the MMPA regulations to manage the polar bear, the interim final special rule is not protective enough. These concerns include that the MMPA has different ''take'' provisions than the ESA, including a lack of means to protect habitat and to consider cumulative impact, and as such, the final special rule should include any elements of taking defined under the ESA that are not covered under the MMPA. Other commenters stated that the MMPA and CITES are sufficient and appropriate standards for the conservation and management of the species since there is well-documented evidence that the oil and gas industry in Alaska, as regulated and monitored under the MMPA, does not injure or otherwise have more than a negligible effect on polar bears.

Response: We disagree that the polar bear will not be adequately protected by the adoption of the MMPA and CITES regulations under this special rule. The preamble explains how, for polar bears, the definition of take under the MMPA is comparable to or stricter than the definition of take under the ESA.

While the direct protections of the MMPA apply to the animals themselves, as explained in the ''Applicable Laws'' section above, the MMPA includes consideration of habitat and ecosystem protection. The terms ''conservation'' and ''management'' in the MMPA are specifically defined to include habitat acquisition and improvement. Protection of essential habitats, including rookeries, mating grounds, and areas of similar significance is addressed in incidental take authorizations issued under section 101(a)(5) of the MMPA. Cumulative effects are also part of the MMPA incidental take evaluation, as explained in our final rule for Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals (September 29, 1989; 54 FR 40338); ''In determining [cumulative] impact, the Service must evaluate the ''total taking'' expected from the specified activity in a specific geographic area. The estimate of total taking involves the accumulation of impacts from all anticipated activities that are expected to be covered by the specific regulations. In other words, the applicant's anticipated taking from its own activities is only one part of the story; the total taking expected from all persons conducting the activities to be covered by the regulations must be determined.'' In addition, cumulative effects to the species and its habitat are evaluated during the intra-Service ESA section 7 consultation required for the issuance of incidental take authorizations under section 101(a)(5).

4. *Issue:* One commenter noted that the MMPA provides no citizen suit provision and therefore argued that enforcement of the protections provided under the special rule is left entirely to the discretion of the agency. This commenter also stated that the Service has failed to pursue past incidental take violations.

Response: We agree that the MMPA contains no citizen suit provision. However, as explained in the preamble, under this special rule the ESA citizen suit provision will continue to allow a citizen or citizen group to bring a lawsuit against any individual, business or organization, State or local government, or Federal agency that is alleged to be in violation of this rule or other applicable provisions of the ESA. Thus, for example, the provision is

available for any Federal action that may affect polar bears where the Federal agency has failed to satisfy the consultation requirements under section 7 of the ESA, regardless of whether the Federal action is located inside or outside the current range of the species. Although the citizen suit provision does not apply to allegations of ESA incidental take outside the current range of the species as that is not a prohibited act under this rule, the ESA citizen suit provision will otherwise continue to allow any citizen or citizen group to pursue a lawsuit alleging that an activity has resulted or will result in a prohibited act under 50 CFR 17.31 and the person conducting the activity has failed to obtain the necessary MMPA or CITES authorization, is not in compliance with their MMPA or CITES authorization or exemption, or, if the activity is not covered under the MMPA or CITES, has failed to obtain the proper authorization under 50 CFR 17.32. Otherwise, for any violations of this rule and any violations of the MMPA or CITES, the Service will use the full range of its legal authorities to pursue violations of the law. The commenter has not identified any examples where take has occurred, including nonlethal harassment, where the take was not authorized under the MMPA with appropriate protections for the species in place or the take was a violation of the MMPA that was not pursued as a violation of law by the Service.

5. *Issue:* The Service's previous attempts to rely upon alternative management regimes that provide similar but not identical protections to species have been rejected by the courts.

Response: While Congress laid out the prohibitions, authorizations, and exemptions that are appropriate for endangered species, it expressly did not do so for threatened species. Instead it left to the discretion of the agency to determine what measures would be necessary and advisable to provide for the conservation of the species. There is no indication that Congress intended that management regimes for threatened species be identical to management regimes for endangered species. In fact, by stating that regulations for a threatened species ''may'' prohibit any act prohibited for endangered species under section 9 of the ESA, Congress made clear that it may not be appropriate to include section 9 prohibitions for some threatened species. As discussed in the preamble of this rule, the case law supports the discretion of the agency to develop regulations appropriate for the conservation needs of the species, while neither of the cases cited by the commenter is relevant to the development of a special rule under section 4(d) of the ESA. Both cases cited by the commenter challenged critical habitat determinations by the Service, which are covered by different standards than the development of threatened species regulations under section 4(d).

6. *Issue:* Concerning activities that are prohibited by the ESA, several commenters suggested that the Service should remove the possible ambiguity between the wording in the special rule itself exempting actions ''consistent with'' the MMPA and CITES, and the language in the preamble exempting actions ''authorized or exempted by'' the MMPA and CITES.

Response: Although there is no change in meaning from the interim final rule, we accept this suggestion and have changed paragraph (2) in the regulatory language to clarify that actions ''authorized or exempted'' under the MMPA and CITES do not require additional ESA authorization. We have further revised paragraph (2) to clarify that an authorization or exemption is needed under the MMPA or CITES, or both, to qualify for the exception, such that if both statutes are relevant to any particular activity, both statutes must be complied with.

7. *Issue:* One commenter stated that the use of the term ''depleted'' with reference to polar bears is inappropriate because the term does not accurately describe the facts with regard to polar bears.

Response: The term ''depleted'' is not used in this rulemaking in the dictionary sense. Section 3 of the MMPA defines ''depleted'' as: (1) A species or population stock that is below its optimum sustainable population as determined by the Secretary in consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals; (2) a species or population stock that is below its optimum sustainable population as determined by a State to which authority for the conservation and management of that species has been transferred under section 1379 of the MMPA; or, (3) a species or population stock that is listed as endangered or threatened under the Endangered Species Act of 1973, as amended. Thus, when the polar bear was listed as a threatened species under the ESA on May 15, 2008, it obtained depleted status as a matter of law under the MMPA.

8. *Issue:* The rule should clarify that a waiver of the MMPA moratorium on taking and importing polar bears under sections 101(a)(3)(A) and 103 is no longer available since the polar bear is now considered a depleted species under the MMPA.

Response: Section 101(a)(3)(A) authorizes the Service, in consultation with the Marine Mammal Commission, to waive the MMPA moratorium on taking and importation of marine mammals so as to allow taking or importing of any marine mammal or marine mammal product as long as a determination to do so is made based on the best scientific evidence and takes into consideration the distribution, abundance, breeding habits, and time and lines of migratory movements and is compatible with the MMPA. In making such a determination, the Service must be assured that the taking is in accord with sound principles of resource protection and conservation. We agree that the waiver of the moratorium is no longer available for polar bears as the species now has depleted status under the MMPA. See *Committee for Humane Legislation* v. *Richardson,* 414 F.Supp. 297 (D.DC. 1976).

9. *Issue:* The preamble to the final rule should provide clarification about importation of polar bears for commercial and educational photography.

Response: Under section 104(c)(6) of the MMPA, a permit may be issued for commercial and educational photography of marine mammals in the wild provided the taking is limited to Level B harassment. Although section 104(a) allows permits to be issued for taking or importation, section 104(c)(6) clearly limits photography permits to taking in the wild; thus importation of polar bears for photography is not allowed. In the interim special rule, we mistakenly included photography in the list of activities under section 101(a)(3)(B) of the MMPA that qualify as exceptions to the prohibition on import for species with depleted status. Section 101(a)(3)(B), when read in conjunction with section 104(c)(6), allows us to issue a permit only for Level B harassment take for photography of polar bears for educational or commercial purposes, and not for importation. We have removed the language in the preamble that was confusing.

10. *Issue:* The discussion of public display permits needs to be clarified to specify that such permits are no longer allowed for polar bears since they are now considered a depleted species under the MMPA.

Response: With the listing of the polar bear under the ESA and the concurrent designation of polar bears as a depleted species under the MMPA, new permits

for the take and import of polar bears for public display under section 104(c)(2) of the MMPA are no longer available.

Before being listed as threatened under the ESA, a polar bear that was permitted for the purpose of public display (or its progeny) could be transferred, transported, exported, or re-imported without additional MMPA authorization, provided the receiving institution met the specific housing and display criteria or comparable standards (if an export was involved). Now that the species is listed under the ESA, only polar bears or their progeny that qualified as public display animals prior to May 15, 2008, can continue to be displayed and transferred within the United States consistent with the MMPA requirements for notification outlined in section 104(c)(2)(E). Further, such animals, or their progeny, can be exported provided they meet the requirements for comparable standards under section 104(c)(9) of the MMPA and all requirements under CITES. However, any animals that have been exported cannot be re-imported for the purpose of public display, and no permit may be issued for the taking or importation of a polar bear for purposes of public display. A waiver of the MMPA's moratorium on taking or importing polar bears under section 101(a)(3)(A) and 103 of the Act is not available now that the species has depleted status under the MMPA. As specified in section 17 of the ESA, nothing in a special rule under section 4(d) of the ESA can override these more restrictive measures of the MMPA.

11. *Issue:* The summary of requirements for obtaining an enhancement of survival permit is discussed under the MMPA but a discussion is not included under the ESA for comparison.

Response: We have added a description of the issuance criteria for ESA enhancement permits under the general threatened species regulation found in 50 CFR 17.32 to the ''Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase'' section above.

12. *Issue:* Authorizations for scientific research and enhancement of survival permits issued under the MMPA should be subject to review under the ESA.

Response: As discussed in the ''Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase'' section above, the standards for issuing scientific research and enhancement permits are stricter under the MMPA than those under the general threatened species regulations under the ESA. Thus, we believe that the MMPA criteria are the appropriate provisions for the conservation of the polar bear. In addition, as mentioned above, we must conduct an intra-Service section 7 consultation for any activity that we authorize, fund, or carry out that may affect a listed species. The issuance of an MMPA scientific research or enhancement of survival permit is a Federal action that would require a section 7 consultation under the ESA.

13. *Issue:* The interim final special rule failed to discuss section 101(a)(4)(B) of the MMPA in which the Service is directed to recommend specific measures that can be used to nonlethally deter a listed marine mammal.

Response: Section 101(a)(4)(B) of the MMPA provides a mechanism for the Service to publish specific measures that may be used to nonlethally deter marine mammals that are listed as endangered or threatened under the ESA. The Service has committed to develop such measures for polar bear deterrence in consultation with appropriate experts. These measures will be published in the **Federal Register** for public review and comment prior to finalization.

14. *Issue:* The Service should clarify discussion in the preamble of the interim final special rule to explain that, for listed marine mammals, ESA incidental take is authorized under section 7(b)(4) instead of a section 10(a)(1)(B) permit.

Response: Absent this special rule, incidental take under the ESA is authorized under section 7(b)(4) and (o)(2) of the ESA through the consultation process for Federal activities, through a section 10(a)(1)(B) permit for non-Federal activities for endangered species, and, if applicable, through a 50 CFR 17.32 permit for non-Federal activities for threatened species. Under this special rule, incidental take authorized under the MMPA does not require additional authorization under the ESA regardless of whether the activity is Federal or non-Federal. However, the section 7 consultation requirements continue to apply to any Federal activity that may affect a listed species. Please see the ''Incidental Take'' section above for additional discussion of incidental take authorizations.

15. *Issue:* The Secretary was correct to conclude that there is no causal link between greenhouse gas (GHG) emissions and take of specific polar bears. Service regulations, policies, and handbooks should be revised to further emphasize this conclusion.

Response: For listed species, section 7(a)(2) of the ESA requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species. If a Federal action may affect a listed species, the responsible Federal action agency must enter into consultation with us subject to the provisions of 50 CFR 402.14(b) and 402.03. In addition, as a Federal agency, the Service must conduct an intra-Service section 7 consultation for any action it authorizes, funds, or carries out that may affect polar bears. This requirement does not change with the adoption of this special rule.

Nonetheless, the determination of whether consultation is triggered is based on the discrete effects of the proposed agency action. This is not to say that other factors affecting listed species are ignored. Initially, however, a Federal agency evaluates whether consultation is necessary by analyzing what will happen to listed species ''with and without'' the proposed action. This analysis considers the direct effects and indirect effects of the action under consultation (including the direct and indirect effects that are caused by interrelated and interdependent activities) to determine if the proposed action ''may affect'' listed species. For indirect effects, our regulations at 50 CFR 402.02 require that they both be ''caused by the action under consultation'' and ''reasonably certain to occur.'' That is, the consultation requirement is triggered only if there is a causal connection between the proposed action and a discernible effect to the species or critical habitat that is reasonably certain to occur. One must be able to ''connect the dots'' between an effect of proposed action and an impact to the species and there must be a reasonable certainty that the effect will occur. Direct effects are the immediate effects of the action and are not dependent on the occurrence of any additional intervening actions for the impacts to species or critical habitat to occur.

While there is no case law directly on point, in *Arizona Cattlegrowers' Association* v. *U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001), the 9th Circuit ruled that in preparing incidental take statements for section 7 consultations the Service must demonstrate the connection between the action under consultation and the actual resulting take of the listed species, which is one form of effect. In that case, the court reviewed grazing allotments and found several incidental take statements to be arbitrary and capricious because the Service did not connect the action under consultation (grazing) with an effect on (take of) specific individuals of the listed species. The

court held that the Service had to demonstrate a causal link between the action under consultation (issuance of grazing permits with cattle actually grazing in certain areas) and the effect (take of listed fish in streams), which had to be reasonably certain to occur. The court noted that ''speculation'' with regard to take ''is not a sufficient rational connection to survive judicial review.''

We have specifically considered whether a Federal action that produces GHG emissions is a ''may affect'' action that requires section 7 consultation with regard to any and all species that may be impacted by climate change. As described above, the regulatory analysis of indirect effects of the proposed action requires the determination that a causal linkage exists between the proposed action, the effect in question (climate change), and listed species. There must be a traceable connection from one to the next, and the effect must be ''reasonably certain to occur.'' This causation linkage narrows section 7 consultation requirements to listed species in the ''action area'' rather than to all listed species. Without the requirement of a causal connection between the action under consultation and effects to species, literally every agency action that contributes greenhouse gases to the atmosphere would arguably result in consultation with respect to every listed species that may be affected by climate change. This would render the regulatory concept of ''action area'' meaningless.

There is currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including polar bears. As we now understand them, the best scientific data currently available do not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change.

Since the development of the interim final special rule for the polar bear, additional guidance has been issued concerning consultation requirements in relation to GHG emissions. A policy memorandum titled ''Expectations for Consultations on Actions that Would Emit Greenhouse Gases'' was issued by the Director of the Service on May 14, 2008. This memorandum speaks to the issues discussed above and establishes a framework for consultation on GHG emissions. The memorandum clarifies that, while direct impacts from oil and gas development operations would undergo consultation, the future indirect impacts of individual GHG emitters cannot be shown to result in ''take'' based on the best available science at this time and that ''the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit GHG will require the initiation of section 7 consultation.''

Furthermore, on August 15, 2008, the Service and NMFS proposed to amend regulations governing interagency consultation under section 7 of the ESA (73 FR 47868). The Service and NMFS proposed these changes to clarify several definitions, to clarify when the section 7 regulations are applicable and the correct standards for effects analysis, and to establish timeframes for the informal consultation process. We have not yet taken final action on this proposed rule.

Finally, on October 3, 2008, the Department of the Interior's Solicitor issued a legal memorandum on the applicability of consultation requirements to proposed actions involving the emission of GHGs. That memorandum noted that the causal link cannot currently be made between emissions from a proposed action and specific effects on a listed species. Therefore, the Solicitor concluded that, given the current state of science, a proposed action that will involve the emission of GHGs cannot pass the ''may affect'' test for those GHGs as they relate to climate change, and is not subject to consultation on those effects under the ESA and its implementation regulations.

16. *Issue:* Paragraph (4) of the interim final special rule should be revised to explicitly exempt GHG emissions from section 9 ''take'' prohibitions and section 7 consultations.

Response: As discussed in the response to issue 15, since the publication of the interim final special rule, the Director has issued a policy memorandum, the Department of the Interior's Solicitor has issued a legal memorandum, and the Service and NMFS have published proposed revisions to the general section 7 regulations under the ESA that address these issues more thoroughly.

17. *Issue:* Several commenters expressed concern or confusion about paragraph (4) of the interim final special rule, noting a lack of rationale for this paragraph in the preamble to the interim final special rule.

Response: We apologize for the confusion and lack of explicit rationale for paragraph (4) in the interim final special rule. Discussion of the operation of paragraph (4) in contributing to the conservation of the polar bear is found in the ''Necessary and Advisable Finding'' section above.

18. *Issue:* Several commenters noted that the use of the term ''Alaska'' in paragraph (4) was vague, inappropriate, or did not accurately reflect the range of the polar bear.

Response: This provision has been modified from the version of paragraph (4) that appeared in the interim final special rule to more precisely delineate where the ESA prohibition against incidental take is necessary and advisable to provide for the conservation of the polar bear. Under paragraph (4), incidental take of polar bears that results from activities that occur outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31. The areas within the current range of the polar bear where ESA incidental take prohibitions at 50 CFR 17.31 apply include land or water that is subject to the jurisdiction or sovereign rights of the United States (including portions of lands and inland waters of the United States, the territorial waters of the United States, and the United States' Exclusive Economic Zone or the limits of the continental shelf) and the high seas.

19. *Issue:* The special rule should be revised to require that a polar bear used to create authentic native articles of handicrafts or clothing must be taken primarily for subsistence purposes, as defined in the Service's ESA regulations at 50 CFR 17.3.

Response: A polar bear that is lawfully taken by an Alaska Native under the exemption in section 101(b) of the MMPA meets the exemption requirements under section 10(e) of the ESA, and therefore no further taking authorization is needed under the ESA. Section 101(b) of the MMPA provides that, to qualify for this statutory exemption, the taking must be for subsistence purposes or for purposes of creating and selling authentic native articles of handicrafts and clothing. The ESA articulates the requisite purpose of the taking somewhat differently by stating that it must be ''primarily'' for subsistence purposes and expressly including the creation and sale of authentic native articles of handicrafts and clothing within the scope of the statutory exemption. In the regulations implementing both the MMPA and the ESA, the Service has clarified that subsistence includes not only use for food but also for clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker of the animal or those who depend upon the taker to provide them with such subsistence. Thus, the taking of a polar bear to create authentic native articles of handicrafts and clothing that are, for example, used directly or

bartered or sold to provide income for one of the above specific purposes, including a use ''necessary to maintain the life of the taker,'' qualifies as a taking for primarily subsistence purposes under section 10(e) of the ESA. Any such taking that meets the requirements of the subsistence provision is exempt under the ESA and requires no authorization.

20. *Issue:* Hunting of polar bears should not be allowed.

Response: Since 1972, only the subsistence hunting of polar bears by Alaska Natives has been allowed in the United States. Congress included specific exemptions for take by Alaska Natives under both the MMPA and the ESA. Harvesting of polar bears is an important cultural and economic activity for Native peoples throughout much of the Arctic. A management agreement is in place between the Inupiat of Alaska and the Inuvialuit of Canada which serves to help ensure that Beaufort Sea polar bear harvests remain at sustainable levels. The Bering-Chukchi polar bear stock is shared with Russia and implementation of the U.S.-Russia Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear population provides a framework for cooperatively managing subsistence harvest of this population. The final listing rule found that subsistence harvest in Alaska was not a threat to the species throughout all or a significant portion of its range. The Service will continue to work with the Alaska Native community to comanage subsistence-related issues.

Neither the ESA nor the MMPA restrict take in areas subject to the territorial jurisdiction of foreign countries. It is within the sovereign rights of other countries to establish the appropriate laws and regulations that govern take of polar bears in their countries.

21. *Issue:* The income from trophy hunts to native communities is a very important aspect of Nunavut economy. Since the special rule recognizes this activity is not a primary threat to the species, the final special rule should permit import of trophies. At a minimum, the Service should allow import of trophies that were actually taken before the polar bear became a threatened species on May 15, 2008.

Response: We recognize that polar bear sport trophy hunt incomes are a vital part of the economy of the native communities in the Northwest Territories and Nunavut, and that Canada's management system of harvest quotas is based on maintaining polar bear populations at sustainable levels. Native communities may choose to use their annual harvest quota tags to guide sport hunts. As described more fully in the interim final special rule (73 FR 28306; May 15, 2008), Congress amended the MMPA in 1994 to allow hunters to import their trophies into the United States provided certain criteria were met, including that the polar bears had been taken in a legal manner from sustainably managed populations.

Under section 3(1)(C) of the MMPA, marine mammals such as the polar bear are considered ''depleted'' species once they are listed as threatened or endangered species under the ESA; therefore, the polar bear was automatically considered a depleted species when it was listed as threatened under the ESA on May 15, 2008. The MMPA (sections 101(a)(3)(B) and 102(b)) sets restrictions on what activities are allowed for species that are depleted. For a depleted species, under section 101(a)(3)(B) of the MMPA only imports for purposes of scientific research or for the enhancement and survival of the species can be authorized or allowed. Importation of polar bear parts taken in sport hunts in Canada is not one of the exceptions to the restrictions on depleted species. However, section 104(c)(5)(D) of the MMPA continues to allow for the import of sport-hunted polar bear trophies that were legally taken in Canada prior to February 18, 1997.

Therefore, as of the effective date of the final listing of the polar bear under the ESA on May 15, 2008, importation of a sport-hunted polar bear trophy taken in Canada after February 18, 1997, is prohibited under the terms of the MMPA, even if the polar bear was taken in a hunt prior to May 15, 2008. A waiver of the MMPA's moratorium on importing polar bears under section 101(a)(3)(A) and 103 is not available because the species has depleted status. Section 17 of the ESA states that, unless expressly provided for, no provision in the ESA takes precedence over any more restrictive conflicting provision in the MMPA. Thus, nothing in a special rule under section 4(d) of the ESA can override the more restrictive provisions of the MMPA. A congressional amendment to the MMPA would be needed in order to allow the import of sport-hunted trophies taken in Canada after February 18, 1997.

22. *Issue:* The special rule should provide specific exemptions for the ongoing activities of the North Slope Borough and the native communities.

Response: Under the special rule, if an activity is authorized or exempted under the MMPA or CITES, it does not require additional authorization under the ESA. Therefore, the ongoing activities of the North Slope Borough and native communities that are authorized or exempt under the MMPA or CITES do not require additional authorization under the ESA. Such activities would include existing authorizations under incidental take regulations, LOAs, IHAs, and exemptions concerning subsistence use of handicrafts, cultural exchange, and defense of life and property.

23. *Issue:* The Service should include a severability clause in the final rule.

Response: We recognize that severability clauses are frequently used in legislation but have decided that such a clause would not be useful in the current rule. The rule is organized in a manner that reflects the connection among the different paragraphs while also indicating the distinctiveness of the different provisions. We would expect a court to take the discreteness of the various provisions into consideration during any judicial review of the rule.

24. *Issue:* The Service should invoke ''Chevron'' deference for the final rule.

Response: The Service agrees that the agency should receive deference during any judicial review of the rule regarding the conservation measures that are appropriate for the polar bear under the ESA. For threatened species, Congress left it to the Secretary's discretion to determine what measures are ''necessary and advisable to provide for the conservation of [the] species.'' We would expect a court to be particularly deferential given that development of appropriate conservation measures for threatened species is a technical matter. Nonetheless, the Service believes that it is unnecessary to specifically invoke such deference as part of the rulemaking process.

25. *Issue:* The interim final rule violated the APA because the public was not given the opportunity to comment on a proposed rule before the interim final rule went into effect.

Response: We disagree. Under section 553(b)(3)(B) of the APA, Federal agencies have the authority to issue interim final rules when ''the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' We issued the interim final rule to ensure that the maximum regulatory protections would be in place for the polar bear from the time the species was listed as threatened until such time as we could promulgate a final special rule. We solicited public comment on the interim rule, and this final rule reflects the consideration of those comments and the appropriate

modifications to the preamble and regulations section that resulted from those comments.

26. *Issue:* Some commenters stated that the interim final rule violated the National Environmental Policy Act (NEPA) because we failed to prepare an environmental impact statement. They assert that the special rule is substantially similar to an incidental take statement and permit for which courts have held that NEPA review is mandatory. Citing previous court decisions, other commenters stated that analysis under NEPA is not required for section 4(d) rules.

Response: This rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant to section 4(d) rules. A 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. The NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decision-making process. The opportunity for public comment, one of the goals of NEPA, is also already provided through the rulemaking procedures. Although this rule is exempt from NEPA, any consultations conducted on activities covered by this 4(d) rule, as well as issuance of IHAs or LOAs, would be subject to the appropriate level of NEPA review.

Required Determinations

Regulatory Planning and Review

Executive Order 12866 requires Federal agencies to submit proposed and final significant rules to the Office of Management and Budget (OMB) prior to publication in the FR. The Executive Order defines a rule as significant if it meets one of the following four criteria:

(a) The rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) The rule will create inconsistencies with other Federal agencies' actions;

(c) The rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) The rule raises novel legal or policy issues.

If the rule meets criteria (a) above it is called an ''economically significant'' rule and additional requirements apply. It has been determined that this rule is ''significant'' but not ''economically significant.'' It was submitted to OMB for review prior to promulgation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

Based on the information that is available to us at this time, we are certifying that this special rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR 121.201 (also found at *http://www.sba.gov/size/*), which the RFA requires all Federal agencies to follow. To determine if potential economic impacts to these small entities would be significant, we considered the types of activities that might trigger regulatory impacts. However, this special rule for the polar bear will, with limited exceptions, allow for maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA. Therefore, we anticipate no significant economic impact on a substantial number of small entities from this rule. Therefore, a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

(b) Because this special rule for the polar bear allows, with limited exceptions, for the maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA, we do not believe that this rule will significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this

Executive Order because this special rule will, with limited exceptions, maintain the status quo regarding activities currently allowed under the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, on the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This special rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The rule does not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

This rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA. The Service subsequently expanded this determination to section 4(d) rules. A section 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decision-making process. The opportunity for public comment—one of the goals of NEPA—is also already provided through section 4 rulemaking procedures. This determination was upheld in *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service,* No. 04–04324 (N.D. Cal. 2005).

Government-to-Government Relationship With Tribes

The Service, in accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 and the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3225, acknowledges our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. During the public comment period following our proposal to list the polar bear as threatened (72 FR 1064), Alaska Native tribes and tribally authorized organizations were among those that provided comments on the listing action. In addition, public hearings were held at Anchorage (March 1, 2007) and Barrow (March 7, 2007), Alaska. For the Barrow public hearing, we established teleconferencing capabilities to provide an opportunity to receive testimony from outlying communities. The communities of Kaktovik, Gambell, Kotzebue, Shishmaref, and Point Lay, Alaska, participated in this public hearing via teleconference.

Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. For reasons discussed within this rule, we believe that the rule does not have any effect on energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.40 by revising paragraph (q) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(q) Polar bear (*Ursus maritimus*).

(1) Except as noted in paragraphs (q)(2) and (q)(4) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 of this part apply to the polar bear.

(2) None of the prohibitions in § 17.31 of this part apply to any activity that is authorized or exempted under the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 et seq., the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), or both, provided that the person carrying out the activity has complied with all terms and conditions that apply to that activity under the provisions of the MMPA and CITES and their implementing regulations.

(3) All applicable provisions of 50 CFR parts 14, 18, and 23 must be met.

(4) None of the prohibitions in § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within the United States, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear.

Dated: December 10, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0812101578–81580–01]

RIN 0648–XM23

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces

temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen for 15 days in an area east of Portsmouth, New Hampshire ranging from 1,284 nm^2 to 1,354 nm^2 (4,404 km^2 to 4,644.1 km^2), depending on the temporal and spatial overlap with another previously established DAM zone. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours December 18, 2008, through 2400 hours January 2, 2009.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in order to protect right whales and is applicable to areas north of 42° 30' N. lat. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (1.85 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On December 6, 2008, an aerial survey reported an aggregation of 3 right whales in the general proximity of 42° 56 N. latitude and 69° 13' W. longitude. The position lies approximately 70nm east of Portsmouth, New Hampshire, in proximity to Cashes Ledge. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

This DAM zone overlaps with one other DAM zone that published in the **Federal Register** on December 12, 2008, and is in effect from 0001 hours December 14, 2008 through 2400 hours December 28, 2008. Effective from 0001 hours December 18, 2008, through 2400 hours December 28, 2008, the DAM zone is bounded by the following coordinates when it overlaps the previously established DAM zone:

43° 16' N., 69° 39' W. (NW Corner)
43° 16' N., 68° 57' W.
43° 04' N., 68° 57' W.
43° 04' N., 68° 49' W.
42° 39' N., 68° 49' W.
42° 39' N., 69° 39' W.
43° 16' N., 69° 39' W. (NW Corner)

Effective from 0001 hours December 29, 2008, through 2400 hours January 2, 2009, the DAM zone is bounded by the following coordinates:

43° 16' N., 69° 39' W. (NW Corner)
43° 16' N., 68° 57' W.
43° 04' N., 68° 57' W.
43° 04' N., 68° 49' W.
42° 39' N., 68° 49' W.
42° 39' N., 69° 39' W.
43° 16' N., 69° 39' W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone.

Lobster trap/pot gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per string;

4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;

5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and

6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours December 18, 2008, through 2400 hours January 2, 2009, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program

and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: December 10, 2008.

Samuel D. Rauch III,

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

[FR Doc. E8–29748 Filed 12–11–08; 4:15 pm]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[1018–AT50]

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–AX15]

50 CFR Part 402

Interagency Cooperation Under the Endangered Species Act

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Commerce.

ACTION: Final rule.

SUMMARY: With this final rule, the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, ''Services'' or ''we'') amend regulations governing interagency cooperation under the Endangered Species Act of 1973, as amended (ESA). This rule clarifies several definitions, provides assistance as to when consultation under section 7 is necessary, and establishes time frames for the informal consultation process.

DATES: *Effective Date:* This rule is effective January 15, 2009.

FOR FURTHER INFORMATION CONTACT: Office of the Assistant Secretary for Fish and Wildlife and Parks, 1849 C Street, NW., Washington, DC 20240; *telephone:* 202–208–4416; or James H. Lecky, Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; *telephone:* 301–713–2332.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (''ESA''; 16 U.S.C. 1531 *et seq.*) provides that the Secretaries of the Interior and Commerce (the ''Secretaries'') share responsibilities for implementing most of the provisions of the ESA. Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the Fish and Wildlife Service and by the Secretary of Commerce through the Administrator of the National Oceanic and Atmospheric Administration to the Assistant Administrator for National Marine Fisheries Service.

In this rule, we refer to the Fish and Wildlife Service as FWS and the National Marine Fisheries Service as NMFS. The word ''Services'' refers to both FWS and NMFS. We use the word ''Service'' when we describe a situation that could apply to either agency. We use the term ''1986 regulations'' to reference the 1986 section 7 regulations found at 50 CFR Part 402.

Procedural Background

On August 15, 2008, the Services published the Proposed Rule. The public was given 30 days to comment. On September 15, 2008, that comment period was extended by 30 days. Approximately 235,000 comments were received; of these, approximately 215,000 were largely similar ''form'' letters.

Changes From Proposed Rule in Responses to Comments

After reviewing the public comments and further interagency discussion, the Services made certain clarifications and modifications in the final rule. The parts of the rule that were changed are set out immediately below. Those changes are discussed in more detail in a section-by-section analysis of comments set out later in this preamble.

Definitions (§ 402.02)

The proposed rule set out a new definition for ''Biological Assessment''. In the final rule, a sentence was added to the end of the definition. The additional sentence requires that the Federal agency provide the Services a specific guide or statement as to the location of the relevant consultation information, as described in 402.14, in any alternative document submitted in lieu of a biological assessment.

The proposed rule set out a new definition of ''cumulative effects.'' No changes were made to the definition of cumulative effects in the final rule.

The proposed rule set out a new definition of ''Effects of the Action''. In the final rule, a definition of ''direct effects'' was added and the fourth sentence of the proposed rule was changed.

Applicability—(§ 402.03)

The proposed rule set out a new applicability section. In the final rule, paragraph (b)(2) and paragraph (b)(3)(i) were changed and paragraph (b)(3)(iii) was deleted. Specifically, paragraph (b)(2) deleted language that ''such action is an insignificant contributor to any effects on a listed species or critical habitat'' and replaced it with language that the effects of such action are manifested through global processes and cannot be reliably predicted or measured at the scale of a listed species' current range; or, would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or, are such that the potential risk of harm to a listed species or critical habitat is remote. Paragraph (b)(3)(i) was changed by moving the word ''meaningful'' to directly before the word ''evaluation.'' Finally, paragraph (b)(3) was deleted in its entirety.

Informal Consultation (§ 402.13)

The proposed rule amended the informal consultation procedures. In the final rule, a sentence was added to the end of paragraph (b) and a paragraph (c) was added. Specifically, a sentence was added to the end of paragraph (b) to set out that if the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied. Paragraph (c) was added to the final rule to provide that notwithstanding the provisions of paragraph (b) the Service, the Federal agency, and the applicant, if one is involved, may agree to extend informal consultation for a specific time period.

Formal Consultation (§ 402.14)

The proposed rule made a change to the formal consultation procedures. In the final rule, we changed the ''exception'' language in § 402.14 to note that informal consultation may be

concluded without the written concurrence of the Director under the circumstances set out in § 402.13(b).

General Comments

Many of the comments received on the proposed rule focused on particular regulatory provisions of the proposed regulation or concepts captured in specific sections of the proposed regulation. These comments are discussed in a section-by-section analysis. Some commenters, however, expressed broad comments related to the proposed regulation. We discuss those comments below.

Comment: Some commenters question why this rule is being promulgated. Some of these commenters think that the 1986 regulations are working so there is no need for change.

Response: As discussed in the preamble to the proposed rule, we believe the narrow changes made in this rule will be beneficial for the consultation process. This rule is intended to accomplish several objectives. First, it is intended to clarify several definitions. Second, it is intended to assist the agencies in determining when consultation is necessary under section 7(a)(2). Since 1986, and continuing under this rule, action agencies are required to review their actions to determine if the effects of that action ''may affect'' listed species or critical habitat. Action agencies and agency personnel have struggled periodically to determine when informal and formal consultation is required. As part of this guidance on when consultation is required, this rule assists action agencies in determining when consultation is necessary in the very narrow circumstances of agency actions where no take is anticipated, and at least one of several other criteria are satisfied. This rule will provide greater guidance to help the action agencies and the Services negotiate the complexities of consultations in the 21st century, particularly with regard to global processes. Third, it is intended to introduce time frames into the informal consultation process, which, just as in formal consultation, can be waived. As discussed above, the standards for jeopardy and adverse modification remain the same, as do the protection provided to species by sections 4(d), 9, and ll.

Comment: Some commenters asserted that this rule changes standards and responsibilities under the ESA. Others assert that this rule is an attempt to weaken or repeal the ESA.

Response: This rule does not change the substantive standard for protection of listed species and critical habitat set out in section 7(a)(2) of the ESA. This rule is not intended to, nor does it, repeal or weaken the ESA. Only Congress can modify a statute. Federal action agencies are still required to use the best scientific and commercial data available to ensure that their actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. Further, the statutory definition of ''take'' and all prohibitions regarding ''take'' remain in place under this rule. Similarly, an action agency cannot proceed with a discretionary agency action that is anticipated to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed species without consulting with the Services first.

All aspects of formal consultation, as found in the 1986 regulations, remain intact. Nothing in this final rule allows action agencies to adversely affect listed species or critical habitat without consultation with the Services. Action agencies remain obligated to review their actions to determine if they ''may affect'' a listed species. In formal consultation, the action agency continues to be required to produce a biological assessment for ''major construction activities,'' to produce a consultation initiation package that describes the action to be considered, the specific area that may be affected by the action, any listed species or critical habitat that may be affected by the action, the manner in which the action may affect listed species or critical habitat, and cumulative effects. An action agency must submit any relevant reports to the Services and the action agency is still required to provide the Services with the ''best scientific and commercial data available.'' Further, nothing in this final rule prevents an action agency from engaging in informal consultation or technical assistance from the Service.

Comment: One commenter expressed concern that the proposed regulation would affect the listing of species.

Response: There is no correlation between this rule and listing procedures set out in section 4 of the ESA. Listing decisions are made pursuant to section 4 of the ESA and regulations located in 50 CFR Part 424. This rule does not alter the listing process or the listing regulations.

Comment: Some commenters addressed matters that are beyond the scope of the proposal. For example, several commenters suggested that we amend several definitions (''environmental baseline'', ''adverse modification''), which were not addressed in the proposed regulation. Some commenters suggested new regulatory language or concepts that were not part of the proposed rule or made budgetary suggestions. Specifically, there were suggestions to add regulatory language related to conservation banks and habitat conservation plans. Further there were comments that related to sections 4, 7(p), 7(a)(1), and 10 of the ESA.

Response: These comments were not considered as they were beyond the scope of the rule. The Services, however, may propose changes to address some of these issues at a future date.

Comment: A commenter asserted that the proposed regulations violate the Services' obligation under section 7(a)(1) to utilize their authorities to further the purposes of the ESA.

Response: We disagree. This rule does not violate section 7(a)(1). The first sentence of section 7(a)(1) requires the Secretaries of Interior and Commerce to review ''other programs administered by him and utilize such programs in furtherance of the purposes of the Act.'' The requirement that the Services utilize other programs to further the purposes of the ESA does not apply to this rulemaking, which involves implementation of the ESA itself. Nevertheless, the changes to the 1986 regulations made by this rule are to further the purposes of the ESA. That is, this rule will allow the Services to focus their resources on those actions that have adverse impacts to listed species or critical habitat.

Comment: Several commenters expressed concern that this rule is contrary to the ''benefit of the doubt to the species'' standard.

Response: The phrase ''benefit of the doubt to the species'' originated in a Conference Report that accompanied the 1979 amendments to the ESA. Relevant to section 7, those amendments changed the statutory text at 7(a)(2) from ''will not jeopardize'' to the current wording of ''is not likely to jeopardize.'' The Conference Report explained that the change in the statutory language was necessary to prevent the Services from having to issue jeopardy determinations whenever an action agency could not ''guarantee with certainty'' that their action would not jeopardize listed species. The Conference Report explained that the amendment permitted the Services to render biological opinions based on the ''best available evidence'' or evidence that ''can be developed during consultation.'' The Conference Report sought to explain that this change in language would not have a negative impact on species:

This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).

H. Conf. Rep. No. 96–697, 96th Cong., 1st. Sess. 12, *reprinted in* [1979] U.S. Code Cong. & Ad. News, 2572, 2576.

The use of the words ''benefit of the doubt to the species'' in the Conference Report appears to have been offered as reassurance that the statutory language, as amended, would remain protective of the species. At most, this language seems to indicate that the statutory language ''is not likely to jeopardize'' continues to provide protections to listed species by requiring action agencies to insure that their actions are not likely to jeopardize listed species. This rule does not change any statutory requirements found in section 7(a)(2) of the ESA and nothing in this rule is contrary to the statutory standard.

Comment: There were several comments related to administrative matters. Some commenters requested public hearings on this rule. Others stated there was not enough time allowed for adequate public comments. Others objected to not being able to submit e-mails or faxes as a method of commenting and some found the Federal Docket Management System difficult to navigate. Finally, some objected to the potential lack of privacy with regard to their comments.

Response: In promulgating this rule, the Services acted in accordance with the Administrative Procedure Act (APA). The APA sets forth procedures to be followed by Federal agencies for rulemaking, and the Services have complied with the APA. The APA does not require public hearings for this type of rulemaking, although the Secretary of the Interior held 25 ''listening sessions'' about cooperative conservation prior to the publishing of the proposed rule. The APA does not set forth specific time frames for a public comment period. The Services initially considered a thirty day comment period to strike an appropriate balance between providing the public an opportunity to address the limited changes in the proposed rule and the Services' desire for prompt action. However, we extended the comment period to provide a total of sixty days in response to comments that more time was needed. The proposed rule stated that e-mails and faxes would not be accepted. However, the Service provided public opportunity to comment electronically via the Federal eRulemaking Portal. Section 206 of the E–Government Act of 2002, Public Law 107–347, and 116 Stat. 2899 directs the use of the Federal eRulemaking Portal for posting public comments electronically. The Office of Management and Budget (OMB) issued ''Implementation Guidance for the E–Government Act of 2002'' in August 2003 which directs Federal agencies to utilize regulations.gov in order to accept electronic submissions related to rulemaking proposals. The rulemaking portal has proven to be an extremely useful tool for the public to efficiently provide comment and insight on Federal rulemaking efforts. The rulemaking portal also assists Federal agencies in managing electronic records so they can efficiently review and respond to comments submitted by the public on rulemaking documents. In most circumstances, we no longer accept comments from the public over facsimile since doing so often caused fax machines to become overwhelmed with incoming documents and because the documents received by fax are usually in paper form and must then be scanned into an electronic form for storage and review. Additionally, the proposed rule generated over 235,000 comments. Therefore, there is no indication that commenters did not have time to submit comments or that the Federal Docket Management System posed difficulty for commenters or last minute submitters.

Finally, with regard to the privacy of commenters, a commenter may request that their personal identifying information be withheld from public review. However, the Services cannot guarantee that they will be able to do so. The Services must comply with the provisions of the Freedom of Information Act, Privacy Act and other applicable laws. Under such laws, the Service may be required to release this information. As a result, the Services advise commenters (as we did in the proposed rule) that, before including addresses, phone numbers, e-mail addresses or other personal identifying information in their comments, they should be aware that the entire comment, including all personal identifying information, may be made publicly available. The Services cannot guarantee that they will be able to withhold this information given a lawful request.

Comment: There were several comments related to various economic issues. Some commenters asserted that there would be a major increase in costs or prices to consumers, state and local governments and geographic regions because Federal agencies are ''ill-prepared'' to implement this rule. These commenters argued that this rule would ''significantly and adversely affect'' employment, investments, and productivity.

Response: There is no basis to conclude that this rule will have any negative economic impacts that will result in major increases in costs or prices to consumers, state and local governments or geographic regions, or that community economies will be weakened by the proposed rule. Additionally, commenters provided no credible evidence that the proposed rule will significantly and adversely affect employment, investments and/or productivity of U.S. based enterprises. The Services believe that the proposed rule will improve the overall consultation process and make it less burdensome, which should benefit Federal agencies and the regulated entities that seek permits, approvals, or funding from them. Moreover, action agencies already must have the wherewithal to determine if their action ''may affect'' listed species or critical habitat. Further, the proposed rule does not require action agencies to bypass informal consultation. Finally, action agencies can choose to continue to take advantage of informal consultation procedures if they believe that their resources would be strained by making unilateral applicability determinations.

Comment: A commenter asserted that without the requirement to obtain Service concurrence, the burden of species protection will fall on state, local, tribal governments and private industry.

Response: The proposed rule does not change the protections, standards or obligations under the Endangered Species Act. Under the proposed rule, Federal agencies still have a responsibility to ensure that their action is not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. This rule does not preclude informal consultation, and formal consultation is still required where the action is likely to adversely affect listed species and critical habitat. Therefore, no new responsibilities for species protection will be transferred to non-Federal entities by this rule.

Comment: Several commenters suggested the proposed rule is a ''major rule'' as defined by the Small Business Regulatory Enforcement Fairness Act.

Response: Subtitle E of the Small Business Regulatory Enforcement and Fairness Act (also known as the ''Congressional Review Act'' or CRA) establishes procedures for Congressional review of Federal agency final rules. Under the CRA, a rule cannot take effect until a copy of the rule and various supporting documentation have been

submitted to both GAO and Congress. For ''major'' rules, the rule cannot take effect until 60 days after it has been submitted, in order to allow Congress time to consider and take action on the rule if it so chooses. This waiting period does not apply to rules not designated as major. The CRA defines ''major'' as any rule that the Administrator of the Office of Information and Regulatory Affairs finds has resulted in or is likely to result in: (A) An annual effect on the economy of $100 million 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. This rule is not a major rule as that term is defined in the CRA. It will become effective 30 days after it has been published in the **Federal Register**.

Comment: Several commenters suggested the proposed rule is a significant rule under Executive Order 12866.

Response: We agree that this rule is a significant rule. As such, it has been submitted to the Office of Management and Budget for review. We note that while the rule is ''significant'' under the definition provided in EO 12866, it is not ''economically significant.''

Proposed Changes to 50 CFR Part 402

Definitions (§ 402.02)

This section sets out definitions of terms. As noted above, the proposed rule altered only three definitions. Only comments that specifically addressed the definitions used in this rule are discussed in this section.

Biological Assessment

A sentence was added to the definition of biological assessment. As delineated above, this additional regulatory text requires action agencies to describe with specificity where the relevant information can be found in an alternative document submitted in lieu of a biological assessment.

Comment: We received several comments that expressed concern that the proposed change to the definition of biological assessment would create more work for the Services and therefore be less efficient. These commenters thought that action agencies might not describe where the relevant analyses for initiation of consultation could be found in the alternative document. Another commenter thought that documents prepared for other purposes may not properly analyze all the potential effects. Finally, we received a comment that this change is more efficient.

Response: We agree with the comment that the consultation process will be more efficient if the rule expressly allows for flexibility in the format of the information submitted by the action agency. However, it would not be more efficient and could add unnecessary delays if action agencies simply attached the alternate document to the request for consultation. Thus, in the preamble to the proposed rule we noted that it was the action agency's responsibility to identify the relevant information from the alternate document being used in place of a biological assessment. To strengthen this message, a final sentence has been added to the regulatory text in the final rule to make it clear that the action agency must provide a guide or statement as to where the relevant information can be found. The requirements for initiation of consultation set out at 402.14(c) remain unchanged. If the document prepared for ''other purposes'' does not include all required information, then consultation is not initiated and the action agency may have to provide supplemental information.

Comment: Action agencies are likely to rely on documents other than their biological assessments to analyze the impacts to species and critical habitat, which will increase the complexity of environmental analyses performed by an action agency.

Response: The Services intend for this modification to recognize current practice and disagree that it will increase the complexity of environmental analysis. Currently only Federal ''major construction activities'' require preparation of biological assessments. Other Federal actions may be subject to environmental reviews under other environmental laws, in particular the National Environmental Protection Act (NEPA). Most Environmental Impact Statements (EISs) include analyses of effects of proposed actions on threatened and endangered species; these analyses can be as robust as those presented in biological assessments. In circumstances where Federal agencies have conducted sufficient analysis, they should be able to benefit by relying on that analysis in the interagency consultation process. As discussed above, however, the Services have added language to the final rule to ensure that the information requirements for a consultation specified in 50 CFR 402.14(c) are identified.

Cumulative effects.

There were no changes between the proposed rule and this final rule.

Comment: Several commenters questioned exclusion of future Federal actions from consultations, claiming either there is no basis for the exclusion or that it provided a way for Federal agencies to not consult on future actions. Some commenters stated that they believed this clarification is consistent with the Services' practice.

Response: The amendment to the cumulative effects language is to clarify and distinguish the term ''cumulative effects'' under the ESA from the term ''cumulative impacts'' under the NEPA. Nothing in the rephrasing of the definition of cumulative effects changes the Services current practice. That is, the effects analysis in consultations under the 1986 regulations does not include future Federal actions that have not undergone consultation. Future Federal actions that have already undergone consultation are added to the environmental baseline; they are weighed, therefore, in the calculus of how the action under consultation is likely to affect listed species. Federal actions that have not undergone consultation will have to do so before they could proceed in compliance with section 7(a)(2). The effects from those actions, therefore, will be considered in a separate consultation and it would not be appropriate to include them as cumulative effects.

Comment: Some commenters thought that informal grouped actions may contribute to cumulative effects and should be considered. Other commenters thought the proposed definition would encourage or allow agencies to move forward with multiple, small-scale projects. A commenter noted that cumulative effects omitted Tribal activities.

Response: Any effect or activity that was considered as a cumulative effect under the 1986 regulations, will be considered under this rule. This rule clarifies the current regulatory definition of cumulative effects and distinguishes it from the definition of ''cumulative impact'' in NEPA. It does not change any requirements or factors to be considered from the 1986 regulations. As set out in the standardized paragraph in the Consultation Handbook, cumulative effects include the effects of ''future State, tribal, local or private actions that are reasonably certain to occur in the action area.* * *'' Joint Endangered Species Consultation Handbook, p.4–30 (March 1998 Final), (hereafter

''Consultation Handbook''). The change to the definition in the 1986 regulations will not exclude any contributions to cumulative effects that would be appropriately reviewed under the 1986 regulations and should not encourage action agencies to move forward with ''small-scale'' and/or grouped projects. The change in definition of cumulative effects does not change any evaluations, procedures, obligations, or responsibilities for the action agency or the Service.

Effects of the Action

We made several changes in the definition of ''effects of the action'' in response to public comments. First, we have added a sentence defining ''direct effects'' in order to clarify the distinction between ''direct effects'' and ''indirect effects.'' In addition, we have modified the sentence that, in the proposed rule, read as follows: ''If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.'' In the final rule, the sentence reads: ''If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect.'' These changes were intended to clarify the manner in which direct and indirect effects are identified and analyzed, which has been an area of confusion since these terms were created in the 1986 regulations. The removal of the reference to ''direct effects'' from the original sentence in the proposed rule is intended to clarify that the quoted sentence provides further clarification of the term ''essential cause'' as applied to indirect effects. By focusing the regulatory revision on indirect effects we do not intend to suggest that an effect that will occur whether or not the action takes place is a direct effect of the action. To the contrary, in most instances such an effect would not be considered a direct effect unless, as discussed below, it is one that inevitably will result from the action. Rather, our purpose is to emphasize that the causal connection between a proposed action and indirect effects must be examined closely.

Comment: The Services received a wide range of comments regarding the proposed modification of the definition of ''effects of the action.'' Several commenters stated that the Services should better explain the appropriate standard of causation with respect to direct and indirect effects. Many comments recommended no change to the existing definition of ''effects of the action.'' Other commenters recommended the use of proximate cause instead of essential cause. Alternatively, one commenter suggested that the appropriate standard for causation is that there needs to be a ''close causal connection.''

Response: The ESA does not specify the nature of the causal relationship that must be examined when considering whether a Federal agency action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Nevertheless, an analysis under section 7(a)(2) necessarily requires examining the causal connection between the agency action and the ultimate biological effects on a species. In the 1986 regulations, the Services recognized three categories of effects: Direct, indirect, and cumulative. Each category is distinguished, in part, from the other two by the degree of causal connection it has to the proposed Federal action—i.e., by the degree to which the taking of the Federal action can be said to be responsible for the cause of the effect occurring to the species. These categories remain intact in the regulations the Services are adopting today.

At one end of the spectrum are direct effects. As the Services have explained in the Consultation Handbook, direct effects are the direct, immediate effects on the species or its habitat from the taking of the action itself, or from interdependent or interrelated activities. These are the effects that will inevitably occur if the action is taken. For example, if permission or funding is provided for the construction of a road, constructing the road will result in direct, easily identifiable modifications to the landscape. The modifications are inescapable; if the action is taken as proposed, they will occur. As the revised definition of ''effects of the action'' explains, direct effects are not dependent upon the occurrence of any additional intervening actions for the impact to listed species or critical habitat to occur. Thus, there is no question that the action agency is responsible for these effects. Conversely, if the road is not constructed, the modifications would not occur (or at least not as a result of the construction), so any effects that would occur anyway are caused by something else, not the permission of or funding for the construction of the road. This does not mean that if a Federal action will cause a direct change to the landscape that impacts listed species or critical habitat it can avoid consultation merely because another private or non-Federal public actor would take a similar action if the Federal agency did not. Thus, using the road example, if a private developer were expected to build the road if the action agency does not fund, permit, or build the road, the action agency could not avoid analyzing the direct effects of the road construction solely because somebody else would build the road anyway.

At the other end of the spectrum are cumulative effects. They are the effects of other entities' actions in the action area of the proposed Federal action that are reasonably certain to occur, but that have no causal connection to the proposed Federal action. In other words, they are effects that would be reasonably certain to occur in the action area even if the proposed Federal action was never taken. There is no question that for these effects within the action area, the agency is not responsible, even though these effects are taken into account when analyzing the likelihood a particular Federal action might jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Located along the spectrum between the direct effects and cumulative effects are other effects that are more difficult to define precisely. These effects are distinguished from direct effects in that they depend on the occurrence of some intervening factors to bring them about. It is more difficult in these situations to determine where to precisely draw a line as to whether the Federal agency should be considered responsible for those effects within the application of section 7(a)(2). In the 1986 regulations the Services determined that action agencies should be responsible for what was termed ''indirect effects,'' which were defined as those effects that are ''caused by'' the proposed Federal action and are ''reasonably certain to occur,'' and are ''later in time.'' The level of causal connection that must exist for an effect to be considered to be ''caused by'' the taking of the proposed Federal action and the degree of certainty that must exist for an effect to be considered ''reasonably certain to occur'' has not been clearly explained previously.

In the preambles for the proposed and final rules for the 1986 regulations, the Services described indirect effects as those that are ''induced by'' the Federal action, but did not elaborate further. The Services also referred to *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir. 1976), in which the U.S. Court of Appeals for the Fifth Circuit found a need to look at the total impacts of a Federal agency action, not simply those direct effects that occur within the project's footprint. A close read of the *Coleman* case reveals its consistency with the understanding the Services are articulating here. In

particular, the court's decision in *Coleman* was based on consideration of facts reflected in the particular record before the court; and, that record indicated that it was virtually certain that future development would follow construction of the highway interchange that was proposed by the Federal agency and that this development would impact the species.

The Services have also referenced a ''but for'' standard of causation in a number of contexts. Under a ''but for'' test, any effect that would not occur ''but for'' the proposed action is considered to be caused by the proposed action. *See* Consultation Handbook 4–27 (interrelated and interdependent); 4–47 (amount or extent of incidental take); 1986 preamble (interrelated and interdependent) 51 FR 19932 (1986). However, neither the 1986 rule nor the Consultation Handbook specifically articulate the ''but for'' standard as applicable to determining whether something is an indirect effect.

At all times, the Services have understood there to be a requirement for a close causal connection between a Federal agency action and an effect on the species. In seeking to clarify what is meant by indirect effects, in the context of ESA section 7, it is important to keep the purpose of the section 7(a)(2) in mind. The purpose is to require Federal agencies to ensure that their actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. The ESA does not seek to bring the otherwise beneficial and necessary actions of those agencies to a halt based on speculation about what could conceivably happen in the future as the result of the taking of an action. Thus, the 1986 regulations appropriately imposed constraints on the extent of the effects analysis by incorporating causation and foreseeablity standards.

This rule clarifies the terms ''caused by'' and ''reasonably certain to occur'' in order to capture the appropriate practice of the Services to require a close causal connection. Essential cause is the standard used to determine whether a close causal connection exists between the action and the effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an activity, which will result in an indirect effect, will occur. The changes are intended to promote consistency in section 7 consultations.

The Services have chosen not to specifically employ, as suggested by some, the concept of ''proximate cause,'' which developed in the law of torts. Utilizing proximate cause would only complicate matters further as there is no commonly accepted, easily applied definition of proximate cause. Instead, we clarified the term ''caused by'' by incorporating new language that looks to whether the action is an ''essential cause'' of a particular effect. The phrase ''essential cause'' denotes that the action is necessary or indispensable for the effect to occur. The addition of the term ''essential'' is meant to emphasize and reaffirm that the effects analysis is limited to those effects for which it is appropriate to hold the Federal agency responsible because there is a close causal connection between the Federal action under consultation and the effects on the species in question.

The concept of ''essential cause'' is not a new one. The Services have previously recognized that to cause an effect under the ESA, the proposed Federal action ''must be essential in causing the effect to the species and also reasonably certain to occur.'' A 2003 joint agreement among BLM, Forest Service, FWS and NMFS explains that a proposed agency action must be ''essential'' in causing the effect to the species and also reasonably certain to occur in order to be recognized as an ''indirect effect'' under the Department's regulations. *Application of the Endangered Species Act to proposals for access to non-Federal lands across lands administered by the Bureau of Land Management and the Forest Service*, January 2003, at 2 (2003 Joint Agreement). On July 1, 2005, this memorandum was clarified by the Director, U.S. Fish and Wildlife Service. In that policy clarification, the Director again reiterated that the correct standard to determine if an indirect effect is caused by an action is whether that action is ''essential'' for the effect to occur. *Policy Clarification of March 10, 2005 memo on Regarding Consultation on Requests for Access Across National Forest and Bureau of Management Lands*, July 2005.

Essential cause focuses on both the nature and degree of the connection between the agency action and the effect to the species. For example, if an indirect effect would occur regardless of the action, then the action is not an essential cause of that effect, and it would not be appropriate to consider its effects as an effect of the action. Similarly, when the agency action merely helps to facilitate an effect it is not necessarily an essential cause of the effect. In such circumstances, it is appropriate to consider the nature of intervening factors and whether and the extent to which the potential effect to the species requires independent action by someone other than the Federal agency or the entity it funded or authorized. Depending upon the particular factual circumstances, the proposed Federal action may not be essential in causing the effect to the species. Of course, when the effects to the species are caused by such independent activities they may be considered as cumulative effects, provided they are within the action area. The courts have long recognized the requirement for there to be a close causal relationship between an environmental effect and an alleged cause for that effect. *See, Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 777 (1983) (in the context of examining cumulative effects under NEPA).

Comment: We received several comments regarding the use of the term ''reasonably certain to occur'' and the addition of the term ''clear and substantial'' information. Some commenters asserted that these terms as defined in the proposed rule were appropriate and reasonable. Some commenters disagreed that the term ''reasonably certain to occur'' was an appropriate standard while others questioned why the standard was not ''reasonably foreseeable.''

Response: As noted above, the final rule also clarifies the term ''reasonably certain to occur.'' Reasonably certain to occur is the standard used to determine the requisite confidence that an action, which will result in an effect, will occur. Like the phrase ''caused by'', the existing regulations do not define the phrase ''reasonably certain to occur.''

The phrase ''reasonably certain to occur'' was first used in a 1981 opinion issued by Department of the Interior's Office of the Solicitor as it related to cumulative impacts. The 1981 opinion was focused upon cumulative impacts and explained that:

> A non-Federal action is ''reasonably certain'' to occur if the action requires the approval of the state or local resource or land use control agency and such agencies have approved the action, and the project is ready to proceed. Other indications which may also support such a determination include whether the project sponsors proved assurance that the action will proceed, whether contracting has been initiated, whether there is obligated venture capital, or whether State or local planning agencies indicate that grant of authority for the action is imminent. These indications must show more than the possibility that the non-Federal project will occur; they must demonstrate with reasonable certainty that it will occur. The more that state or local administrative discretion remains to be exercised before a proposed state or private action can proceed, the less there is reasonable certainty that the project will be authorized. In summary, the consultation team should consider only those state or private projects which satisfy all major land

use requirements which appear to be economically viable.

Solicitor's Opinion, M–36938, *Cumulative Impacts under Section 7 of the Endangered Species Act*, August 27, 1981 (emphasis in original).

Additionally, the preamble to the 1986 regulation explained the Services' interpretation of the phrase ''reasonably certain to occur.'' 51 FR 19,926, 19,932 (June 3, 1986). The preamble notes that some commenters ''believed that the proposed [definition] of 'cumulative effects' and 'effects of the action,' '' both of which were defined to include only effects that are ''reasonably certain to occur,'' ''were too narrow.'' *Id.* As described in the preamble, the commenters ''suggested that cumulative effects should include the effects of all reasonably foreseeable future Federal, State and private actions,'' because to do so ''would be more in line with that mandated under NEPA,'' and ''any lesser review could detrimentally affect endangered species.'' *Id.* While the focus of the comments, and the Service's response, was on ''cumulative effects,'' rather than ''indirect effects,'' the Service's reasoning in rejecting the suggestion that the regulations rely on a broader or more lenient standard than ''reasonably certain to occur'' applies equally to the use of the phrase in the definition of ''indirect effects.''

The Service noted that ''NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of * * * effects'' than the ESA, which imposes ''a substantive prohibition.'' *Id.* at 19933. In other words, NEPA is designed to insure that a decision maker has a full complement of information about the possible environmental effects of the decision before making it; it does not, however, require that any particular decision be made. The theory is that the more information the decision maker has, the better the decision is likely to be. For that reason, requiring the consideration of all ''reasonably foreseeable'' environmental effects makes sense in the NEPA context. The ESA, on the other hand, is designed to insure the accomplishment of a particular substantive objective—i.e., that Federal actions are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. Unlike NEPA, the prohibition in the ESA can stop an otherwise worthwhile Federal project from going forward. For that reason, it makes sense that the Service consider ''indirect effects'' to be only those ''reasonably certain to occur,'' rather than merely ''reasonably foreseeable.'' As the Service put it, ''[o]therwise, in a particular situation, the jeopardy prohibition [of the ESA] could operate to block 'nonjeopardy' actions,'' *id.*, based on mere speculation about the effects that might occur to listed species or critical habitat. In the Service's view, ''Congress did not intend that Federal actions be precluded'' based on speculative effects. *Id.*

The discussion in the 1986 preamble makes clear that ''reasonably certain to occur'' focuses on the probability that a future action will occur and is a stricter standard than ''reasonably foreseeable.'' As the Service explained, ''reasonably certain to occur'' requires ''more than a mere possibility that the action may proceed.'' *Id.* At the same time, however, the Service recognized that '' 'reasonably certain to occur' does not mean that there is a guarantee that the action will occur. [Agencies should consider the] effects of those actions that are likely to occur, bearing in mind the economic, administrative, or legal hurdles which remain to be cleared.'' *Id.*

The Consultation Handbook provides additional illustration of the exacting nature of determining whether a future action, which may cause an effect, is ''reasonably certain to occur.'' The Services emphasized in the discussion of cumulative effects that when looking at future actions, the ''action agency and the Services should consider the economic, administrative, and legal hurdles remaining before an action proceeds.'' *Id.* at 4–30. The Services further explained that:

> Indicators of actions ''reasonably certain to occur'' may include, but are not limited to: approval of the action by State, tribal, or local agencies or governments (e.g. permits, grants); indications by State, tribal or local agencies or governments that granting authority for the action is imminent; project sponsors' assurance the action will proceed; obligation of venture capital; or the initiation of contracts. The more State, tribal or local administrative discretion remaining to be exercised before a proposed non-Federal action can proceed, the less there is a reasonable certainty the project will be authorized.

Consultation Handbook, at 4–30.

In the context of cumulative effects, the discussion of ''reasonably certain to occur'' necessarily focused on the certainty of activities occurring because by definition the effects at issue do not derive from the Federal action but from activities of others operating in the action area of the action under consultation. In similar fashion, some indirect effects of the action ultimately may occur only after subsequent activities of others, which themselves are caused by the Federal action under consultation. In the context of indirect effects, the Consultation Handbook notes that ''reasonably certain to occur may be evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by the agency in the action area, or they are the logical extensions of the proposed action.'' *Id.* at 4–28. Just as with cumulative effects, then, evaluating and establishing the reasonable certainty that those activities will occur and produce the indirect effect of concern is appropriate where indirect effects also depend on a subsequent actor to bring about their outcome. If the subsequent activity is not reasonably certain to occur then the indirect effect is not reasonably certain to occur. Reasonably certain to occur allows for a possibility that the activity will not occur, but that possibility has to be low.

Finally, the 2003 Joint Agreement among BLM, Forest Service, FWS and NMFS provides guidance on the ''reasonably certain to occur'' standard:

> ''Reasonably certain to occur'' requires existence of clear and convincing information establishing that an effect to the species or its habitat that will be caused by the proposed action is reasonably certain to occur. This is a rigorous standard; it is not based on speculation or the mere possibility that effects to the species may occur. Nor is this a foreseeability standard as is commonly used in NEPA analysis. If no such information exists, or is speculative or not credible, then that effect is not reasonably certain to occur and should be disregarded. In no event should a conclusion be reached that some effect is reasonably certain to occur absent clear and convincing information to support that finding in the record.

2003 Joint Agreement at 2. Similarly, the final rule incorporates a ''clear and substantial'' standard to reemphasize that there must be a firm basis, based on best available scientific and commercial data, for believing that a future activity is reasonably certain to occur before its effects should be viewed as caused by the Federal action under consultation. The information need not be dispositive, free from all uncertainty, or immune from disagreement to meet this standard. However, there must be a clear and substantial basis to support the conclusion.

Comment: Several commenters asked questions about how the use of the word ''essential'' will impact baseline analysis with regard to jeopardy opinions. Specifically, they questioned how ''essential cause'' would be employed in cases where a species status is seriously imperiled.

Response: Nothing in this rule changes the jeopardy analysis. The term ''essential'' clarifies the term ''caused

by'' as used in the definition of indirect effects. After the effects of the action are determined, the impacts of those effects are then analyzed to determine if the effects of the action (combined with cumulative effects) are likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. The status of the species is part of that analysis but the action under consultation must still impact the species in a negative fashion in order for there to be a jeopardy determination.

Applicability (§ 402.03)

Paragraph (b)(2) was amended and now only pertains to effects that are ''manifested through global processes.'' The subparagraphs of (b)(2) are clarified and further limit the application of this paragraph. Paragraph (b)(3)(iii) was deleted.

Initially, we will address the general comments on this section as a whole. Comments specific to various subparts of this section are discussed below.

Comment: While some commenters supported the change in the applicability section under the proposed rule, many commenters asserted the Services cannot allow action agencies to make applicability determinations as set out in the rule. That is, they asserted that action agencies cannot decide, without formal or informal consultation with the Services, that their action has no effect or is essentially not likely to adversely affect listed species or critical habitat. These commenters relied on the wording of section 7(a)(2) of the ESA that states ''Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action* * *.'' The commenters read these words to be absolute. That is, they read the words ''in consultation with'' to mean that action agencies must enter into formal or informal consultation with the Secretary to insure that any of their actions will not violate the prohibitions set out in the remainder of section 7(a)(2).

Response: The existing regulations recognize that there are a variety of ways that action agencies can meet their procedural obligations under section 7(a)(2). The 1986 regulations, the thousands of interactions between the Services and the action agencies over the past thirty years, and these revisions are, in addition to the formal and informal consultation procedures established under the regulations, part of the framework for ''consultation'' and ''assistance'' provided to action agencies to allow them to determine the steps they must take to insure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat.

Section 7 does not define the term ''consultation.'' While Congress has provided certain requirements for what should happen after consultation, the statute does not provide any direction or criteria as to how consultation is to be carried out. In relevant part, section 7 provides that:

> [e]ach Federal agency *shall,* in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat. * * *

16 U.S.C. 1531(a)(2) (emphasis added). Neither the term ''consultation'' nor ''assistance'' is defined within the section, or elsewhere in the ESA. These terms are quite broad and suggest that Congress has provided a great deal of discretion to define consultation and assistance in this provision, as it has throughout the ESA. Furthermore, Congress did not specify that the consultation obligation can be fulfilled only by consulting with the Services on each and every action they take. Indeed, we believe the mandatory term ''shall'' in section 7(a)(2) refers to the obligation of the action agency to avoid jeopardy or destruction or adverse modification of critical habitat, not to a requirement to consult on each and every action. Recently, one court determined that a broad interpretation of section 7(a)(2) to require consultation in each and every case does not ''comport with either the plain meaning of the ESA or the legislative intent underlying it.'' *Defenders of Wildlife* v. *Kempthorne*, 2006 U.S. Dist. LEXIS 71137 (D.D.C. Sept. 29, 2006).

An interpretation that requires ''consultation'' under 7(a)(2) on each and every action ignores both the 1986 regulations, and the Services practice since then. The Services established the current process as a regulatory mechanism for efficient implementation of the mandate to provide their expertise to the action agencies. The 1986 regulations recognized that case-by-case consultation on certain actions was not necessary or beneficial. The Services devised off-ramps to eliminate those actions from case-by-case consultation.

The 1986 regulations provided that action agencies need only consult case-by-case on those actions that are ''discretionary.'' Section 7(a)(2) does not specifically recognize such an exception, but the Services recognized that there was no benefit in consulting case-by-case on actions that the action agencies were powerless to modify for the benefit of listed species. The Supreme Court recently upheld the Services' regulatory interpretation that non-discretionary agency actions could be excluded from case-by-case consultation. *National Association of Home Builders* v. *Environmental Protection Agency*, 127 S. Ct. 2518 (2007).

Similarly, the Services have long implemented section 7(a)(2) through regulations that exclude from case-by-case consultation those actions that the action agency determines will have ''no effect'' on listed species or critical habitat even though the statute makes no express exception for such actions. The original section 7 regulations, promulgated in 1978, specified that ''[i]f a Federal agency decides that its activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless required by the Service.'' 43 FR 870, 875 (Jan. 4, 1978). Subsequently, when the Services modified the regulatory scheme in 1986, we implicitly retained the no effect/may affect threshold for consultation. Thus, section 402.14 requires consultation for any action that ''may affect'' listed species or critical habitat. The courts have routinely upheld action agency ''no effect'' determinations, notwithstanding that they have been made without consultation with the Services. *See*, e.g., *Southwest Center for Biological Diversity* v. *U.S. Forest Service*, 100 F.3d 1443 (9th Cir. 1996) (upholding Forest Service determination that salvage timber sale would have ''no effect'' on listed species and concluding that formal consultation was not necessary); *Ground Zero Center for Non-Violent Action* v. *United States Department of Navy*, 383 F.3d 1082 (9th Cir. 2004); *Pacific Rivers Council* v. *Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994); and, *Defenders of Wildlife* v. *Kempthorne*, at 60. In addition, Congress has amended the ESA several times and never made any changes to section 7 that would express their disapproval with this interpretation.

The rule that is being published today is an incremental change that builds upon the existing regulatory framework and attempts to address the increased burden of informal consultations, case-by-case, as well as the new challenge the agencies and Services confront regarding case-by-case consultation as it relates to greenhouse gas emissions and climate change.

The Services have seen steady increases in section 7 consultations since adoption of the 1986 regulations.

For example, the number of consultations completed by FWS doubled between fiscal year 1996 and fiscal year 2002. Although NMFS' workload has also increased significantly due to new listings and court decisions, it has not collected these statistics. As the number of section 7 consultations has increased, the workload for the Services has grown. For example, requests to the Services for technical assistance or section 7 consultations increased from 41,000 requests in 1999 to over 68,000 requests in fiscal year 2006. In 2006, there were 39,346 requests for technical assistance, 26,762 requests for informal consultations, and 1,936 requests for formal consultations.

To meet these challenges, the Services have developed several carefully crafted and narrow categories of actions for which they believe case-by-case consultation would not be necessary or beneficial. The pre-existing ''may affect'' trigger for formal consultation is retained, except in the case of projects where no take is anticipated and the effects are: Wholly beneficial; or cannot be measured or detected in a manner that permits meaningful evaluation; or are manifested through global processes (and meet one of several additional criteria). The Services have determined that such actions are far removed from any potential for jeopardy or destruction or adverse modification of critical habitat, and consultation in these limited circumstances is therefore not required. In 1986, the Services recognized the key concern was to set thresholds for consultation (there speaking of formal consultation) that are ''sufficiently low to allow Federal agencies to satisfy their duty to 'insure' under Section 7(a)(2).'' 51 FR 199926. The applicability criteria established in the final rule do that. As noted, the action agencies already make no effect/may affect determinations without assistance from the Services. Clearly such actions do not violate the substantive standard of section 7(a)(2). The Services have also determined that no further consultation and advice on specific actions is necessary for those agency actions that are wholly beneficial. Because of the threshold requirement that no take is anticipated and the requirement that the action be beneficial in its entirety, such actions also inherently are not likely to jeopardize listed species or adversely modify or destroy critical habitat. The threshold of no take being anticipated also applies for those effects that are so insignificant that they cannot be measured or detected in a manner that permits meaningful evaluation. These effects were previously determined to be ''not likely to adversely affect.'' Consultation Handbook, at XV. By definition, then these effects are not likely to adversely affect and cannot be likely to jeopardize listed species or adversely modify critical habitat and, therefore, no further consultation on the specific action is necessary. Finally, section 402.03(b)(2) provides that effects that are manifested through global processes (and meet one or more of the additional criteria) do not require further consultation. As discussed in more detail below, the Services believe that section 7(a)(2) simply was not intended to deal with global processes at individual project level consultations. Further, the threshold requirement of no anticipated take and the additional criteria set out in 402.03(b)(2) limit the use of this subparagraph to only those effects from an action that would not be likely to jeopardize listed species.

The Services' determination that case-by-case consultation is not necessary or beneficial in these instances is consistent with the latitude Congress has granted the Services to implement the procedural aspects of section 7(a)(2), including the development of appropriate triggers for case-by-case consultation. In addition, through this regulation we provide our advice and guidance to action agencies with regard to those narrow categories set out in section 402.03. Thus, we have determined that compliance with this rule by action agencies satisfies the procedural requirements of section 7(a)(2) for those narrow categories of actions set out in section 402.03. Moreover, the change from prior practice is an appropriate response to the burden of increased informal consultations.

Comment: Some commenters asserted that all agency actions must undergo the process set out in the 1986 regulations as ''formal consultation.''

Response: We disagree and conclude that these commenters read far more into section 7(a)(2) of the ESA than exists. Simply put, under section 7(a)(2), Federal agencies must insure their action ''is not likely to jeopardize the continued existence of any endangered species or threatened species,'' and the Services must provide expert advice and help (''consultation and assistance'') to the action agencies. The precise form and manner in which this expert advice and help is provided is not specifically prescribed by Congress; instead, the Services and action agencies can ''fine tune'' the regulations as appropriate.

Moreover, such an assertion flies in the face of many years of agency practice. Indeed, a district court recently noted, ''the Services play no role whatsoever in that threshold determination.'' *Defenders of Wildlife* v. *Kempthorne*, at 60 (referencing the initial determination as to whether a proposed action 'may affect' listed species or critical habitat). Since 1978, if an action agency concludes that a proposed action will have no effect on a listed species, it is under no obligation to consult with the Services.

The Services have provided guidance to action agencies in the past with regard to when formal or informal consultation on specific actions is required. The 1986 regulations determined that action agencies need only consult on those actions that are ''discretionary.'' The statutory language found in section 7(a)(2) of the ESA does not make such an exception. Rather, the Services, by regulation, determined that neither formal nor informal consultation on specific actions was required for non-discretionary actions. The Supreme Court recently upheld the Services' determination that no further consultation is required once an agency determines that their action is non-discretionary. *National Association of Home Builders* v. *Environmental Protection Agency*, 127 S. Ct. 2518 (2007).

The Services have also interpreted section 7(a)(2) to not require formal or informal consultation on specific actions for those instances when the action agency determines that its action will have ''no effect'' on listed species or critical habitat. Consultation Handbook, p. 3–12. Statutory language does not specifically make such an exception; rather, the determination that consultation is not necessary was made at the Secretaries' discretion. Since 1978, Federal agencies have been making their own determinations about whether a project would result in no effect to a listed species. The original section 7 regulations issued in 1978 specified that ''[i]f a Federal agency decides that its activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless required by the Service.'' 43 FR 870, 875 (January 4, 1978). Congress confirmed this regulatory approach when it reviewed, with approval, the 1978 regulations when deliberating over the 1978 amendments to the ESA. See *e.g.* 1978 U.S.C.C.A.N. 9484, 9486. Later, in 1986, Congress had the ability to require section 7 consultation for each and every action carried out by a Federal action agency, but it chose not to make any changes to the section 7

consultation process in its amendments to the ESA in 1986. 51 FR at 19,927.

In summary, we do not believe section 7(a)(2) mandates Federal action agencies to undertake a separate ESA formal or informal consultation with the Services for each and every action they take. No definition of ''consultation'' is provided in section 7(a)(2) or elsewhere in the ESA. Congress left it to the Services to craft the consultation process, including the interpretation of the reach of the statute and the development of an appropriate trigger for formal and informal consultation. *See Sweet Home* v. *Babbitt* 515 U.S. 687, 708 (1995). This interpretation is not new. As discussed above, the Services have already identified two situations where no further consultation on specific actions has been required once a threshold determination was met.

Comment: Several commenters suggested that action agencies are not equipped to make their own determinations either because they lack the requisite expertise, lack funding, will not be able to find qualified reviewers, or do not have a mission compatible with resource protection.

Response: The Services disagree that agencies with other missions are not equipped to make the determinations required to implement the new applicability provisions. Most major action agencies already have well-qualified staff that support their ESA compliance. And, agencies regularly make their own consultation determinations on a number of issues under the 1986 regulations. As under the 1986 regulations, this rule does not preclude an action agency from seeking the expertise of the Services or taking advantage of expertise that may be available from State or local agencies, universities, non-governmental organizations or other sources, which often work cooperatively with Federal agencies on species conservation matters. Finally, nothing in the applicability section requires that action agencies bypass informal consultation. If action agencies have any limitations in their ability to make their determinations under the ESA, the rule explicitly recognizes that the action agencies retain the ability to seek informal consultation with the Services. If an action agency believes that it does not have the scientific expertise to make an accurate assessment of its project's impacts on listed species and critical habitat, it may avail itself of the expertise offered by the Services under the current regulatory procedures.

In this regard, we note that the final rule represents an incremental change regarding the extent to which the action agencies will make their own determinations about the effects of their actions on listed species. Under the 1986 regulations, and continuing under this rule, action agencies presently are responsible for determining if their action may affect listed species and critical habitat. They need not engage in case-by-case consultation where they determine that the proposed action will have no effect on listed species. The final rule adds several narrow additional categories in which they will also not need to consult case-by-case where they determine that their actions will not result in take and satisfy the criteria in 402.03(b).

The types of actions that we believe will fall into the ''wholly beneficial'' or incapable of meaningful evaluation categories are ones for which we have routinely concurred on action agency NLAA determinations in the past. For example, these have included, but are not limited to:

Construction, maintenance or repair of small-scale bulkheads, docks, piers and boat ramps; Small-scale shoreline or streambank stabilization projects; Routine bridge repair and maintenance; Construction, maintenance or repair or replacement of culverts and tide gates; Construction, maintenance and repair of aids to navigation, e.g., buoys and moorings.

We have engaged in many thousands of informal consultation on these types of activities over the past thirty years. We have routinely agreed with the action agencies' conclusions (supported by their biologists' opinions) that the projects are not likely to adversely affect the species because the actions will occur at a time when listed species are not present and habitat will not be affected or will recover prior to species returning to the area, or they enhance the biological value of the habitat without any short term risk to species or harm to the habitat. Also, based on years of consulting informally, many agencies have developed best management practices for these types of actions to ensure adverse effects are avoided. Based on this lengthy experience, we believe that action agencies are well equipped to make and document appropriate determinations under the applicability provisions.

As a legal matter, action agencies cannot assert that lack of resources or that contrary missions excuse them from compliance with their ESA obligations. Indeed, the action agencies have a strong incentive to ensure that they are equipped to make appropriate determinations. If they fail to do so, they will be subject to lawsuits challenging those determinations and their actions could be delayed or enjoined.

Comment: Several commenters pointed to the report from the Healthy Forest Counterpart regulations to support the assertion that action agencies will not make credible effects determinations.

Response: We do not agree that this report requires such a conclusion. In our view this report demonstrates the importance of action agencies developing administrative records that demonstrate the soundness of their conclusions with respect to the potential effects of a project and reflect the information available to them.

Comments: Several other commenters believe that there needs to be an ''oversight'' role for the Services. One commenter believed that action agencies needed to set up internal procedures to assure funding for biologists and to require an independent decision-maker. Another commenter suggested that action agencies should enter into alternate consultation procedures with the Services to suit their individual needs. Several commenters believed the Services should offer guidance to the action agencies as to how to make effects determinations.

Response: The Services have determined that a formal oversight process is not necessary or consistent with the purposes of this rule. The objective of this rule, in part, is to provide for a more efficient process for certain very narrow situations where the Services have determined no further consultation on specific actions is necessary or beneficial, as discussed above. Action agencies, however, can create any internal procedures they deem necessary to establish a credible administrative record to support their determinations. Further, nothing in this rule prevents action agencies from entering into agreements or promulgating counterpart regulations with the Services. Finally, the Services do offer training courses on section 7, which have been well-attended by action agency personnel. And, the Services' Consultation Handbook is available for guidance.

Comment: Several commenters questioned how ''contested determinations'' among agencies would be resolved. Another commenter noted there was no mechanism for the Services to ''overturn'' an incorrect determination made by an action agency.

Response: It is not clear what is meant by ''contested determinations.'' Currently, there is no mechanism for the Services to ''overturn'' decisions made by action agencies. The Services can exercise, and have exercised, their authority under 402.14(a) to request that

an action agency consult on an agency action. This option continues to be available to the Services.

Comment: Some commenters questioned how the rule will impact applicants.

Response: This rule does not affect the level of involvement an applicant may have either before or during informal consultation or formal consultation, except to the extent any applicant must agree to the extension of informal consultation beyond 120 days. Action agencies may involve applicants to any extent they choose, beyond the minimum requirements for applicant involvement established in the 1986 regulations.

Comment: Other commenters noted that action agencies already may face an increased litigation risk if they make determinations under the applicability section of this rule.

Response: As discussed above, action agencies already have a potential litigation risk when making the ''no effect'' determination as well as the ultimate liability with regard to jeopardy and adverse modification. Action agencies that determine that an action fits under the applicability section of this rule and forgo informal consultation on that basis should, as appropriate, develop an administrative record that supports the determination and should be prepared to defend it.

Comment: Some commenters believe this regulation will reduce collaboration between the action agencies and the Services, which they believe could result in an increase in adverse effects to listed species.

Response: In light of the narrow provisions set out in the applicability section, it is difficult to surmise when there would be likely adverse effects that would not be subject to formal consultation under this rule. Further, nothing in this rule prevents action agencies from consulting with the Services informally. Nor does this rule change an action agency's obligation to consult formally if there are likely to be adverse effects to listed species or critical habitat. Typically, in those consultations, the action agency and the Services collaborate to reduce impacts.

Comment: Several commenters questioned how this rule would impact listed plants and some believed the applicability section (402.03) of this rule would lessen protection for listed plants.

Response: This rule does not lessen protections for plants. The applicability section of this final rule sets a threshold for an off-ramp from consultation whereby no take is anticipated to result from the agency action. The ESA defines take to include ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed species.'' While some of these terms are more appropriate to listed wildlife, many of them would apply to plants. We recognize that take of listed plants is not prohibited under section 9 of the ESA; nevertheless, under section 7(a)(2) and the regulations, Federal agencies are still responsible for assessing whether their actions are likely to adversely affect (which may include take) listed plant species. Under this rule, even once the threshold of ''no take is anticipated'' has been met, the action agency must still demonstrate that its action is either wholly beneficial to listed plants, will have no effect on listed plants, or will have effects that are so insignificant they cannot be measured or detected in a manner that would permit meaningful evaluation of those effects. If the effect will be manifested through global processes, the remaining conditions set out in paragraph (b)(2) must also be met. Nothing in this rule changes the manner in which plants are dealt with in informal or formal consultation; listed plants, therefore, will continue to be protected under this rule.

Paragraph (b)(1)—No Effects

Comment: Several commenters agreed that the rule should formalize the long-standing practice of the Services to not require consultation on ''no effects'' determinations made by action agencies. On the other hand, a few commenters thought consultation was required even for ''no effects.''

Response: As discussed above, case-by-case consultation is not required on every action taken by an action agency. Paragraph 402.03(b)(1) of the rule makes explicit the guidance to the action agencies inherent in the 1986 regulations that no consultation is required in those instances when an action poses no effects to listed species or critical habitat. We determined that consultation is not required because an action that has no effect on listed species or critical habitat inherently meets the section 7(a)(2) statutory requirement that agencies ensure their actions are not likely to jeopardize a listed species or adversely modify or destroy critical habitat. Moreover, requiring consultation when an action is determined to have no effect on listed species or critical habitat is an unnecessary diversion of scarce resources.

Paragraph (b)(2)—Insignificant Contributor

Comment: Many commenters were troubled by paragraph 402.03(b)(2) as set out in the proposed rule. The proposed rule stated that consultation was not required when no take was anticipated and ''such action is an insignificant contributor to any effects on a listed species or critical habitat.'' Some commenters were concerned how broad the language appeared and that it would be used to avoid reviewing effects that were simply ''not significant.''

Response: After considering those comments, we determined that this portion of the rule should be revised. Accordingly, paragraph 402.03(b)(2) now is limited in scope to those effects that are ''manifested through global processes'' and: (i) The effects cannot be reliably predicted or measured at the scale of a listed species' current range; or (ii) would result at most in a small, insignificant impact on a listed species or critical habitat; or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote.

We have revised section 402.03(b)(2) to establish a very narrow applicability exception to consultation for certain effects that are manifested through ''global processes.'' This exception would apply where the effects of an action are manifested through such processes and at least one of the following applies: The effects cannot be reliably predicted or measured at the scale of a listed species' current range; or the effects would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or the effects are such that the potential risk of harm to a listed species or critical habitat is remote. The phrase ''manifested through global processes'' covers those effects that are the result of a specific source but become well mixed and diffused at the global scale such that they lose their individual identity. The combined effect of any particular source and other sources then becomes a potential contributor to a separate phenomenon with possible global impacts. Typically, however, the contribution of any particular source to the global process that then affects the local environment is very, very small. The most topical example of effects that would be manifested only through a global process is the effects of individual sources of greenhouse gas emissions and their contribution to global climate change and warming. ''Manifested through global processes'' does not refer to effects that can be evaluated for the immediate effects on

the surrounding area caused by their primary physical and chemical characteristics. In that context, they would be traced and measured to the extent possible. It is also possible that an action might have some effects that are manifested through global processes and others that are not. In this case, consultation would be required with respect to those other effects, but under revised section 402.03(c) consultation would not be required with respect to those effects manifested through global processes, provided at least one of the other criteria of section 402.03(b)(2) is met. These revisions reflect our conclusion that section 7(a)(2) is not an appropriate or effective mechanism to assess individual Federal actions as they relate to global issues such as global climate change and warming. We do not believe that Congress designed or intended the ESA to be utilized as a tool to regulate global processes, nor is it appropriate to hold an agency responsible for global processes.

Comment: Some commenters questioned why it was appropriate to exclude effects that contribute to climate change.

Response: This very narrow type of effect is generally beyond the scope of section 7(a)(2) because of the inability to separate out the effect of a specific Federal action from a multitude of other factors that contribute through global processes. In addition, the case-by-case consultation on specific effects that would fall under this provision would not be necessary or beneficial. As discussed above, the exclusion applies only to those effects that lose their individual identity and only produce the potential to have an impact when they combine with other factors through a global process.

Even after the threshold of the effect being manifested through global processes, there are other limiting factors. The effects under this section must also be of such a nature that they cannot be reliably predicted or measured at the scale of a listed species' current range or would result at most in a small, insignificant impact on a listed species or critical habitat, or are of the nature that the potential risk of harm to a listed species or critical habitat is remote. In the context of greenhouse gases, current models, though capable of quantifying the contribution to changes in global atmospheric greenhouse gas concentrations and temperature, do not allow us to quantitatively link an individual action to localized climate impacts relevant to consultation. However, based on the best scientific information available, we are presently able to conclude that the impacts of a particular source are likely to be extremely small. For example, in a recent exchange of letters, EPA provided a model-based analysis that projected that even the emissions of a very large coal-fired power plant would likely result in a rise in the maximum global mean temperature of less than one-thousandth of a degree.

Finally, to attempt to regulate effects at a global scale would have the untenable consequence of transforming the ''action area'' for consultation into the globe itself, which would eviscerate any meaningful limit on the concept of ''action area'' and defy analysis. The concept of ''action area,'' as established in the 1986 regulations and unchanged by this rule, is an important and necessary tool to keep consultations manageable and tied to the particular action under consultation. In a global context, the concept of ''action area'' would be rendered meaningless.

Comment: Several commenters asked for a further explanation of ''remote''. One commenter suggested that we clarify that remote applies to effects that are remote ''in time, space, or in probability of occurrence.''

Response: This comment was originally submitted with regard to paragraph 402.03(b)(3)(iii), which has been withdrawn, but we will respond because of the use of the word ''remote'' in paragraph 402.03(b)(2). We agree with the commenter that remote can qualify an effect with regard to time, space, or in probability of occurrence, among other things.

Comment: Some commenters expressed concern that this regulation would prevent review of climate change in all consultations, even when the best available science indicates that climate change may impact a species.

Response: Paragraph (b)(2) is intended to deal with effects that are manifested through a global process. For example, under this paragraph consultation would not be required for actions involving the emission of greenhouse gases so long as they met the threshold of no anticipated take and one of the three criteria specified in paragraph (b)(2). This paragraph does not preclude the appropriate consideration of climate change, generally, for purposes of establishing the environmental baseline and the status of the species in the action area. For example, if, based upon the best available information it is determined that an action area will face a different precipitation pattern than it had experienced in the past (from the effects of climate change overall rather than from the project under consultation) that information would be appropriately evaluated for purposes of establishing the environmental baseline.

Paragraph (b)(3)

The proposed regulation set out three types of effects that would not require consultation: Those effects that are wholly beneficial, those effects that are ''not capable of being meaningfully identified or detected in a manner that permits evaluation,'' and those effects for which the ''potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.''

Comment: There were limited comments on the concept of ''wholly beneficial'' as set out in paragraph (b)(3)(ii). One commenter acknowledged that it would be a waste of time and resources to consult on such an action, but stated the ESA would still require it. One commenter preferred the words ''clearly beneficial.''

Response: As discussed above, we disagree that the ESA requires consultation on every action taken by an action agency. The final rule continues the use of the words ''wholly beneficial'' to establish clearly that the action can have no adverse effects on listed species or habitat in order to be deemed ''wholly beneficial.'' This subparagraph does not allow a balancing of beneficial against detrimental. We believe the term ''wholly beneficial'' better captures that concept than ''clearly beneficial.'' Further this language tracks language in the Consultation Handbook, which defined ''beneficial effects'' as effects that are ''contemporaneous positive effects without any adverse effects to the species.'' We believe that no consultation is required for these effects because there is no question that an action agency can ensure that its action does not violate section 7(a)(2) with effects that are wholly beneficial.

Comment: Some commenters objected to proposed rule paragraph (b)(3)(i), which does not require further consultation on effects that are ''not capable of being meaningfully identified or detected in a manner that permits evaluation.''

Response: After review of several comments, we concluded that the language set out in the proposed rule should be amended to better reflect the language contained in the Consultation Handbook. We made two technical changes to lend more precision to this applicability criterion. First, we changed the term ''identified'' to ''measured.'' The terms ''identified'' and ''detected'' are so similar in meaning that using both terms diminished the clarity of the provision. The term ''measured,'' however, is clearly distinct

and provides an independent basis for examining whether an effect is suitable for consultation. The second change we made was to move the word ''meaningfully'' to the end of the sentence to modify ''evaluated.'' If an effect cannot be measured or detected in a manner that permits meaningful evaluation, we do not think consultation is beneficial or necessary.

We think the language in this rule captures the intent of language used to describe insignificant effects as defined in the Consultation Handbook under ''is not likely to adversely affect.'' That language reads, ''Based on best judgment, a person would not: (1) Be able to meaningfully measure, detect, or evaluate'' such effects. We think these effects were properly excluded from formal consultation by the determination that they were ''not likely to adversely affect.'' Consultation Handbook, p. xv. If an effect cannot be measured or detected to the point that it cannot be meaningfully evaluated, there is simply no point in requiring consultation on such an effect. We believe they are properly placed in the category of effects that do not require consultation once a determination has been made that no take is anticipated and any effects satisfy the criterion of section 402.03(b)(3)(i). However, this provision is not meant to suggest that consultation is not required merely because the predicted effect of an action is small in magnitude. Even though the magnitude of an effect is small, if the effects on the environment can be measured or detected in a manner that permits meaningful evaluation, then informal consultation may be necessary.

Comment: Many commenters objected to the language set out in the proposed rule at paragraph (b)(3)(iii) that consultation was not required for those effects that ''are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.'' Primarily, the commenters thought this required or allowed action agencies to make a jeopardy determination, without consultation with the Services. Several commenters asked for clarification of the difference between ''potential risk of jeopardy'' with the jeopardy determination made as part of formal consultation. Another commenter noted that they did not see how this evaluation meshed with the threshold requirement for this entire paragraph that no take is anticipated.

Response: After considering the comments, we decided to remove paragraph (b)(3)(iii) from the final rule. Although, as discussed above, we have incorporated the concept of ''remoteness'' in the specialized global processes exception (402.03(b)(2)), we have delinked it from the statutory jeopardy standard.

Informal Consultation (§ 402.13)

A sentence was added to the end of paragraph 402.13(b) to explain when consultation has been satisfied. A new paragraph, 402.13(c), was added to establish that consultations, by mutual agreement, could be extended beyond the 120 day time period.

Comment: Several commenters expressed concerns about the new time frames for informal consultation and the provision that allows action agencies to terminate informal consultation. One commenter stated that the provisions to allow up to 120 days for informal consultation are not authorized by law. Other comments stated that the new time line allows action agencies to terminate informal consultation and move forward with the project without Service concurrence, which seriously weakens the consultation process, and that the proposed deadline for informal consultation is arbitrary and counterproductive. Other commenters supported the proposed establishment of a time limit for informal consultation as appropriate.

Response: The ESA does not require an informal consultation procedure. Rather, the informal consultation process as it has been implemented was created by regulation as part of the mechanism for streamlining consultations when an action agency does not need an incidental take statement and the effects are not expected to be adverse. The Services retain the authority to adapt the procedure based on their experience with implementation. Experience has shown that under the existing regulations informal consultations can be prolonged, sometimes lasting longer than formal consultations. This delay affects the action agencies' execution of their actions and fulfillment of their missions. Adding a time frame to this process is expected to contribute to achieving the efficiencies that were anticipated when the concept of informal consultation was introduced. The sixty-day period we have added (with a sixty-day extension) emphasizes the need for the Services to conduct timely review of requests for informal consultation and provides the Services an adequate opportunity to raise any concerns they may have. At the same time, the time frames provide action agencies with greater certainty by allowing them to terminate consultation and move forward after an established time. However, the action agency may move forward with the action only if the action agency concludes that the action will not result in take and is not likely to adversely affect listed species or critical habitat.

Comment: The proposed regulations fail to provide for at least a pro forma written opinion of the Secretary, which is contrary to the statutory duty.

Response: Section 7(b)(3) requires that ''[p]romptly after conclusion of consultation'' under either section 7(a)(2) or (3), ''the Secretary shall provide to the Federal agency and applicant, if any, a written statement setting forth the Secretary's opinion.'' Under the 1986 regulations, the Services provide a biological opinion only after formal consultation. This rule does not change that requirement. We assume that the commenter refers to the concurrence letter in the informal consultation process as a pro forma written opinion of the Secretary. Although the Services expect that in many cases informal consultation will conclude in a letter of concurrence or a request for formal consultation, the final rule permits action agencies to move forward without one. Neither informal consultation nor concurrence with ''not likely to adversely affect'' determinations are set forth in the ESA. The Services are exercising their discretion under the ESA by concluding that in certain narrow circumstances a written statement from the Services is neither required nor beneficial.

Comment: Revise the proposed section 402.13(b) to clearly state that termination means that the action agency has fulfilled its procedural obligation to consult with the Services.

Response: The Services have modified the proposed text to clarify that if the action agency terminates consultation at the end of the sixty-day period established under section 402.13(b) (or the end of an extension pursuant to that section), or if the appropriate period has expired without a written statement from the Service, the action agency will be considered to have satisfied its procedural duty to consult under section 7(a)(2) of the ESA. However, we have also added a provision to the final rule to clarify that the Service, the action agency, and the applicant, if any, may agree to extend informal consultation for a specified period of time. This provision will allow the relevant parties to continue informal consultation in situations where progress has been made so that the Service's written concurrence will still be a possible outcome. Because the purpose of the time limit is to expedite informal consultation, we expect that extensions beyond 120 days will be rare.

Comment: The requirement to consult when the action agency is unable to find that its action is ''not likely to adversely affect'' a species has not changed.

Response: We agree, in this circumstance the Federal agency would proceed to formal consultation.

Comment: Some comments supported the use of informal consultation for review of batched, similar, or grouped actions.

Response: We agree this is appropriate provided that the group of actions or batched actions meet the threshold criterion of ''no take is anticipated.''

Comment: Several commenters questioned what the implications are if an action agency chooses to proceed without a concurrence from the Services.

Response: In the final rule the Services have clarified that a Federal agency may consider lack of a response at the end of 60 days (unless extended by the Services to 120 days) as satisfying their procedural obligations under 7(a)(2). The action agency can choose to proceed with the action. The Services have determined that this approach has little risk of adverse affect on species, because the threshold requirement of informal consultation is that no take is expected to occur and because the Service has ample opportunity in 60 or 120 days to raise issues with the action agency if adverse effects are likely and move the action into formal consultation.

Comment: Several commenters noted that it is sometimes helpful to have extended informal consultations that allow the action agencies and the Services to work together to lessen impacts to species and critical habitat. Some of those commenters requested additional language be added to clarify that consultations could proceed past 120 days.

Response: The Services also have considered that circumstances may arise in which the informal consultation is proceeding but is not likely to conclude in 120 days. If the action agency wishes to continue informal consultation, then Services may agree with the action agency on an extension, provided the applicant also agrees. Although the Services have incorporated this provision into the regulation, as noted above, we expect that it will be rarely utilized.

We also note that the Services may indicate that they do not concur when they have not been provided adequate information to consider the action agency's not likely to adversely affect determination. In such circumstances, the Services should specify in detail the supplemental information they think is necessary to consider the action agency's determination.

Formal Consultation (§ 402.14)

We made a minor change to this section to reflect changes in the informal consultation section of the rule. Specifically, we changed the ''exception'' language in § 402.14 to note that informal consultation may be concluded without the written concurrence of the Director under the circumstances in § 402.13(b).

Comment: Some commenters thought that the exception language in 402.14 appeared to require formal consultation even when the action agency chooses to conclude consultation.

Response: We agree that there could be some confusion as to whether formal consultation was required when an action agency chooses to conclude consultation without receiving a concurrence from the Services. We think the rule makes it clear that under those circumstances, consultation under section 7(a)(2) is satisfied.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

Executive Order 12866 requires Federal agencies to submit proposed and final significant rules to the Office of Management and Budget (OMB) prior to publication in the FR. The EO defines a rule as significant if it meets one of the following four criteria:

(a) The rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) The rule will create inconsistencies with other Federal agencies' actions;

(c) The rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) The rule raises novel legal or policy issues.

If the rule meets criteria (a) above, it is called an ''economically significant'' rule and additional requirements apply. It has been determined that this rule is ''significant'' but not ''economically significant.'' It was submitted to OMB for review prior to promulgation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, the Secretaries of the Interior and Commerce certify that this regulation will not have a significant economic impact on a substantial number of small entities. This rule applies only to Federal agencies and does not regulate, either directly or indirectly, any small entities.

Congressional Review Act (CRA)

This rule is not a major rule under 5 U.S.C. 804(2), Subpart E of the Small Business Regulatory Enforcement Fairness Act, also known as the Congressional Review Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more;

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions;

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

As discussed above, this rule makes narrow changes to the section 7 consultation process. As such, the impacts are relatively narrow and limited to the Federal action agencies. A copy of the rule and required supporting documentation will be provided to the Comptroller General and both Houses of Congress before the rule goes into effect.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act:

(1) The rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. We expect that these regulations will not result in any significant additional expenditure by entities that develop formalized conservation efforts.

(2) The rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of $100 million or greater in any year; and so is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The rule imposes no obligations on State, local, or tribal governments.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. The rule has no impact on personal property rights. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism Assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, this rule does not unduly burden the judicial systems and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We promulgate this rule consistent with the Executive Order.

Paperwork Reduction Act

This rule will not impose any new requirements for collection of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We 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.

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).

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. In compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), and the Council on Environmental Quality's regulation for implementing NEPA (40 CFR 1500–1508), we published the availability of a draft environmental assessment on October 27, 2008 (73 FR 63667), followed by a 10-day comment period. The final environmental assessment is available to the public (see **ADDRESSES**). The action falls within the scope of the final environmental assessment and accompanying Finding of No Significant Impact. The FWS and NMFS are considered the lead Federal agencies for the preparation of this rule, pursuant to 40 CFR part 1501.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government relations with Native American Tribal Governments'' (59 FR 22951); E.O. 1315; and the Department of the Interior's 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to Government basis. The rule applies only to Federal agencies, not to Indian Tribes. To the extent that Federal actions requiring consultation may indirectly affect the Tribes, the rule is intended only to streamline the administration of the ESA and clarify definitions; the rule does not change any substantive requirements concerning protections of listed species or critical habitat. Any indirect effect to Tribes, therefore, would be minimal.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Dated: November 26, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Dated: November 26, 2008.

Samuel D. Rauch,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

■ For the reasons set forth in the preamble, the Services amend part 402, title 50 of the Code of Federal Regulations as follows:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

■ 1. The authority for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531, et seq.

■ 2. In § 402.02 revise the definitions for ''Biological assessment,'' ''Cumulative effects,'' and ''Effects of the action'' to read as follows:

§ 402.02 Definitions.

* * * * *

Biological assessment means the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. A biological assessment may be a document prepared for the sole purpose of interagency consultation, or it may be a document or documents prepared for other purposes (e.g., an environmental assessment or environmental impact statement) containing the information required to initiate consultation. The Federal agency is required to provide the Services a specific guide or statement as to the location of the relevant consultation information, as described in § 402.14, in any alternative document submitted in lieu of a biological assessment.

* * * * *

Cumulative effects means those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the particular Federal action subject to consultation. Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.

* * * * *

Effects of the action means the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation

in process. Direct effects are the immediate effects of the action and are not dependent on the occurrence of any additional intervening actions for the impacts to species or critical habitat to occur. Indirect effects are those for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur. If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

* * * * *

■ 3. Revise § 402.03 to read as follows:

§ 402.03 Applicability.

(a) Section 7 of the Act and the requirements of this part apply to all actions in which the Federal agency has discretionary involvement or control.

(b) Federal agencies are not required to consult on an action when the direct and indirect effects of that action are not anticipated to result in take and:

(1) Such action has no effect on a listed species or critical habitat; or

(2) The effects of such action are manifested through global processes and:

(i) Cannot be reliably predicted or measured at the scale of a listed species' current range, or

(ii) Would result at most in an extremely small, insignificant impact on a listed species or critical habitat, or

(iii) Are such that the potential risk of harm to a listed species or critical habitat is remote; or

(3) The effects of such action on a listed species or critical habitat:

(i) Are not capable of being measured or detected in a manner that permits meaningful evaluation; or

(ii) Are wholly beneficial.

(c) If all of the effects of an action fall within paragraph (b) of this section, then no consultation is required for the action. If one or more but not all of the effects of an action fall within paragraph (b) of this section, then consultation is required only for those effects of the action that do not fall within paragraph (b) of this section.

■ 4. Revise § 402.13 to read as follows:

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency that the action, or a number of similar actions, an agency program, or a segment of a comprehensive plan, is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary, if the Service concurs in writing. For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats.

(b) If the Service has not provided a written statement regarding whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section within 60 days following the date of the Federal agency's request for concurrence the Federal agency may, upon written notice to the Service, terminate consultation. The Service may, upon written notice to the Federal agency within the 60-day period, extend the time for informal consultation for a period no greater than an additional 60 days from the end of the 60-day period. If the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied.

(c) Notwithstanding the provisions of paragraph (b) of this section, the Service, the Federal agency, and the applicant, if one is involved, may agree to extend informal consultation for a specific time period.

(d) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

■ 5. In § 402.14 revise paragraphs (a) and (b)(1) to read as follows:

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.

If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, and the Director concurs in writing or informal consultation has been completed under § 402.13(b) without a written statement by the Service as to whether it concurs;

* * * * *

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Proposed Rules

Federal Register

Vol. 73, No. 242

Tuesday, December 16, 2008

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

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB03

Registration, Five-Year Terms

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is proposing to amend the regulations under the Packers and Stockyards Act, 1921 as amended (7 U.S.C. 181 *et seq.*) (P&S Act or Act), regarding the registration of market agencies and dealers. Under the current regulations, there is no expiration date or renewal process for the registration of a market agency or dealer under the Act. The proposed amendment would establish a 5-year term for registrations and renewal procedures. This action would assist USDA in regulating the business operations of market agencies and dealers through the effective enforcement of the P&S Act.

DATES: Written or electronic comments received by February 17, 2009 will be considered prior to issuance of a final rule.

ADDRESSES: You may submit written or electronic comments to:

- *Written:* Mail to the attention of Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643–S, Washington, DC 20250–3604.
- *Fax:* (202) 690–2173.
- *Internet:* Go to *http://www.regulations.gov* and follow the on-line instruction for submitting comments.

Comments should be identified as ''P&SA, Registration, 5-Year Term Comments,'' and should make reference to the date and page number of this issue of the **Federal Register**. All comments will become a matter of public record and available for public inspection at the above address during regular business hours (7 CFR 1.27(b)). Please call the GIPSA Management Support Staff at (202) 720–7486 for an appointment to view the comments.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Grain Inspection, Packers and Stockyards Administration (GIPSA) administers and enforces the Packers and Stockyards Act of 1921 (7 U.S.C. 181–229) (P&S Act or Act). Under authority delegated to GIPSA by the Secretary of Agriculture in Section 407(a) of the P&S Act (7 U.S.C. 228), we are authorized to write regulations necessary to carry out the provisions of the Act.

Section 303 of the P&S Act (7 U.S.C. 203) requires that market agencies and dealers register with USDA. Section 201.10 of the regulations (9 CFR 201.10) currently requires that any person operating or desiring to operate as a market agency or dealer must apply for registration (Form P&SP 1000). When applying for a registration, the applicant must certify that its financial condition meets the Act's requirements, list its type of business organization, whether it will operate on a calendar year or fiscal year basis, indentify the character of its business and the species of livestock it will handle. If registration is granted, a market agency or dealer receives an acceptance letter from GIPSA, which includes the registration number and the registration's effective date.

Under current § 201.10(b) of the P&S Act regulations (9 CFR 210.10(b)), GIPSA's Administrator may deny a registration if the Administrator believes that the applicant is unfit to engage in the business of a market agency and/or dealer. If a registration is denied, however, the applicant may request a formal hearing before a USDA administrative law judge who will decide if the Administrator's decision should be overturned. Once issued by GIPSA, however, the registration does not expire.[1] After a registration is granted, the registration becomes inactive if the registrant notifies us that it has ceased business operations. Otherwise, a registration is effective indefinitely.

We have found that many market agencies and dealers registered under the P&S Act do not provide us with updates of information about their business operations. Without a registrant's current and accurate business information, we cannot adequately investigate complaints received from livestock sellers about a registrant's business practices, and we therefore cannot effectively enforce the Act. Also, as a part of GIPSA's oversight of the livestock industry, we conduct periodic onsite compliance reviews of the business operations of registrants. Requiring registrants to renew their registration would require applicants to inform GIPSA periodically whether the entities are still operating and the type of operation being conducted. GIPSA would then be able to focus its oversight activities on actively operating businesses and better manage the pool of regulated entities that would be scheduled for compliance investigations over a 5-year period.

Because no provision for expiration of a registration currently exists in the P&S Act or regulations, a registration can only be suspended or be considered inactive. However, if a registration is not renewed as required by this proposal, the registration would expire. A market agency or dealer that wants to resume operating after its registration has expired would have to file a new application for registration. The proposed renewal process would give GIPSA's Administrator the ability to consider whether a current or former registrant continues to be fit to engage in business subject to the Act.

In 2007, a total of 6,931 entities were registered with GIPSA as market agencies and/or dealers. Most of these entities, approximately 5,400, have been registered for more than 5 years. Therefore, in order to comply with the proposed regulation, these registrants would have to file an application for renewal of registration during the first year the proposal became effective. If these registrants failed to renew their registration timely, their registrations

[1] However, GIPSA may suspend a registration for cause.

would expire. If all 5,400 registrants filed renewal applications in 1 year, GIPSA's regional offices would be overwhelmed with applications, and it would likely take 6 months for all the registrations to be renewed. In the interim, a registrant would either operate without being registered in violation of the Act, or suspend its business operations until it received its renewed registration. We would need to phase-in the implementation of the new renewal requirement so that GIPSA could process the renewal applications in an efficient and effective way. This would provide registered entities with sufficient notice of the renewal requirement and also provide them a grace period in which to renew while continuing operations.

Description of Proposed Changes to the Regulations

Section 201.10 of the regulations (9 CFR 201.10) establishes the requirements and procedures for the registration of a market agency and/or dealer. Our proposed amendments to § 201.10 would add two paragraphs regarding the expiration of registrations. New paragraph (e) would change the time period for which a registration is valid from an indefinite period to a 5-year period. A registration that is not renewed timely would expire automatically after 5 years. New paragraph (e) also establishes the phased-in renewal process. The renewal process would give us the ability to review a market agency and/or a dealer's business information to determine if it continues to be fit to engage in business subject to the Act. New paragraph (f) would specify that GIPSA would renew registrations for applicants whose registration is suspended under § 201.11 (9 CFR 201.11, Suspended registrants; officers, agents and employees) but the registration would not be effective until the suspension period terminates.

Because some firms operate in multiple regions, we are also proposing to amend paragraph (a) of § 201.10 (9 CFR 201.10) to require that firms file applications for registration (and registration renewals) with the GIPSA regional office located in the geographic area where their primary place of business is located, rather than the area where they propose to operate. If we have questions about a firm's registration or its business records, the regional office would contact the firm's primary place of business. This would also make § 201.10(a) consistent with § 201.28 of the regulation (9 CFR 201.28) that requires that duplicates of bonds be filed with the GIPSA regional office covering the area where the registrant is located.

We also propose to make minor changes to the existing paragraphs in this section to make the regulation clearer. This proposal would not change the registration form that applicants complete or the information required of the applicants on the form. We would, however, add a new ''renewal'' check box in the section of the form to be completed by GIPSA personnel.

Proposed Phased Implementation of Final Rule

We would implement the proposed 5-year registration amendment over a 5-year period, starting with the date that the final rule becomes effective. We would require that 20 percent of existing registrations be renewed in the first year after the rule becomes effective, with 20 percent renewed in each of the 4 subsequent years. During that first year, registrants whose registration numbers end in the digit ''0'' or ''5'' would be required to renew. We propose that the renewal be submitted at the same time as the annual report that is required by § 201.97 of the regulations. For example, registrations issued in the year 2000 and assigned a number ending in the digit ''0'' or ''5'' would be required to be renewed no later than April 15, 2009; or, if the registrant's records are kept on a fiscal year basis, no later than 90 days after the close of the registrant's 2008 fiscal year.

The implementation of the proposed regulatory amendment would be scheduled according to the last digit of each registrant's registration number as follows:

- Registration number ending in the digit ''0'' or ''5'': April 15, 2009, or 90 days after the close of the 2008 fiscal year.
- Registration number ending in the digit ''1'' or ''6'': April 15, 2010, or 90 days after the close of the 2009 fiscal year.
- Registration number ending in the digit ''2'' or ''7'': April 15, 2011, or 90 days after the close of the 2010 fiscal year.
- Registration number ending in the digit ''3'' or ''8'': April 16, 2012, or 90 days after the close of the 2011 fiscal year.
- Registration number ending in the digit ''4'' or ''9'': April 15, 2013, or 90 days after the close of the 2012 fiscal year.

Following this 5-year phased-in implementation period, registration renewals would be due 5 years after the registration was last renewed, rather than the last digit of the registration number. For example, the registrants who renewed their registrations by April 15, 2009, would be required to renew again by April 15, 2014. Registrants would keep the same registration number for subsequent renewals.

On or about the first business day of each new calendar year, GIPSA regional offices would mail to each registrant in its respective regional territory whose registration would expire in the succeeding year a copy of the previously filed registration application and a blank renewal application. The registrant would then be required to complete the renewal application with its current business information and return it to the appropriate GIPSA regional office at the same time the registrant's annual report is due, as specified in the regulations (9 CFR 201.97). That would mean the renewal application would be due by April 15th of the following calendar year or no later than 90 days after the end of the fiscal year. If a registration is not renewed and expires, we would provide a registrant a 2-week grace period to submit a renewal application to us before notifying it by mail that its registration had expired. In our letter, we would also notify the registrant that operating without a valid and effective registration is a violation of the P&S Act.

We do not need to phase-in implementation of the proposed amendment concerning suspended registrations. That proposed amendment would take effect on the effective date of the final rule (proposed 9 CFR 201.10(f)).

Options Considered

We considered several different alternatives to these proposed regulatory changes. For the 5-year registration renewal, these alternatives included issuing policy guidance to GIPSA employees and making a public announcement regarding the importance that market agencies and/or dealers submit to GIPSA accurate and current business information. We do not believe that either of these options would ensure that we have accurate and current information on registered entities.

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget (OMB) has designated this rule as not significant for the purposes of Executive Order 12866.

We have determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined in

the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). Most of the entities to which this rule applies do meet the applicable size standard for small entities in the Small Business Administration (SBA) regulations (13 CFR 121.201). For the North American Industry Classification System, codes that apply to animal production (subsector 112), the SBA size standard is $750,000 in average annual receipts. Based on the information that we have on bonded registrants, about 75 percent of the approximately 5,400 entities to which this rule applies have annual receipts of less than $750,000. The proposed rule will impose a burden of 30 minutes of effort to complete the application to renew registration every 5 years. Thirty minutes (.5 hours) is the current burden estimate for the registration application form under the currently approved OMB information collection 0580–0015. We have determined, however, that this does not represent a significant economic impact.

In accordance with the RFA, we are not required to provide an initial regulatory flexibility analysis because this proposed rule will not have a significant economic impact on a substantial number of small entities. Because it would impose a small burden on a substantial number of small entities, we did consider alternatives to reduce that burden. One alternative would be to exempt small businesses from this proposed rule. That alternative, however, would not meet our responsibility to enforce the registration requirements of the P&S Act, which apply to all market agencies and dealers. We considered whether an electronic online form would reduce the burden on small entities. Since small entities may not have reliable online Internet access, and the form would take as long to fill out online as on paper, this would not reduce the burden on small entities. Of all the feasible alternatives considered, we have determined that the proposed approach to require the renewal of registration every 5 years represents the least burden on small entities.

For new registrants, the burden would remain the same as under the current regulation given that we are not changing the application form.

We have considered the effects of this rulemaking action under the RFA and we believe that it will not have a significant impact on a substantial number of small entities. We welcome comments on the cost of compliance with this rule, and particularly on the impact of this proposed rule on small entities. We also welcome comments on alternatives to the proposed rule that would achieve the same purpose with less cost to, or burden upon, registrants.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect. This rule would not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Paperwork Reduction Act

In accordance with Office of Management and Budget regulations (5 CFR Part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and record keeping requirements that are covered by this proposed rule were approved under OMB number 0580–0015 on February 21, 2008, and expire on February 28, 2011.

E-Government Act Compliance

GIPSA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

1. The authority citation continues to read as follows:

Authority: 7 U.S.C. 203, 204, 207, 217a, 222, and 228.

2. Section 201.10 is amended to revise paragraphs (a) through (d) and to add paragraphs (e) and (f) to read as follows:

§ 201.10 Requirements and Procedures.

(a) Every person operating or desiring to operate as a market agency or dealer as defined in section 301 of the Act (7 U.S.C. 201) must apply for registration. To apply, such persons must file a properly executed application for registration on a form furnished by the Agency. Each applicant must file an application for registration with the regional office for the region where the applicant has his or her primary place of business, and file and maintain a bond as required in §§ 201.27 through 201.34 (9 CFR 201.27 through 201.34).

(b) If, upon review of an application, the Administrator has reason to believe the applicant is unfit to engage in the activity for which application has been made, a proceeding shall be instituted promptly affording the applicant the opportunity for a full hearing, in accordance with the Department's Rule of Practice Governing Formal Adjudicatory Proceedings (7 CFR Subpart H), to show cause why the application for registration should not be denied. If after the hearing the application is denied, as soon as the issue(s) that formed the basis of the denial have been remedied, the applicant may file a new application for registration.

(c) Any person regularly employed on salary, or other comparable method of compensation, by a packer to buy livestock for such packer is subject to the regulation requirements of this section. Such person must be registered as a dealer to purchase livestock for slaughter on behalf of the packer.

(d) Every person clearing or desiring to clear the buying operations of other registrants must apply for registration as a market agency providing clearing services by filing a properly executed application on a form furnished by the Agency, and file and maintain a bond as required in §§ 201.27 through 201.34.

(e) If an application for registration is granted, a market agency or dealer receives an acceptance letter from the Agency that issues the registration number and the effective date of the registration. Each registration issued in accordance with this section expires 5 years after the year of issuance. If a registrant intends to continue to operate in a manner described in paragraph (a), (c) or (d) of this section, its registration must be renewed by filing an application for renewal of registration as prescribed in paragraph (a) of this section that includes any applicable updated information. A registrant who fails to renew its registration in a timely manner, and continues to operate will be engaged in business subject to the Act without a valid registration in violation of section 303 of the Act (7 U.S.C. 203).

(1) Between (INSERT EFFECTIVE DATE OF THE FINAL RULE) and December 31, 2013, applications for renewal of registration must be filed in accordance with the chart below:

Last digit of Registration No.	Year of renewal	Next renewal due date
0 or 5	2009, by April 15 [1]	2014, by April 15.[1 2]
1 or 6	2010, by April 15	2015, by April 15.
2 or 7	2011, by April 15	2016, by April 15.
3 or 8	2012, by April 15	2017, by April 15.
4 or 9	2013, by April 15	2018, by April 15.

[1] However, if records are kept on a fiscal year basis, renewal is due by 90 days after the close of the fiscal year.
[2] For all dates in this column, due date for renewal application is without regard to last digit of registration number.

(2) Beginning January 14, 2014, all registrations must be renewed every 5 years by April 15 of the calendar year in which registration expires. (See notes 1 and 2 above.)

(f) Registrations that expire during a period of suspension imposed as a result of an order or injunction may be renewed, but the renewal will not be effective until the specified suspension period terminates.

* * * * *

Terry D. Van Doren,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E8–29652 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1311; Directorate Identifier 2007–NE–48–AD]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc., T5313 and T5317 Series Turboshaft Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Honeywell International Inc., T5313 and T5317 series turboshaft engines. This proposed AD would require initial and repetitive visual inspections and initial and repetitive ultrasonic inspections. This proposed AD results from eight instances of cracks in combustion chamber housings (CCHs). Two of the instances resulted in an engine shutdown during flight. We are proposing this AD to detect cracks in the CCH, which could result in rupture of the CCH, leading to loss of engine power and damage to the helicopter.

DATES: We must receive any comments on this proposed AD by February 17, 2009.

ADDRESSES: Use one of the following addresses to comment on this proposed AD.

- *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.

You can get the service information identified in this proposed AD from Honeywell International Inc., P.O. Box 52181, Phoenix, AZ 85072–2181, U.S.A.; telephone (800) 601–3099 (U.S.A.) or (602) 365–3099 (International), Web site: *http://portal.honeywell.com/wps/portal/aero.*

FOR FURTHER INFORMATION CONTACT: Robert Baitoo, Aerospace Engineer, Los Angeles Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; e-mail: *robert.baitoo@faa.gov*; telephone (562) 627–5245; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–1311; Directorate Identifier 2007–NE–48–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light 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 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).

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.

Discussion

We have received reports of eight instances of cracks developing in CCHs, part numbers (P/Ns) 1–130–610–05 and 1–130–610–12. Two of the instances resulted in an engine shutdown during flight. The cracks developed between the seam welds on the rear outer flange, in the angled bend area, forward of the fuel manifold mounting flange. Fatigue cracking in the ''doubler detail'' develops from the inside of the CCH, typically starting from corrosion pitting. There have been several instances in which a crack was found during maintenance activities or preflight inspection of the engine. In one instance, with a previously weld-repaired CCH (assumed to be a repair of a crack), additional fatigue cracks grew sufficiently to result in a loss of CCH integrity, subsequent in-flight engine shutdown, and significant airframe damage. A previously weld-repaired CCH has a high potential for additional cracks that might or might not be visible. This condition, if not corrected, could result in rupture of the CCH

leading to loss of engine power and damage to the helicopter.

Relevant Service Information

We have reviewed and approved the technical contents of Honeywell International Inc. Alert Service Bulletin (ASB) T53–A0142, Revision 1, dated September 14, 2006. That ASB describes procedures for performing an initial and subsequent daily visual inspections of the CCH for cracks. We also approved Service Bulletin (SB) T53–0144, Revision 4, dated March 31, 2008, that describes procedures for performing an initial and repetitive ultrasonic inspection of the CCH for cracks.

Differences Between This AD and the Service Information

Honeywell International Inc. ASB T53–A0142, Revision 1, dated September 14, 2006, requires daily repetitive inspections, and allows the flight crew to perform them. This AD would allow intervals of 50 hours time-in-service between repetitive visual inspections, and allows appropriately certificated technicians only to perform the visual inspections. The ASB also requires removing a welded CCH before further flight. This proposed AD would require removing a welded CCH within 100 hours time-in-service after the visual inspection.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD to detect cracks in the CCH, which could result in rupture of the CCH leading to loss of engine power and damage to the helicopter. You must use the service information described previously to perform the actions required by this AD.

Costs of Compliance

We estimate that this proposed AD would affect 100 engines installed on helicopters of U.S. registry. We also estimate that it would take about 3 work-hours per engine to perform the proposed actions, and that the average labor rate is $80 per work-hour. No parts are required. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $24,000.

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 AD:

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. Would 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. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Honeywell International Inc. (Formerly AlliedSignal and Textron-Lycoming): Docket No. FAA–2008–1311; Directorate Identifier 2007–NE–48–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by February 17, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Honeywell International Inc. T5313B, T5317A, T5317A–1, T5317B, and T5317BCV turboshaft engines with combustion chamber housing (CCH), part numbers (P/Ns) 1–130–610–05, 1–130–610–12, and 1–130–610–17, installed. These engines are installed on, but not limited to, Bell 205 and 210 Series and Kaman K–1200 helicopters.

Unsafe Condition

(d) This AD results from eight instances of cracks in CCHs. Two of the instances resulted in an engine shutdown during flight. We are issuing this AD to detect cracks in the CCH, which could result in rupture of the CCH, leading to loss of engine power and damage to the helicopter.

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.

Initial Visual Inspection

(f) For CCH, P/N 1–130–610–05 and 1–130–610–12, within 50 hours time-in-service (TIS) after the effective date of this AD, inspect the area between points A and B around the entire housing circumference in Figure 1 of this AD for weld repairs and cracks.

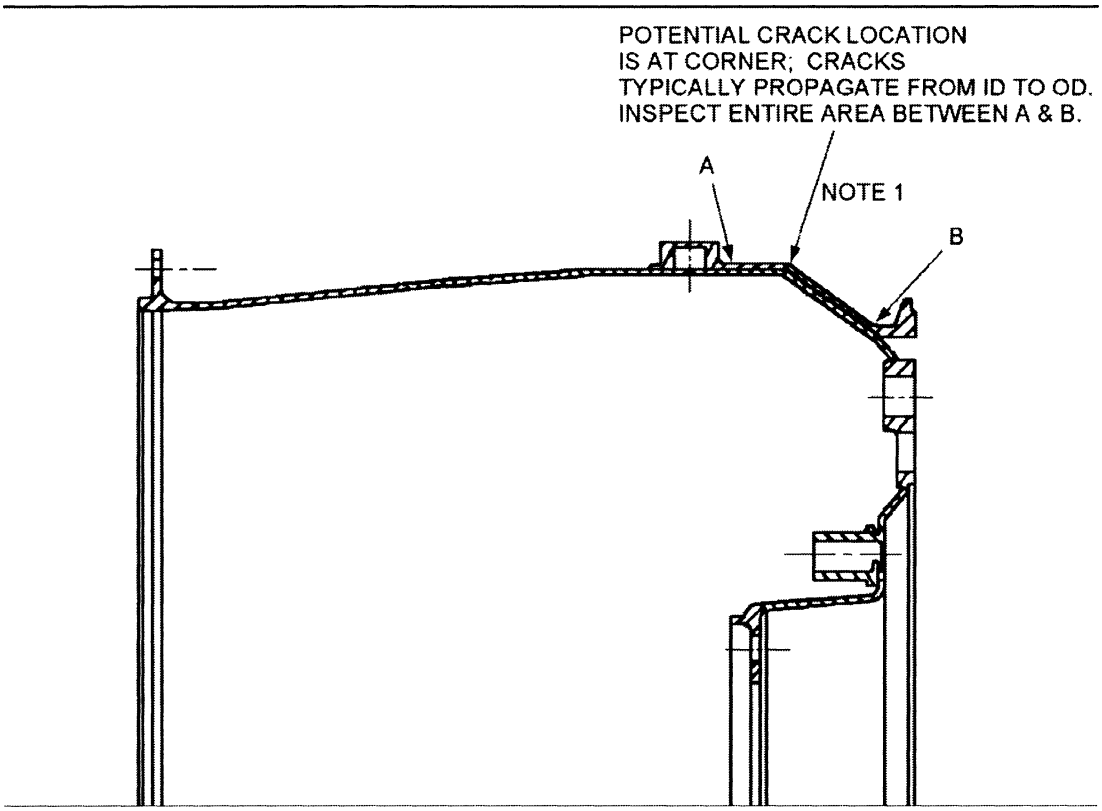
(1) If you find any cracks, replace the CCH before further flight. Honeywell International Inc. Alert Service Bulletin (ASB) T53–A0142, Revision 1, dated September 14, 2006, contains additional information on replacing the CCH.

(2) If you find any weld repairs, replace the CCH within 100 hours TIS after the visual inspection. Honeywell International Inc. ASB T53–A0142, Revision 1, dated September 14, 2006, contains additional information on replacing the CCH.

Repetitive Visual Inspection

(g) For CCH, P/N 1–130–610–05 and 1–130–610–12, inspect the area between points A and B around the entire housing circumference in Figure 1 of this AD for cracks within 50 hours time-since-last inspection. Honeywell International Inc. Standard Practices Manual 70–20–02, SP 1302, contains additional information on visual inspection.

(h) If you find any cracks, replace the CCH before further flight. Honeywell International Inc. ASB T53–A0142, Revision 1, dated September 14, 2006, contains additional information on replacing the CCH.



NOTE 1. NO WELD REPAIRS ALLOWED IN THIS AREA.

Figure 1. Visual Inspection of CCH

Initial Ultrasonic Inspection

(i) Perform an ultrasonic inspection on the CCH. Use Honeywell International Inc. Service Bulletin (SB) No. T53–0144, Revision 4, dated March 31, 2008, section 3. Accomplishment Instructions, to perform the ultrasonic inspection at the following compliance times.

(1) For CCH, P/N 1–130–610–05 and 1–130–610–12, within 500 hours TIS or next hot section inspection, whichever occurs first after the effective date of this AD, but not to exceed 6 months after the effective date of this AD.

(2) For CCH, P/N 1–130–610–17, perform at the first overhaul, but do not exceed 5,000 hours or 11,000 cycles, after the effective date of this AD, whichever occurs first.

Repetitive Ultrasonic Inspection

(j) Repeat the ultrasonic inspection on the CCH using Honeywell International Inc. SB No. T53–0144, Revision 4, dated March 31, 2008, section 3. Accomplishment Instructions, at the following compliance times:

(1) Within 1,200 flights, as defined as the cumulative number of landings, since the last inspection; or

(2) If the last inspection had unacceptable ultrasonic findings, within 200 flights after the last inspection to determine if the indication length increased.

Optional Terminating Action

(k) Replacing a CCH, P/N 1–130–610–05, 1–130–610–12, or 1–130–610–17, with a CCH, P/N 1–130–610–19 or 1–130–610R16, or an FAA-approved equivalent part, terminates the repetitive inspection requirements specified in paragraphs (g) and (i) of this AD.

Alternative Methods of Compliance

(l) The Manager, Los Angeles Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(m) Honeywell International Inc. ASB T53–A0142, Revision 1, dated September 14, 2006, SB No. T53–0144, Revision 4, dated March 31, 2008, and Standard Practices Manual 70–20–02, SP 1302, pertain to the subject of this AD. Contact Honeywell International Inc., P.O. Box 52181, Phoenix, AZ 85072–2181; telephone (800) 601–3099, Web site: *http://portal.honeywell.com/wps/portal/aero*, for a copy of this service information.

(n) Contact Robert Baitoo, Aerospace Engineer, Los Angeles Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; e-mail: *robert.baitoo@faa.gov;* telephone (562) 627–5245; fax (562) 627–5210, for more information about this AD.

Issued in Burlington, Massachusetts, on December 8, 2008.

Peter A. White,

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

[FR Doc. E8–29712 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1231; Airspace Docket No. 08–ASW–25]

Proposed Amendment of Class E Airspace; Tulsa, OK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace at Tulsa, OK. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at William R. Pogue Municipal Airport, Sand Springs, OK. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at William R. Pogue Municipal Airport.

DATES: Comments must be received on or before January 30, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1231/Airspace Docket No. 08–ASW–25, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1231/Airspace Docket No. 08–ASW–25.'' The postcard will be date/time stamped and returned to the commenter.

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/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace for SIAPs operations at Tulsa, OK. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would 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. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Tulsa, OK.

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; AIRWAYS; 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 Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

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

* * * * *

ASW OK E5 Tulsa, OK [Amended]

Tulsa International Airport, OK
(Lat. 36°11′54″ N., long. 95°53′17″ W.)
Tulsa, Richard Lloyd Jones Jr. Airport, OK
(Lat. 36°02′23″ N., long. 95°59′05″ W.)
Sand Springs, William R. Pogue Municipal Airport, OK
(Lat. 36°10′31″ N., long. 96°09′07″ W.)
Tulsa VORTAC
(Lat. 36°11′47″ N., long. 95°47′17″ W.)
Glenpool VOR/DME
(Lat. 35°55′15″ N., long. 95°58′07″ W.)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of Tulsa International Airport and within 1.6 miles each side of the 089° radial of the Tulsa VORTAC extending from the 8-mile radius to

11.9 miles east of the airport and within a 6.4-mile radius of Richard Lloyd Jones Jr. Airport, and within a 7.2-mile radius of William R. Pogue Municipal Airport and within 4 miles each side of the 355° bearing from William R. Pogue Municipal Airport extending from the 7.2-mile radius to 10.9 miles north of the airport, and within 4 miles each side of the 175° bearing from William R. Pogue Municipal Airport extending from the 7.2-mile radius to 10.9 miles south of the airport and within 4.1 miles each side of the 330° radial of the Glenpool VOR/DME extending from the 7.2-mile radius of William R. Pogue Municipal Airport to 8.3 miles northwest of the airport.

* * * * *

Issued in Fort Worth, TX on December 9, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–29755 Filed 12–15–08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 160, 161, 164, and 165

[USCG–2005–21869]

RIN 1625–AA99

Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to expand the applicability of notice of arrival and departure (NOAD) and automatic identification system (AIS) requirements to more commercial vessels. This proposed rule would expand the applicability of notice of arrival (NOA) requirements to additional vessels, establish a separate requirement for certain vessels to submit notices of departure (NOD), set forth a mandatory method for electronic submission of NOA and NOD, and modify related reporting content, timeframes, and procedures. This proposed rule would also expand the applicability of AIS requirements, beyond Vessel Traffic Service (VTS) areas, to all U.S. navigable waters and require AIS carriage for additional commercial vessels. These proposed changes would improve navigation safety, enhance the Coast Guard's ability to identify and track vessels, heighten our overall maritime domain awareness, and thus help us address threats to maritime transportation safety and security and mitigate the possible harm from such threats.

DATES: Comments and related material must reach the Docket Management Facility on or before April 15, 2009. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before April 15, 2009.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2005–21869 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

Online: http://www.regulations.gov.

Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Fax: 202–493–2251.

You must also send comments on collection of information discussed in the Paperwork Reduction Act section of this NPRM (VI. D.) to the Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure that the comments are received on time, the preferred method is by e-mail *oira_submission@omb.eop.gov* (the subject line of the e-mail must include the docket number and Attention: Desk Officer for Coast Guard, DHS) or by fax at 202–395–6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

You may inspect the material proposed for incorporation by reference at room 1409, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–372–1563. Copies of the material are available as indicated in the ''Incorporation by Reference'' section of this preamble.

FOR FURTHER INFORMATION CONTACT: If you have questions on the NOAD portion of this proposed rule, contact Lieutenant Sharmine Jones, Office of Vessel Activities (CG–543), Coast Guard, *Sharmine.N.Jones@uscg.mil,* telephone 202–372–1234. If you have questions on the AIS portion of this proposed rule, contact Mr. Jorge Arroyo, Office of Navigation Systems (CG–5413), Coast Guard, *Jorge.Arroyo@uscg.mil,* telephone 202–372–1563. If you have questions on viewing material in the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

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Table of Abbreviations and Acronyms

AC Alternating Current
AIS Automatic Identification System
AOR Area of Responsibility
API American Petroleum Institute
APIS Advance Passenger Information System
ARPA Advanced Radar Plotting Aid
ASTM American Society for Testing and Materials
CBP U.S. Customs and Border Protection
CDC Certain Dangerous Cargo
CFR Code of Federal Regulations
COP Common Operating Picture
COTP Captain of the Port
CSTDMA Carrier-sense Time Division Multiple Access
DGPS Differential Global Positioning System

DHS U.S. Department of Homeland Security
ECDIS Electronic Chart Display and Information System
ECS Electronic Chart System
eNOAD Electronic Notice of Arrival and Departure
FCC Federal Communications Commission
GPS Global Positioning System
GT Gross Registered Tons
IEC International Electrotechnical Commission
IMO International Maritime Organization
IRVMC Inland River Vessel Movement Center
ISM International Safety Management
ISPS International Ship and Port Facility Security
ISSC International Ship Security Certificate
ITU International Telecommunications Union
MDA Maritime Domain Awareness
MISLE Marine Information for Safety and Law Enforcement
MKD Minimal Keyboard Display
MMSI Maritime Mobile Service Identity
MTS Marine Transportation System
MTSA Maritime Transportation Security Act of 2002
NAICS North American Industry Classification System
NAIS Nationwide Automatic Identification System
NARA *National Archives and Records Administration*
NEPA National Environmental Policy Act of 1969
NOA Notice of Arrival
NOAD Notice of Arrival and Departure
NOD Notice of Departure
NPRM Notice of Proposed Rulemaking
NTTAA National Technology Transfer and Advancement Act
NVMC National Vessel Movement Center
OMB Office of Management and Budget
OSRV Oil Spill Response Vessel
PV Present Value
PWSA Ports and Waterways Safety Act
RA Regulatory Assessment
RFA Regulatory Flexibility Act
RTCM Radio Technical Commission for Maritime Services
SBA Small Business Administration
SCC Sector Command Center
SOLAS International Convention for the Safety of Life at Sea
U.S.C. United States Code
USCS United States Customs Service
VSL Value of Statistical Life
VTC Vessel Traffic Center
VTS Vessel Traffic Service

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation to use the Docket Management Facility.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2005–21869), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time, click on ''Search for Dockets,'' and enter the docket number for this rulemaking (USCG–2005–21869) in the Docket ID box, and click enter. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

D. Public Meeting

We plan to hold one public meeting in Washington, DC. The date, time, and location will be announced by a later notice in the **Federal Register**. You may submit a request for additional public meetings under **ADDRESSES** explaining why one would be beneficial. If we determine that additional public meetings would aid this rulemaking, we will hold one or more at a time and place announced by a later notice in the **Federal Register**.

II. Background and Purpose

This section discusses threats to the maritime transportation system, and provides background information on the elements of notice of arrival and departure (NOAD) and the automatic identification system (AIS). This section also discusses maritime domain awareness, the Nationwide AIS project, and the role NOAD and AIS will play in increasing our understanding of the maritime domain.

A. Threat to the Marine Transportation System

A terrorist attack against the U.S. marine transportation system (MTS) has the potential to inflict a disastrous impact on global shipping, international trade, and the world economy. Waterborne commerce enters the United States through more than 360 ports, transiting over 26,000 miles of commercially navigable waterways, carried by more than 8,000 foreign vessels, making more than 50,000 port calls a year. Over six million cruise ship passengers travel annually from U.S. ports, and domestic ferries transport over 180 million passengers annually. At any given time, we estimate that over 5,000 commercial vessels are within 2,000 nautical miles or 96 hours of our shores.

Threats to our MTS can come from a variety of scenarios. Use of explosive-laden small boats to attack larger vessels to cause injury and loss of life has already been demonstrated in the cases of the USS COLE and the MT LIMBURG. The use of an explosive device on a commercial ferry was also demonstrated when, in August 2005, several persons were killed and dozens of others were injured after a bomb exploded on the M/V DONA RAMONA in the Philippines. Other possible terrorist scenarios include use of maritime transportation routes to smuggle weapons of mass destruction or terrorists into the United States. In December 1999, a person planning to bomb the Los Angeles International Airport was arrested at Port Angeles, WA, after he got off a ferry arriving from Canada and customs agents discovered explosives in the trunk of his car. The large geographic area that is occupied by U.S. waterways, combined with the high volume of commercial and recreational

vessel traffic on those waterways, presents enormous challenges for preventing terrorist incidents.

The terrorist attacks of September 11, 2001, along with maritime-related terrorist events listed in the paragraph above, call attention to the vulnerability of the United States to potential terrorist attacks. U.S. waterways and ports present both vulnerable and attractive targets, as well as a means of transportation for terrorists. The Coast Guard, working with other international, national, State, and local agencies, has acted to identify and counter the threat to our MTS. In an effort to ensure that we make the most cost-effective use of our resources and funding, we have identified the need for a comprehensive knowledge and understanding of all activities in our maritime domain as key to preventing a terrorist attack.

B. Notice of Arrival and Departure

Under 33 CFR part 160, owners, agents, masters, operators, or persons in charge of vessels must file notices of arrival (NOA) before such vessels enter a U.S. port. The Coast Guard's NOA requirements had been in effect for decades before the terrorist attacks of 9/11. Vessels over 300 gross tons submitted pre-arrival notices directly to the applicable arriving port only 24 hours in advance. On October 4, 2001, the Coast Guard published a temporary final rule under the authority of the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221–1232), increasing the submission time for a notice of arrival (NOA) from 24 to 96 hours prior to arriving at a U.S. port or place; required centralized submissions of this information to the National Vessel Movement Center (NVMC); temporarily suspended exemptions from reporting requirements for some groups of vessels; and required submission of passenger, crew, and cargo information. *See* 66 FR 50565 (Oct. 4, 2001).

The information in notices of arrival provides the Coast Guard with valuable data for screening vessels for safety and security purposes. We have no current regulation in place, however, to capture vessel, crew, passenger, or specific cargo information on vessels 300 gross tons or less intending to arrive at or depart from U.S. ports or places unless they are arriving with certain dangerous cargo (CDC) or are arriving at a port or place in the Seventh Coast Guard District—which includes South Carolina, most of Georgia and Florida, and the island possessions of the United States pertaining to Puerto Rico and the Virgin Islands. *See* 33 CFR 160.203(b)(1) and 160.210(c). This proposed rule would expand the applicability for NOADs to further enhance homeland security by increasing our awareness of vessels and people entering or departing U.S. ports or places.

We propose to eliminate the current 300-gross-tons threshold exception and to require NOADs from all foreign commercial vessels departing to or coming from a port or place in the United States and all U.S. commercial vessels coming to a U.S. port or place from a foreign port. Requiring more vessels to report a NOAD will allow the Coast Guard to screen more vessels for safety and security purposes well in advance of an arrival, thereby enhancing the safety and security of our ports and waterways.

C. Automatic Identification System

Section 102 of the Maritime Transportation Security Act of 2002 (MTSA), Public Law 107–295, 116 Stat. 2064, mandates that automatic identification systems (AIS) be installed and operating on most commercial vessels on navigable waters of the United States. *See* 46 U.S.C. 70114.

AIS automatically broadcasts dynamic, static, and voyage-related vessel information that is received by other AIS-equipped stations. AIS has achieved acceptance through worldwide adoption of performance and technical standards developed by diverse international bodies, such as the International Maritime Organization (IMO), the International Telecommunications Union (ITU), and the International Electrotechnical Commission (IEC), that ensure commonality, universality, and interoperability. Further, installation of such equipment is required on vessels subject to the International Convention for the Safety of Life at Sea, 1974, (SOLAS), as amended. *See* specifically SOLAS, Chapter V, regulation 19.2.4. *http://www.navcen.uscg.gov/enav/ais/SOLAS.V.19.2.1-5.pdf.*

In ship-to-ship mode, AIS provides essential information to other vessels, such as name, position, course, and speed, that is not readily available on board vessels. In the ship-to-shore mode, AIS allows for the efficient exchange of vessel traffic information that previously was only available via voice communications with a VTS. In either mode, AIS enhances the mariner's situational awareness, makes possible the accurate exchange of navigational information, mitigates the risk of collision through reliable passing arrangements, facilitates vessel traffic management while simultaneously reducing voice radiotelephone transmissions, and enhances maritime domain awareness (MDA).

For further information and background on AIS, see 68 FR 39353, 39355 (July 1, 2003); 68 FR 60559, 60560 (Oct. 22, 2003); or visit *http://www.navcen.uscg.gov/enav.*

D. AIS Displays and Integration

Shipboard AIS devices are divided into two classes. AIS Class A devices come with a minimal keyboard display (MKD) that allows the user to input AIS information (*e.g.*, vessel identity, dimensions, navigation status, and antenna location) and to access all information received from other devices. AIS Class B devices require this input to be pre-programmed into the device. For further discussion of AIS Class A and Class B, their differences and similarities, see Section IV, Discussion of Comments below. Both types of shipboard AIS allow multiple input-output and display (presentation) options that facilitate using or integrating AIS data on other navigational systems, such as radar, Advanced Radar Plotting Aid (ARPA), Electronic Chart Display and Information System (ECDIS), and Electronic Chart System (ECS).

The greatest benefits of AIS will be achieved by its widest use, both by the number of vessels that use it and its integration and synergy with other shipboard systems. Although we encourage full integration of AIS with all navigation systems, this proposed rule would not require such integration because of the current limited availability of type-approved equipment that can readily and reliably integrate AIS and these other systems (*e.g.*, ECDIS, ARPA, radar, and chart plotters). We caution mariners who seek to integrate the equipment on their own, particularly on non type-approved equipment. This view is also set forth in recommendations by the Transportation Research Board's ''Special Report 272, Shipboard Automatic Identification System: Meeting the Needs of the Mariners''; see *http://fermat.nap.edu/catalog/10708.html.*

The Conference Report accompanying the Coast Guard and Maritime Transportation Act of 2004 (Public Law 108–293) states ''[we] should require the AIS system information to be integrated with the electronic chart display.'' *See* H. Conf. Rep. No. 108–617, at 82 (July 20, 2004). Section 410 of this Act mandates that electronic charts be installed and operational on basically the same vessel population mandated to have AIS under the MTSA. The Coast Guard expects to implement this electronic chart mandate and address

the display of AIS on electronic charts through a separate rulemaking.

E. Maritime Domain Awareness

In October 2005, the National Security Council and Homeland Security Council jointly published ''The National Plan to Achieve Maritime Domain Awareness,'' (available at *http://www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf*), a collaborative inter-agency effort in support of the National Strategy for Maritime Security. This plan defines MDA as the effective understanding of anything associated with the global maritime domain that could impact the security, safety, economy, or environment of the United States. The Plan also identifies MDA as a key component of an active, layered maritime defense in depth—expanding maritime boundaries.

MDA involves both the process of receiving and analyzing data as well as the system of technology that facilitates this process. To maximize the employment of our resources, MDA, among other things, requires monitoring and tracking vessels, cargo, and people. Cold War legacy data collection capabilities must be integrated with current and emerging capabilities and systems to provide near real-time awareness of maritime threats.

Our primary method for collecting AIS information will be the Nationwide Automatic Identification System (NAIS) network. These data will be used in conjunction with the national maritime common operating picture (COP). The COP is a near real-time information grid that will be shared by all U.S. Federal, State, and local agencies with maritime interests and responsibilities. COP data will be accessible to all users, except when limited by security restrictions, policy, or regulations.

NOAD, NAIS, and AIS, when employed together, provide a major portion of the information needed for MDA. AIS provides real-time information on vessels that can be correlated with NOAD data to enable us to track vessel movements in or bound for U.S. waters via NAIS COP.

Expanding NOAD and AIS applicability broadens our sources of information and enhances MDA. The combined NOAD and AIS information is one critical element in the overall MDA process, along with data collected from other various maritime and maritime-related sources. These data streams will form part of the COP and will also then be reviewed by analysts to identify vessels, persons, and activities that might be suspect through a process known as anomaly detection.

Anomaly detection assists us in the early identification of possible terrorist or other suspicious activities, which in turn allows us to take appropriate preventive measures to protect public safety and economic security. This enhanced MDA would improve our ability to prevent and respond to terrorist attacks.

The greater synergy of NOAD and AIS is realized when they are combined to provide a comprehensive picture of the maritime domain. The COP uses input from various sources to provide both a visual display of ship movements as well as a display of each vessel's accompanying information.

The intent of the system is to allow the Coast Guard to review the different data elements against one another to detect anomalies. For example, a Coast Guard unit may identify a vessel prepared to enter a U.S. harbor. The Coast Guard unit could call up that vessel's information and review its destination. At that time, the Coast Guard would review the vessel's notice of arrival (NOA) and may observe that the vessel has reported it is bound for the container docks. Later, the AIS broadcast may indicate that the vessel did not maneuver to turn down the channel to the container docks as expected and is instead proceeding on a collision course with a major marine transportation infrastructure on the other side of the harbor. In this example, the comparison of different data sources would have allowed the Coast Guard to recognize this anomaly in reported data, to deploy the necessary resources, and to notify the surrounding infrastructure.

This is just one of many scenarios that fuse NOAD and AIS data to ensure maritime traffic is being monitored and evaluated.

F. Nationwide AIS

In response to a Congressional mandate in 46 U.S.C. 70113(a), emerging homeland security requirements, and the need to improve navigational safety, the Coast Guard initiated the Nationwide AIS (NAIS) project: a major Federal acquisition project to collect, aggregate, and share information concerning AIS equipped vessels operating on or bound for waters subject to the jurisdiction of the United States. NAIS will consist of an integrated system of AIS equipment (*e.g.*, base station radios, antennas), data storage, processing, and networking infrastructure. NAIS will also be integrated with other systems for the purpose of sharing infrastructure and improving NAIS' overall performance.

NAIS will process (*e.g.*, validate and filter) and store AIS data and make these data available for use by other existing operational systems (*e.g.*, COP, Sector Command Center (SCC), Marine Information for Safety and Law Enforcement (MISLE), and VTS). It is expected that these other systems will provide data processing functions (*e.g.*, vessel tracking correlation, information processing, traffic analysis, and anomaly detection) and user interfaces necessary to take full advantage of AIS data exchange functionality. NAIS information will be displayed in the Coast Guard's national maritime COP and shared—along with correlated data and intelligence, as appropriate—with other entities. Access to these NAIS data by other authorized governmental entities is intended to enhance maritime safety and security and promote interagency cooperation. Portions of the COP will also be available to local port partners in support of local security and safety operations. Some users of NAIS capabilities (*e.g.*, U.S. Coast Guard units, other governmental entities, and strategic port partners) may indirectly access AIS data via other systems. Having such near real-time information of vessels' identity, location, and cargo will be invaluable.

NAIS will be deployed regionally and incrementally. As of the end of September 2008, AIS-receive coverage has been established in 58 major ports and 16 critical coastal areas across the nation under Increment One of the NAIS project. All Coast Guard Sectors have at least one AIS receiver site within their Area of Responsibility (AOR) and also have the capability to view AIS vessel tracks outside their AOR (*e.g.*, for an adjacent CG Sector or nationwide) via the maritime COP. Increment Two will expand our detection and surveillance nationwide and add AIS transmit capability out to 24 nautical miles. Finally, Increment Three will provide AIS detection and surveillance capability out to 2,000 nautical miles. NAIS full operational capability (*i.e.*, AIS long range detection, system integration, data processing and sharing, etc.) is anticipated to be achieved by 2014.

III. Regulatory History

Since the tragic events of September 11, 2001, the Coast Guard has modified the NOA requirements for vessels numerous times and implemented SOLAS AIS regulations and carriage requirements for AIS in VTS waters. The summary below describes this evolution of NOA and AIS regulations since 2001 and provides background intended to assist the reader as we later describe existing regulations we are seeking to revise through this proposed

rule. The summary compiles **Federal Register** citations in tables and presents them in chronological order to assist those who seek to review these past rulemaking documents or notices.

A. Notice of Arrival

On October 4, 2001, we published a temporary final rule entitled ''Temporary Requirements for Notification of Arrival in U.S. Ports'' in the **Federal Register**. *See* 66 FR 50565. As noted previously, that temporary rule increased the submission time for a NOA from 24 to 96 hours prior to arriving at a U.S. port or place; required centralized submissions; temporarily suspended exemptions from reporting requirements for some groups of vessels; and required submission of passenger, crew, and cargo information. We extended the effective period of that temporary rule to allow us to complete a rulemaking for permanent changes. *See* 67 FR 37682 (May 30, 2002) and 67 FR 55115 (Aug. 28, 2002).

Following a notice of proposed rulemaking published June 19, 2002, we published a final rule on February 28, 2003, that replaced temporary regulations and revised NOA requirements in 33 CFR part 160 by consolidating the notice of departure (NOD) into the NOA, requiring electronic submission of cargo manifest information to the then United States Customs Service (USCS), and requiring additional crew and passenger information. *See* 67 FR 41659 and 68 FR 9537.

On May 22, 2003, after consultation with U.S. Customs and Border Protection (CBP), we suspended the NOA requirement for electronic submission of cargo manifest information (Customs Form 1302) pending further CBP regulatory action under then-recent legislation, including the Trade Act of 2002. *See* 68 FR 27907.

On August 18, 2004, we published a temporary final rule with request for comment that changed the definition of CDC to include ammonium nitrate and certain ammonium nitrate based fertilizers, in bulk, as well as propylene oxide, alone or mixed with ethylene oxide, in bulk. That temporary final rule also allowed vessels to submit notices of arrival electronically; in this rulemaking, we propose to make electronic methods of submission mandatory. *See* 69 FR 51176. On December 16, 2005, we published an interim rule with a request for comments that adopted the temporary final rule's definition of ''certain dangerous cargo'' to include (1) ammonium nitrate, in bulk; (2) ammonium nitrate based fertilizers, in bulk; and (3) propylene oxide, alone or mixed with ethylene oxide, in bulk, as well as adding an option for vessels to submit notices of arrival electronically. *See* 70 FR 74663. That interim rule is part of a separate rulemaking focused on CDC.

Table 1 lists NOA rulemaking documents discussed above and associated corrections.

TABLE 1—NOA RULEMAKINGS

Date	Action	FR cite	Title of rule [Docket No.]
10/04/2001	Temporary final rule	66 FR 50565	Temporary Requirements for Notification of Arrival in U.S. Ports [USCG–2001–10689].
11/19/2001	Temporary final rule; request for comments; correction.	66 FR 57877	Do.
01/18/2002	Temporary final rule; request for comments; correction.	67 FR 2571	Do.
05/30/2002	Temporary rule; change of effective date	67 FR 37682	Do.
06/19/2002	Notice of proposed rulemaking	67 FR 41659	Notification of Arrival in U.S. Ports [USCG–2001–11865].
08/28/2002	Temporary rule; change of effective date	67 FR 55115	Temporary Requirements for Notification of Arrival in U.S. Ports [USCG–2001–10689].
02/28/2003	Final rule	68 FR 9537	Notification of Arrival in U.S. Ports [USCG–2002–11865].
05/22/2003	Final rule; partial suspension of regulation	68 FR 27907	Do.
08/18/2004	Temporary final rule; request for comments	69 FR 51176	Notification of Arrival in U.S. Ports; Certain Dangerous Cargoes; Electronic Submission [USCG–2003–16688].
12/16/2005	Interim rule; request for comments	70 FR 74663	Notification of Arrival in U.S. Ports; Certain Dangerous Cargoes; Electronic Submission [USCG–2005–19963].

B. Automatic Identification System

On July 1, 2003, we published a temporary interim rule with a request for comments and notice of public meeting titled ''Automatic Identification System; Vessel Carriage Requirement'' in the **Federal Register**. *See* 68 FR 39353. That temporary interim rule was one of six Coast Guard maritime security rules published July 1, 2003, in response to the MTSA. The interim rule implemented AIS requirements under MTSA and SOLAS, and required AIS on all vessels subject to SOLAS AIS provisions, Vessel Traffic Service Users and certain other commercial vessels identified in the MTSA.

On October 22, 2003, we published a final rule which adopted, with changes, the requirements of the AIS temporary interim rule. The major changes were to adopt a uniform U.S. implementation date of December 31, 2004, and to not require AIS on certain fishing and passenger vessels. See 68 FR 60559 and 60562.

Table 2 lists the two AIS rulemaking documents discussed above and a correction document.

TABLE 2—AUTOMATIC IDENTIFICATION SYSTEM; VESSEL CARRIAGE REQUIREMENT [USCG–2003–14757]

Date	Action	FR cite
07/01/2003	Temporary interim rule with request for comments and notice of meeting	68 FR 39353.

TABLE 2—AUTOMATIC IDENTIFICATION SYSTEM; VESSEL CARRIAGE REQUIREMENT [USCG–2003–14757]—Continued

Date	Action	FR cite
07/16/2003	Correcting amendments	68 FR 41913.
10/22/2003	Final rule	68 FR 6055.

C. Expansion of AIS Carriage

On the same date the AIS temporary interim rule was published, we published a notice in the **Federal Register** posing eight questions and requesting comments on how best to address implementation beyond the then-published AIS regulations. See 68 FR 39369 (July 1, 2003). We held public meetings and extended the comment period to January 5, 2004, to allow the public and, specifically, the fishing and small passenger vessel industry, the opportunity to submit comments after they had seen the final rule published October 22, 2003. *See* 68 FR 55643 (Sept. 26, 2003) and 68 FR 61818 (Oct. 30, 2003). In Section IV, below, we discuss the many comments we received and note proposed changes from the 2003 final rule based on these comments.

Table 3 lists the three documents we published requesting comments on AIS expansion discussed above.

TABLE 3—AUTOMATIC IDENTIFICATION SYSTEM; EXPANSION OF CARRIAGE REQUIREMENTS FOR U.S. WATERS [USCG–2003–14878]

Date	Action	FR cite
07/01/2003	Notice; request for comments	68 FR 39369.
09/26/2003	Notice; request for comments; extension of comment period; notice of public meetings.	68 FR 55643.
10/30/2003	Notice; request for comments; notice of public meetings	68 FR 61818.

IV. Discussion of Comments Received on Expansion of AIS Carriage

We thank the more than 180 persons or organizations who responded to our request for comments and participated in our public meetings on the expansion of AIS requirements [see docket USCG–2003–14878]. Their answers to our original eight questions (68 FR 39369) and subsequent two questions (68 FR 61818) posed in 2003 assisted us in crafting or amending various provisions of the AIS portion of this rule as stated in the ''AIS Revisions'' section below. We also received numerous comments beyond the scope of our ten questions that were similar or reiterated concerns expressed during the previous rulemaking [see USCG–2003–14757]. Our opinion and resolution of these comments remains as stated in our final rule (68 FR 60559), with the following exceptions:

A. Need for AIS and Scope of Availability

Numerous commenters, for various reasons, do not believe that AIS requirements are needed or that they should apply to their type of vessel. In general, we disagree. Congress has given us an AIS mandate to implement. The Coast Guard has been involved in the development of AIS since the 1990s and has done so in response to industry demands [see USCG 2003–14757–8] for ''silent VTSs'' and the need to provide mariners with pertinent, near real-time navigation information in a seamless manner which AIS does while reducing the need for voice communication. We recognize AIS is not a panacea. It will not in itself prevent a collision or terrorist attack; if AIS is coupled with other information sources, however, it does provide the mariner and the government with situational awareness to help thwart these events. It is not intended to replace the radiotelephone, radio, sound signals, security measures, or other similar items; rather, it is there to complement them.

The starting point or initial affected population of AIS has been determined for the most part by the MTSA. Congress has stated that all self-propelled commercial vessels of 65 feet or greater or 26 feet or greater and over 600 horsepower when engaged in towing and certain passenger vessels (which we have determined to be those carrying 50 or more passengers) should have AIS; a portion of the same population is also required to have radiotelephones under the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (Radiotelephone Act), Public Law 92–63, 85 Stat. 164. *See* 33 U.S.C. 1201 *et seq.* A principal purpose of both the MTSA and the Radiotelephone Act is to improve navigation safety. AIS and the radiotelephone, working together, provide the necessary tools to potentially prevent and mitigate collisions and other mishaps.

The Radiotelephone Act requires every power-driven vessel of 20 meters (65 feet) or more in length; towing vessels of 26 feet or more in length; vessels of 100 gross tons and upward carrying one or more passengers for hire; and dredge and floating plants, in or near a channel or fairway, engaged in operations likely to restrict or affect navigation to be equipped and monitor the Bridge-to-Bridge Radiotelephone (33 U.S.C. 1203, 1204).

We also propose in this NPRM to require AIS on dredges or floating plants near commercial channels because these vessels—given the nature of their operation—pose a unique challenge to navigation. As for passenger vessels, the AIS provision of the MTSA grants the Coast Guard discretion as to number of passengers for hire a vessel less than 65 feet may carry. In our 2003 Temporary Interim Rule, we established that threshold at carrying 50 or more passengers for hire. Subsequently, in our Final Rule, we excepted these vessels (and fishing vessels) and established a 150-passengers-for-hire threshold.

After we published the Final Rule, we posed two additional questions via a Request for Comments (68 FR 61818), specific to these segments of industry—fishing and small passenger operators—and the burden that these regulations placed on these predominantly small entities. We reviewed all of these comments and made Congress aware of the various concerns expressed by industry [see USCG–2003–14757–129]; nonetheless, this segment of industry is not uniquely impacted by the regulations and can greatly benefit from AIS. We therefore propose in this NPRM, AIS carriage requirements on

fishing vessels of 65 feet or more and on vessels carrying 50 or more passengers. We propose to omit the distinction of ''for hire'' because we believe all passengers, whether paying or not, are subject to a similar safety risk and thus deserve the navigation safety and maritime security benefit afforded to them by AIS.

Finally, we propose that any vessel moving CDC also be required to carry AIS because of the unique risk the movement of CDC poses to the marine transportation system.

B. Reason AIS Requirement Was Not Expanded to All Vessels

Many commenters expressed the desire that all vessels have AIS. Ultimately, we believe all vessels should avail themselves of AIS; however, we propose to apply this rule only to those vessels for which we have current authority to mandate carriage of AIS. We propose to add two classes of vessels, not specifically addressed in the Radiotelephone Act: high-speed passenger vessels and vessels involved in the movement of certain dangerous cargo. High-speed passenger vessels and vessels that transport dangerous cargo pose unique challenges that AIS is well-suited to address.

With the advent of AIS Class B devices and the continual drop in prices for Class A devices, these systems will become more affordable. Consequently, more vessels will use AIS and the collective benefit AIS provides will increase. Someday, we hope all vessels will avail themselves of AIS, as many have done so with charts, radiotelephones, radars, and other navigation equipment.

C. Use of AIS Class B Devices

Some commenters recommended that the Coast Guard permit the use of AIS Class B devices. We agree. Since publication of the 2003 final rule (68 FR 60559) and through the diligent work of various standards bodies, we now have AIS Class B devices that are interoperable with AIS Class A devices. Class B devices differ slightly in features and nature of design, which reduce their cost (on average half the cost of Class A devices); however, their performance is somewhat limited. They report at a fixed rate (30 seconds) vice the Class A's variable rate (2–10 seconds dependent on speed and course change). They consume less power, but also report at lower power (2 watts versus 12 watts of AIS Class A), thus impacting their broadcast range. Despite these design limitations, and after extensive testing by the Coast Guard Research and Development Center (see International Telecommunication Union study group report ''Performance Assessment and Interoperability of Proposed Class B AIS With Existing Class A AIS System Using Simulation Software'' dated September 9, 2005), we deem AIS Class B devices can operate properly and safely amongst Class A devices and offer similar AIS benefits. They broadcast and receive virtually the same vessel identification and other information. They have the same ability to see targets that radar may not always show (around the bend, in sea clutter, or during foul weather). For these reasons, we have concluded that AIS Class B devices do enhance navigation safety and assist in collision avoidance comparable to AIS Class A devices; however, given their design limitations, we caution users that they may not be the best alternative for vessels that are highly maneuverable, travel at high speed, or routinely transit congested waters.

The Coast Guard seeks comment in this NPRM on whether AIS Class B devices should be permitted only on certain vessels or waterways, or whether this decision should be best left to the master or owner's discretion.

We welcome the advent of lower cost AIS Class B devices and the continual drop in price of AIS Class A devices—currently averaging approximately $3,000 vice $7,000 in 2003. Fishing vessels and small passenger vessels, previously included in the original AIS carriage requirements of our temporary interim rule (68 FR 39353), will be less impacted by the current cost of AIS Class A devices and the potential to use even lower cost AIS Class B devices.

D. Deviation From AIS Requirements

There were a number of comments stating that AIS should not be required on vessels operating on certain waterways. We recognize that the MTSA provides us authority to waive AIS requirements on waterways where we determine AIS is not needed for safe navigation; however, we have decided not to create a patchwork of waterways where AIS is or is not required. Rather than waive requirements on specific waterways we propose here to grant a deviation based on where or how vessels operate. To that end, we propose to define what conditions under which a deviation may be sought. Vessels that operate—

(1) Solely within a very confined area (*e.g.*, less than a one nautical mile radius, shipyard, fleeting area);

(2) On short and fixed scheduled routes (*e.g.*, a bank-to-bank river ferry service); or

(3) In a manner that makes it unlikely they will encounter other AIS users may request a yearly deviation from AIS requirements as set forth in § 164.55.

E. Relation of Coast Guard AIS Receiving Infrastructure to Requirement for AIS in All Waters

Some commenters stated that we should not require the carriage of AIS in areas where the Coast Guard does not have infrastructure in place to receive these data. First, we note that the use of AIS may prevent collisions wherever it is used, regardless of the existence of shore-side AIS infrastructure. Second, we are working to establish nationwide capability to fully utilize AIS data wherever we require it to be transmitted.

As discussed in the Nationwide AIS section above, a NAIS project is being conducted to provide the Coast Guard with the capability to receive and distribute information from shipboard AIS equipment in order to enhance MDA. That project will provide detection and surveillance of vessels carrying AIS equipment approaching or operating in the maritime domain where little or no shore-side vessel tracking currently exists. Although the NAIS project is not projected to be fully operational until 2014, we have achieved initial operational capability for the receive-only increment of the project, and we anticipate achieving initial operational capability in three Coast Guard sectors for the transmit-and-receive increment by 2010. Our existing AIS network of over 90 sites and initial NAIS (Increment One) capability, in conjunction with other resources to benefit our overall MDA, would be available before the implementation date of the AIS requirements proposed here. To complement our existing AIS and future NAIS infrastructure, all Coast Guard cutters, many boats and some aircraft are AIS capable.

For more details on that project, please see the NAIS programmatic environmental impact statement notice published November 23, 2005 (70 FR 70862); the NAIS programmatic environmental impact statement record of decision published November 6, 2006 (71 FR 64977); or the NAIS Web site at *http://www.uscg.mil/hq/g-a/Ais/.*

V. Discussion of Proposed Rule

In this section we discuss how we propose to revise our NOAD and AIS regulations.

A. NOAD Revisions

We propose numerous changes to our NOAD regulations. We propose to expand the applicability of the NOAD regulations by changing the minimum

size of vessels covered below the current 300 gross tons, require that a notice of departure be submitted for all vessels required to submit a notice of arrival, and mandate electronic submission of NOAD notices to the National Vessel Movement Center. These changes are described in further detail under the following 11 headings in this section.

1. Applicability

We propose to amend the applicability of our regulations in 33 CFR part 160, subpart C, to clarify that unless a vessel is exempted, NOAD regulations apply to U.S. vessels in commercial service and all foreign vessels departing to or coming from a port or place in the United States. *See* proposed § 160.203. We have revised some exemptions in proposed § 160.204. For example, foreign vessels 300 gross tons or less not engaged in commercial service and not carrying certain dangerous cargo is one group of vessels that will continue to be generally exempted from submitting a NOA and will no longer have a separate NOA requirement for Coast Guard District Seven.

2. Definitions

We propose to add definitions for *commercial service, continental United States* (which includes Alaska), *disembark, embark, foreign vessel, offshore supply vessel, oil spill response vessel, passenger vessel, recreational vessel,* and *towing vessel* to the definitions section in 33 CFR part 160, subpart C, proposed § 160.202. These additions would clarify the meaning of these 10 terms used in our NOAD regulations. Most of the new definitions come directly from 46 U.S.C. 2101.

3. Exemptions

We also propose to change the exemptions from reporting requirements currently found in § 160.203. We would revise the exemption for vessels 300 gross tons or less not carrying CDCs so that all commercial vessels coming from a foreign port or place would be required to submit a NOA, regardless of tonnage.

We propose to remove the exemption for foreign commercial vessels 300 gross tons or less whether or not they are coming from a foreign port. Removing this exemption entirely for foreign commercial vessels would allow the Coast Guard to align its vessel reporting requirements with CBP electronic arrival manifest requirements in 19 CFR 4.7b. We propose to maintain the exemption for U.S. commercial vessels 300 gross tons or less, not carrying CDCs, and transiting between ports or places of the United States because most are already screened through specific Federal and State registration and/or licensing programs as are the mariners that operate and crew these vessels.

We currently require all foreign commercial and recreational vessels 300 gross tons or less arriving at a port or place in the Seventh Coast Guard District to submit NOAs directly to the cognizant Captains of the Port (COTPs). We are proposing to remove that unique NOA requirement for foreign recreational vessels arriving in the Seventh Coast Guard District. This will ensure consistency between Coast Guard districts and allow more efficient use of Coast Guard District Seven personnel and resources.

Vessels over 300 gross tons are currently subject to NOA regulations. We continue to require their compliance so that we can maintain visibility of these vessels because they carry a greater number of passengers and crew and a larger volume of cargo.

We also propose to revise an exemption for vessels operating upon the Mississippi River above mile 235 and its tributaries. That exemption would be limited to vessels required to report to the Inland River Vessel Movement Center (IRVMC) under 33 CFR part 165.

We propose to clarify the exemption for a vessel operating exclusively within a COTP Zone when not carrying certain dangerous cargo. Under both the current 33 CFR 160.203(b)(2) and proposed 33 CFR 160.204(a)(4)(ii), once a vessel has arrived at a port or place within a single COTP zone and has submitted the required NOA, if it then transits to another port or place within the same COTP Zone it is considered to be operating exclusively within that Zone and, therefore, is not required to submit a NOAD if it is not carrying CDC. If that vessel, however, is carrying CDC or leaves one COTP Zone and enters another, it is not covered by the exemption under current § 160.203(b)(2) or proposed § 160.204(a)(4)(ii) and, therefore, must submit the required notices.

4. Submitter

We have inserted proposed § 160.205 to clarify who must submit notices of arrival and notices of departure. This section would direct the owner, agent, master, operator, or person in charge of a vessel to submit NOADs in compliance with the subpart's time, method, and notice content requirements.

5. NOA Information

We propose to remove the optional submission of INS (now CBP) Form I–418 to satisfy crew and passenger information reporting requirements currently found in § 160.206(c) and to remove the option of submitting consolidated NOAs found in § 160.206(d). The Coast Guard found that many vessels submitting consolidated NOAs, or NOAs with consecutive port submissions, were not reporting changes in their crew, cargo, or persons in addition to crew. The eNOAD system we have developed to support the submission of non-consolidated NOADs meets the requirements of both the Coast Guard and CBP.

We would revise § 160.206, which contains the information requirements for NOA reports. The Coast Guard proposes adding a requirement for the Maritime Mobile Service Identity (MMSI) number for vessels in NOA reports because that number is associated with AIS. For vessels with an MMSI, this would allow the Coast Guard to quickly link a vessel's NOA with its AIS broadcast in order to detect security anomalies.

We also propose to require passport country of issuance and passport date of expiration information from everyone onboard who presents a passport—crewmembers and persons in addition to crew. This additional passport information will aid in the detection of fraudulent passports that may be used by individuals, both foreign and domestic, attempting to enter or depart the United States.

We propose to add a requirement to indicate whether the vessel is 300 gross tons or less and whether the vessel's voyage will be less than 24 hours in NOA reports. This information will allow the Coast Guard to prioritize screening of vessels on brief voyages with a shorter reporting requirement so they are screened before entering their port or place of destination.

We also propose to add a data field for vessels to submit their estimated time of arrival to the entrance to the port (if applicable). This would be used by COTPs to facilitate vessel traffic management and to coordinate boardings and inspections. Additionally, we propose to clarify through item (2)(i) in the table for proposed 33 CFR 160.206 that vessels that have visited ports or places outside the continental United States need to submit the last five foreign ports or places visited on their NOA. In a separate item from the table, (2)(ix), all

vessels must report their last port of call, whether domestic or foreign.

These two data fields, with accompanying items requesting arrival and departure dates from ports or places listed, will better enable us to determine which vessels are coming from foreign ports, and whether they may have been subject to inspection at another U.S. port since entering U.S. navigable waters. A vessel that has not visited a foreign port would make the appropriate entry, as specified by eNOAD, for the (2)(i) and (2)(ii) fields to report they have not visited a foreign port or place.

Finally, in regard to § 160.206, we propose to revise the reporting requirements on the operational condition of equipment. For that item, we have replaced the reference to 33 CFR 164.35 with 33 CFR part 164, so that we would include all relevant navigation equipment, including AIS.

6. NOD Information

We propose that all vessels required to submit a NOA will also be required to submit a NOD when departing from a port or place of the United States. The departure information required by proposed § 160.207—regarding the vessel, voyage, cargo, crewmembers, and persons in addition to the crew—would increase our awareness of vessel movements and, by supplementing NOA data, would allow us to maintain a complete picture of movements in and out of U.S. ports or places.

Commercial vessels departing U.S. ports or places bound for foreign ports or places are currently required by CBP to submit an electronic passenger departure manifest and an electronic crewmember departure manifest. See 19 CFR 4.64. As noted in their final rule entitled ''Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircrafts,'' published in the **Federal Register** April 7, 2005 (70 FR 17820, 17833), however, CBP has adopted the use of the Coast Guard's eNOAD to eliminate duplicate reporting requirements and provide a ''single window'' for filing manifest information. While, as indicated in the paragraph above, we would not limit our NOD requirements to vessels going to foreign ports, our proposed rule will not change what CBP stated in their final rule: eNOAD will capture the notice information we require and the electronic manifest information CBP requires. *See* 70 FR 17831 (Apr. 7, 2005).

We have worked with CBP to avoid requiring a vessel to submit the same information to our agencies separately, but our agencies do have separate missions. The information we need to better enable us to fulfill our mission under 33 U.S.C. 1225—to prevent damage to structures on, in, or adjacent to the navigable waters of the United States, as well as protecting those navigable waters—may differ somewhat from information CBP requires to implement the laws defining its missions. To the extent, however, that we both require the same information of vessels, we do not require separate submissions of that information to satisfy our respective regulations in 19 CFR and 33 CFR.

7. Electronic Submission

In proposed § 160.210, we would require NOAs and NODs be submitted via electronic formats found at the National Vessel Movement Center's (NVMC) Web site: *http://www.nvmc.uscg.gov.* Mandating electronic submission of NOADs allows the Coast Guard and CBP to quickly and automatically process, validate, and screen arrival and departure notices. The CBP's Advance Passenger Information System (APIS) regulations, 19 CFR 4.7b and 4.64, mandated that arrival and departure information be submitted by the electronic system. Coast Guard and CBP consolidated the reporting requirements and provided the public with a ''single-window'' for transmitting NOA and NOD information. Information received through the eNOAD system is automatically forwarded to both the Coast Guard and CBP.

Currently, 87 percent of NOA submissions are made via the eNOAD method. The eNOAD offers a quick and easy way to submit NOAs and NODs.

8. When To Submit NOA

We recognize that the current times for submitting NOAs in § 160.212 might encumber some small commercial vessels transiting between U.S. and foreign ports; therefore, we propose to make the reporting time closer to the departure time for smaller vessels that make frequent, short voyages between U.S. and foreign ports or places.

For U.S. commercial vessels 300 gross tons or less, arriving from a foreign port, and on a voyage of less than 24 hours, we propose in this NPRM a submission time of 60 minutes prior to departure from the foreign port or place. This population of vessels often engages in multiple, unscheduled, short-term voyages within a given 24-hour period. Because of the emergent and spontaneous nature of their business, this portion of the vessel industry would be disproportionately affected if required to submit NOADs 24 hours before arrival. Additionally, the Coast Guard or State authorities already document commercial vessels of the United States of 300 gross tons or less.

In contrast, we have much less information on some foreign commercial vessels of 300 gross tons or less; nor do we have advance access to foreign merchant mariner documentation or licenses of commercial vessel crews. As a result, our personnel require more time to review and verify the information submitted by foreign commercial vessels 300 gross tons or less; therefore, we are not proposing to reduce the reporting time for this population of foreign vessels.

This proposed rule would also mandate that foreign commercial vessels of 300 gross tons or less that had been required by § 160.210(c) to contact COTPs in the Seventh Coast Guard District would instead submit their NOAs and NODs to the NVMC.

In proposed 33 CFR 160.212(a)(4) and (b)(4), we have sought to clarify that the times for submitting a NOA or update are based on a vessel's arrival at a port or place.

9. When To Submit NOD

We are proposing a new requirement to mandate times for submitting NODs. This requirement is similar to the time frame for departure notices mandated by CBP in its APIS requirements, 19 CFR 4.7b.

10. Force Majeure

In proposed 160.215, we specify information to be conveyed by vessels bound for a port or place in the United States under force majeure. The Coast Guard recognizes the special circumstances of such vessels and limits the requirements of 33 CFR part 160, subpart C, to reporting information to the nearest Captain of the Port regarding the vessel operator's intentions, any hazardous conditions, and whether the vessel is carrying or controlling a vessel carrying CDC. COTP zones are defined in 33 CFR part 3.

11. Customs Form 1302 Removed

Finally, we propose to remove some NOA regulatory text that has been suspended. Requirements for submittal of Customs Form 1302, a cargo declaration, were included in Coast Guard NOA regulations published February 28, 2003. *See* 68 FR 9537. The paragraphs in 33 CFR part 160 referencing this cargo declaration were suspended 3 months later pending further CBP regulatory action under then recently enacted legislation. *See* 68 FR 27907 (May 22, 2003). At the time, we noted that we would remove these

cargo-manifest submission requirements from Coast Guard regulations when they were no longer needed.

On December 5, 2003, CBP published its ''Required Advance Electronic Presentation of Cargo Information'' final rule (68 FR 68140), which fully addressed the requirement for submission of this cargo declaration (Customs Form 1302). 19 CFR 4.7. Our proposed rule would reinstate the suspended paragraphs (d) and (e) regarding Customs Form 1302 in 33 CFR part 160 so that we could then remove them because they are no longer needed.

B. AIS Revisions

We are proposing numerous changes to our automatic identification system and related regulations. Those regulations require the installation and operation of a device that automatically broadcasts information about the vessel—its position, and current voyage—that may be received by other AIS-equipped stations.

The proposed rule would revise current AIS operation requirements and would expand AIS applicability to all U.S. navigable waters; under our current regulations, vessels not on an international voyage are only required to use AIS in Vessel Traffic Service (VTS) areas. We would also expand AIS applicability to all commercial vessels 65 feet or more in length and the following commercial vessels, regardless of length: Vessels carrying 50 or more passengers (whether for hire or not); vessels carrying 12 or more passengers for hire and capable of speeds in excess of 30 knots; dredges and floating platforms operating near or in a commercial channel or shipping fairway; and any vessels carrying or engaged in the movement of CDC. These proposed changes are described in greater detail in the 12 headings below in this section.

1. Changes to VTS Terminology and Definitions

In § 160.5, we replace the term ''Commanding Officers, Vessel Traffic Services'' with ''Vessel Traffic Services Director'' to better align with our current sector organizational structure.

In part 161, we are making several changes. Those include adding vessels operating with a type-approved AIS to the definition of ''Vessel Traffic Service (VTS) user'' in § 161.2. Since all Coast Guard VTSs are AIS-capable, this revision will facilitate vessel traffic management within a VTS and will allow AIS-equipped vessels to avail themselves of VTS services.

2. Administrative Changes and Changes in Definition

In part 161, we propose making two revisions, in §§ 161.12 and 161.19, to reflect the new location (§ 160.202) of our certain dangerous cargo (CDC) definition.

In part 164, we are making several revisions including in § 164.02(a), in which we are revising the section reference to § 164.46 to reflect the new location of AIS requirements for SOLAS vessels in that section, paragraph (c), which, unlike the rest of the part, apply to vessels in innocent passage.

We are adding four items to the incorporation by reference list in § 164.03 ((f)(2), (5), (6), and (8)) reflecting new guidance regarding AIS installation, use of binary applications and the AIS destination field, and deleting the IEC and ITU portions.

We are revising § 164.46 to expand its applicability and better define the proper operation of AIS.

We are moving three terms—gross tonnage, length, and properly installed—previously discussed in the note to § 164.46(a) and adding them to a new proposed ''Definitions'' paragraph at § 164.46(a). This paragraph (a) also includes definitions for Automatic Identification System (AIS) and International Voyage. We have combined the properly installed definition with the broader properly installed, operational definition.

We are making a revision to § 164.46(b) to denote only ''Coast Guard type-approved'' equipment as meeting our requirements. This would include various newly, Coast Guard type-approved AIS Class B devices, but these devices currently await FCC certification (FCC rules regarding AIS Class B certification are pending; *see* 71 FR 60102, October 12, 2006). We have done so in response to the many commenters who asked about alternative or less expensive ways to meet the requirement with AIS Class B devices.

3. Expansion of AIS Carriage Requirements

We propose to revise AIS requirements and extend applicability beyond VTS areas to all U.S. navigable waters. Further, we would expand applicability to all commercial vessels 65 feet or more in length, including fishing vessels and vessels carrying passengers regardless of the number of passengers. We would also require commercial passenger vessels carrying 50 or more passengers (whether for hire or not), reducing the previous passenger threshold from 150 or more for hire. Additionally, we propose that vessels carrying 12 or more passengers for hire and capable of speeds in excess of 30 knots; dredges and floating platforms operating near or in a commercial channel or shipping fairway; and any vessels carrying or controlling vessels carrying CDC be required to install and use AIS.

4. Class A and Class B AIS Devices

We have also added a note that addresses the use of AIS Class B devices. AIS Class B devices differ slightly in features and nature of design, which reduces their cost (on average half the cost of AIS Class A devices) but also impacts their performance. They report at a fixed rate (30 seconds) versus the AIS Class A variable rate (2–10 seconds dependent on speed and course change). They consume less power but also report at lower power (2 watts versus 12 watts of AIS Class A), thus impacting their broadcast range. Despite these design limitations, AIS Class B devices offer similar AIS benefits. They broadcast and receive virtually the same vessel identification and information. They have the same ability to see targets that radar may not always show (around the bend, in sea clutter, or during foul weather). For these reasons, and after conducting our own AIS Class B testing, we have concluded that AIS Class B devices would enhance navigation safety and assist in collision avoidance as do Class A devices; however, we caution users that they may not be the best alternative for vessels that are highly maneuverable, travel at high speed, or routinely transit congested waters.

5. Changes Regarding SOLAS AIS Requirements

As previously noted, we propose to revise paragraph (b) of § 164.02 to reflect the new location in § 164.46 for SOLAS requirements. In our proposed § 164.46(c), we omit SOLAS implementation dates because those dates have lapsed. In the proposed paragraph (c), we would also reflect SOLAS applicability for self-propelled vessels in three paragraphs rather than four:

- 500 gross tonnage or more,
- 300 gross tonnage or more on international voyage, or
- 150 gross tonnage or more carrying more than 12 passengers.

The first two paragraphs, § 164.46(c)(1) and (2), would properly reflect SOLAS applicability for tankers; therefore, there is no need to list tanker applicability separately.

6. Clarification of Operating Requirements

In response to numerous comments and suggestions, we have expanded operating requirements in new paragraph § 164.46(d) clarifying that the use of AIS does not relieve the vessel of existing requirements in the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), 28 U.S.T. 3459, T.I.A.S. 8587, or Inland Navigation Rules, 33 U.S.C. 2001 through 2073, the Vessel Bridge-to-Bridge Radiotelephone Act (33 U.S.C. 1201 through 1208), part 26 of this chapter, nor requirements of the Federal Communications Commission (FCC) specified in 47 CFR part 80. AIS-equipped vessels are to sound whistle signals and display lights or shapes to denote a vessel's navigation status. Vessels should ensure that their AIS ''navigation status'' field accurately reflects the vessel status as denoted by its navigation lights or displayed shapes. Vessels must also make appropriate voice broadcasts and passing arrangements on the designated VHF bridge-to-bridge channel. We also address the use of AIS messaging and note that it should not be relied upon for distress or urgent marine communications.

We also propose a requirement for the vessel to ascertain that its AIS and associated equipment is properly operating prior to navigating. We have done so in response to the many improperly operating AIS we have encountered in enforcing the current regulations. Many users are not aware that proper operation of AIS on SOLAS certificated vessels requires the use of external devices (the vessel's navigation system, gyro, and their associated converters) or that they broadcast the pertinent information regarding the vessel's description, dimensions, and navigation status. We reiterate here that vessels not ascertaining that their broadcast AIS information is correct prior to navigation will now be in clear violation of the rules. This also pertains to the broadcasts of an unassigned or improper Maritime Mobile Service Identity (MMSI) number. Each vessel's properly assigned MMSI is what distinguishes its reports from other vessel's reports. Duplicate or improper MMSIs may cause a vessel's reports not to be heard or to interfere with the reports of other vessels.

7. Location and Use of AIS

We further propose that the functionality and the display of AIS information be located at or near the conning position of the vessel and be used by the master or the person in charge to pilot or direct the movement of the vessel. The safety benefits of AIS can only be accrued by those who avail themselves of its information; thus, we deem it should be located at the conning position for use by the master and conning officer and that a periodic watch be kept of AIS information. Note, we do not require that the unit itself be installed there, only that access to AIS information be available there. This can be accomplished by the AIS MKD or some other appropriate AIS presentation device, such as an AIS-capable radar or electronic chart system being installed there.

8. Integration of External Sensors

We recognize the use of external sensors or devices, such as transmitting heading devices, gyros, rate of turn indicators, ECDIS/ECS, or radar, and we are aware that such devices may improve AIS performance; however, as of the date of this publication, we do not require their installation or integration, except for those vessels subject to requirements in SOLAS Regulation V/19 as denoted in proposed § 164.46(c). We are also mindful that the MKD is not the most optimal interface to access and use AIS information; it was never intended to be so. Each AIS has, at minimum, two high speed input/output ports for connection of onboard control equipment, ECDIS/ECS, radar, etc., and a pilot/auxiliary port for connection of an AIS pilot system. Use of these ports for external display systems is certainly envisioned and desirable; however, we note that technical requirements to do so are still in development. Requirements regarding electronic chart systems and the display and integration of AIS information on them will be the subject of a separate rulemaking.

9. Implementation Date

We also propose an implementation date, for those vessels covered by this rulemaking, but not currently required to have AIS, of no later than 7 months after publication of the final rule. We consider this a reasonable length of time for owners to plan to purchase and install AIS.

10. Location of AIS Pilot Port

In proposed § 164.46(g), we clarify the previous requirement that the AIS Pilot Port be located ''near'' an alternating current (AC) outlet to a maximum length—no more than 3 feet from each other.

11. Requests for Deviation

The following vessels may request a yearly deviation from AIS requirements. Vessels that operate—

Solely within a very confined area (*e.g.*, less than a one nautical mile radius, shipyard, fleeting area);

On short and fixed scheduled routes (*e.g.*, a bank-to-bank river ferry service); or

In a manner that makes it unlikely they will encounter other AIS users.

12. Removal of Expired Requirements

We propose to remove § 164.43 and its separate and expired Prince William Sound AIS requirement. Also, in § 165.1704, we propose to remove paragraph (c)(6) because it refers to expired requirements for having Automatic Identification System Shipborne Equipment in the Prince William Sound regulated navigation area.

C. Incorporation by Reference

Material proposed for incorporation by reference appears in 33 CFR 164.03. You may inspect this material at U.S. Coast Guard Headquarters where indicated under **ADDRESSES**. Copies of the material are available from the sources listed in § 164.03.

Before publishing a binding rule, we will submit this material to the Director of the **Federal Register** for approval of the incorporation by reference.

VI. Regulatory Analysis

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

A. Regulatory Planning and Review

Section 3(f) of Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993) requires a determination whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and subject to the requirements of the Executive Order. This rulemaking has been identified as significant under Executive Order 12866. A combined Regulatory Analysis and an Initial Regulatory Flexibility Analysis is available in the docket as indicated under the ''Public Participation and Request for Comments'' section of this preamble. A summary of the analysis follows.

This proposed rule would expand the applicability for NOAD and AIS requirements.

The regulatory analysis (RA) presents the scope and magnitude of costs incurred by industry (vessel owners) and benefits derived from an anticipated reduction in marine casualty cases, and we include a cost-effectiveness analysis for both segments of this rulemaking. We also present the overarching assumptions that provided the foundation for both our cost and benefit analyses and make this information available to the public for comment.

The NOAD portion of this proposed rule would significantly expand the applicability to include all commercial foreign-flag vessels regardless of tonnage down to zero gross tons that make port calls to the United States. The expanded NOAD applicability also includes all U.S. commercial vessels 300 gross tons or less coming from a foreign port. It would also require that a notice of departure be submitted for all vessels that are required to submit a notice of arrival. The proposed rule would also mandate electronic submission of NOAD notices to NVMC.

Section 102 of the MTSA mandates that AIS be installed on all—foreign or domestic—commercial self-propelled vessels equal to or greater than 65 feet in length (including fishing vessels) in U.S. navigable waters, including those outside already-regulated VTS areas. This includes towing vessels equal to or greater than 26 feet in length and 600 horsepower and, as determined by the Secretary under authority of the MTSA, passenger vessels carrying at least 50 passengers, certain high-speed passenger craft, certain dredges or floating plants, and vessels carrying or moving CDCs. These expanded requirements would allow the Coast Guard to better correlate vessel AIS data with NOAD data, enhance our ability to identify anomalies, and expand our overall MDA.

We could not, with a great degree of certainty, estimate how many vessels transit outside of VTS coverage areas. With this in mind, we estimated the numbers of vessels affected by this rulemaking by using the population figures presented in the AIS final rule (included in the MTSA suite of rulemakings) under docket number, USCG–2003–14757. The Coast Guard published the final rule for AIS in the **Federal Register** on October 22, 2003, at 68 FR 60559. We estimate that both segments of the proposed rule would affect approximately 42,607 vessels. The total number of domestic vessels affected is approximately 17,323 and the total number of foreign vessels affected is approximately 25,284.

We estimate that the NOAD portion of the proposed rule would affect approximately 5,566 domestic vessels and approximately 25,284 foreign vessels. Of the 5,566 domestic vessels, approximately 4,566 would be required to install AIS and submit NOADs and about 1,000 of the remaining vessels would be required to submit NOADs only. The total number of vessels affected by the NOAD portion of the proposed rule is approximately 30,850.

We estimate that the AIS portion of the proposed rule would affect approximately 16,323 domestic vessels and approximately 1,119 foreign vessels. The total number of vessels affected by the AIS portion of this proposed rule is approximately 17,442.

Table 4 below summarizes the vessel population affected by the proposed rule.

TABLE 4—SUMMARY OF U.S. AND FOREIGN VESSEL POPULATIONS

	NOAD	AIS	Total vessels affected*		
			U.S.	Foreign	Total
U.S. Vessels	**5,566	16,323	17,323	25,284	42,607
Foreign Vessels	25,284	***1,119			
Total Vessels by Portion of Rule	30,850	17,442			

*Totals do not add up to sum of portions of the proposed rule since some vessels required to install AIS would also be required to submit NOADs. Consequently, adding both would double count most of the "AIS affected" vessels.

**Of the approximately 5,566 U.S. vessels required to submit NOADs, about 1,000 would submit NOADs only; the remainder of about 4,566 would be required to both install AIS and submit NOADs.

***All of the approximately 1,119 foreign-flag vessels required to install AIS would also be required to submit NOADs.

Our NOAD vessel populations include vessels greater than 300 gross tons (approximately 3,099), although these vessels are currently required to submit NOAs for a distinct voyage or port call to the U.S. The proposed rule would mandate that all commercial vessels would be required to submit NODs as well as NOAs; therefore, we based our analysis on this difference in applicability. The proposed rule would also mandate that all commercial vessels must submit NOADs electronically (eNOAD).

The eNOAD system would allow the Coast Guard to meet its notification of arrival requirements and provide synergy with the CBP requirements that would eliminate duplicative reporting. We anticipate that submitting NOADs by this format should reduce the burden hours imposed on industry whereas under a temporary final rule (69 FR 51176, Aug. 18, 2004) and a subsequent interim rule (70 FR 74663, Dec. 16, 2005), two new methods of electronic submission were added and made optional. All vessels would be required to submit NOADs by a computer, which would require the purchase of this item.

We assess the costs and benefits of the proposed rule over the 10-year period, 2008–2017, and present costs in 2006 dollars. We discount costs to their present value (PV) at three and seven percent discount rates over the period of analysis. Cost estimates include capital costs such as the purchase of a computer, and transmission, annual maintenance, and replacement costs for the NOAD portion of this rulemaking. Cost estimates for the AIS portion of this rulemaking include the AIS unit itself and installation, training, annual maintenance, and replacement costs. Quantified, monetized benefit estimates for the AIS portion of this rulemaking include avoided injuries, fatalities, and pollution as a result of the proposed rule. Non-quantified benefits for AIS include enhanced MDA, improved information sharing with NOAD, and improved overall communications. We expect that non-quantified benefits exist for the NOAD portion of this rulemaking such as an efficient and timesaving method of notification thereby reducing the hour burden on industry and Coast Guard resources.

Considering domestic commercial vessels less than or equal to 300 gross tons coming from a foreign port, for example, we propose a 60-minute notice time for vessels on voyages of less than 24 hours. We believe that this population of vessels would originate

mostly from Caribbean or Canadian ports and many vessels in this population potentially could be charter vessels such as fishing vessels or smaller ferries that would not have passenger information until a few minutes before departure. To the extent that many vessels in this population are charter vessels, a 60-minute notice time would greatly benefit these small vessel owners since they would not be idle in port waiting for the charter to reach its capacity. In contrast, if we expand the notice time, for example, to 24 hours for this vessel population, these vessel owners potentially would lose customers and revenues since they rely on walk-up business as they wait in port in order to satisfy a longer notice time. It may be likely that a longer notice time would force some of these small business owners to leave the industry as they realize lower revenues and reduced economic profits as a result.

Our proposed 60-minute notice time provides flexibility for the smaller vessel owner since these businesses would continue to be able to operate efficiently as charter businesses due to the spontaneous nature of their business. This requirement also aligns with the Customs and Border Patrol (CBP) proposed requirement, which would alleviate confusion within the industry and provide consistency for the public. The Coast Guard requests comments from the public on how a shorter notice time benefits your business with increased flexibility as opposed to a longer notice time. We would also like comments on how much this provision would save your business annually.

We estimate the total initial cost of the proposed rule to U.S. vessel owners and operators to comply with the NOAD portion of this rulemaking is between $3.4 and $4.3 million (non-discounted, with a 2008 implementation date), which covers the preparation of NOADs, the capital cost of purchasing a computer [we used $500 for the cost of a computer which is consistent with the CBP's APIS rulemaking (70 FR 17820, Apr. 7, 2005)]. The total initial year cost to U.S. vessel owners and operators to comply with the AIS portion of this rulemaking is approximately $69.0 million (non-discounted, with a 2008 implementation date), which includes the capital cost of an AIS unit, installation, and training costs. Due to economies of scale, we estimate the cost of an AIS unit to be approximately $3,000. The annual recurring cost for the NOAD portion of the proposed rule would be approximately between $4.1 million (using median number of trips made per vessel) and $6.7 million (using mean number of trips made per vessel) (non-discounted). The annual recurring cost of the AIS portion of the proposed rule would be approximately $4.4 million (non-discounted).

We estimate that the 10-year total present discounted value or cost of the proposed rule to U.S. vessel owners is between $132.2 and $163.7 million (seven and three percent discount rates, respectively, 2006 dollars) over the period of analysis, 2008–2017. We estimate the 10-year present discounted value or cost of the NOAD portion of the proposed rule using both a high and a low median number of trips to account for the variability in the number of trips made. The 10-year total present discounted value or cost to U.S. vessel owners for the NOAD portion of the proposed rule is between $10.4 and $20.1 million at seven and three percent discount rates, respectively. Using the median and mean number of trips made by U.S.-flag vessels, we estimate the annualized NOAD costs to U.S.-flag vessel owners and operators to be approximately $1.5 and $2.4 million, respectively.

The 10-year total present discounted value or cost to U.S. vessels owners for the AIS portion of the proposed rule is between $121.8 and $143.5 million at seven and three percent discount rates, respectively. The AIS portion of the proposed rule is the most costly element representing about 87 percent of the 10-year total present discounted value or cost at both seven and three percent discount rates. The initial cost (non-discounted) for the AIS portion represents nearly 94 percent of the total initial cost (non-discounted) of the proposed rule. We estimate annualized AIS costs to U.S. vessel owners and operators to be approximately between $17.3 and $16.8 million at seven and three percent discount rates, respectively.

We estimate that the 10-year total present discounted value or cost for foreign-flag vessels to comply with the NOAD portion of the proposed rule is between $40.9 and $62.4 million at seven and three percent discount rates, respectively. Using the mean and median number of trips made by foreign-flag vessels, we estimate the annualized NOAD costs to foreign-flag vessel owners and operators to be approximately $7.3 and $4.8 million, respectively. We estimate the total present discounted value or cost for foreign-flag vessel owners to comply with the AIS portion of the proposed rule is between $8.3 and $9.8 million at seven and three percent discount rates, respectively. We estimate annualized AIS costs to foreign-flag vessel owners and operators to be approximately $1.2 million. We estimate that the total present discounted value or cost of the proposed rule for both U.S. and foreign-flag vessel owners is between $181.4 and $235.9 million at seven and three percent discount rates, respectively, over the 10-year period of analysis.

Table 5 below summarizes the total annualized costs of the proposed rule for both U.S. and foreign-flag vessel owners and operators.

TABLE 5—SUMMARY OF TOTAL ANNUALIZED COSTS OF PROPOSED RULE TO U.S. AND FOREIGN-FLAG VESSEL OWNERS

[$Millions]

	NOAD * (median trips made)	AIS	Totals * (median trips made)
U.S.-Flag Vessels	$2.4 ($1.5)	$16.8–$17.3	$20.2 ($19.2)
Foreign-Flag Vessels	7.3 (4.8)	1.2	8.5 (7.0)

* Mean number of trips made.

In the interest of national security and maritime domain awareness, the Coast Guard believes that this proposed rule, through a combination of NOAD and AIS, would strengthen and enhance not only maritime security but also the national security of this country. We believe that expanding NOA applicability, specifically to foreign commercial vessels under 300 gross tons and to all U.S. commercial vessels coming from foreign ports or places, and requiring them to also submit NODs—in conjunction with AIS—would accomplish this goal. The combination

of NOAD and AIS would create a synergistic effect between the two requirements and would include a significant number of smaller vessels not currently covered under the current regulations. This is the primary benefit of the proposed rule.

Ancillary or secondary benefits exist in the form of avoided injuries, fatalities, and barrels of oil not spilled into the marine environment. We estimate that the total discounted benefit (injuries and fatalities) derived from 68 marine casualty cases analyzed over an 8-year data period from 1996–2003 for the AIS portion of the proposed rule is between $24.7 and $30.6 million using $6.3 million for the value of statistical life (VSL) at seven and three percent discount rates, respectively. Just based on barrels of oil not spilled, we expect the AIS portion of the proposed rule to prevent 22 barrels of oil from being spilled annually.

The 68 casualty cases over the 8-year data period yielded about $3.2 million in property damage or about $400,000 per year.

Table 6 below summarizes our findings.

TABLE 6—SUMMARY OF TOTAL DISCOUNTED COST AND BENEFIT OF PROPOSED RULE FOR U.S. AND FOREIGN-FLAG VESSELS (2008–2017, 7 AND 3 PERCENT DISCOUNT RATES, 2006 DOLLARS)

[$Millions]

	NOAD	AIS	10-Year total cost of proposed rule
7 Percent Discount Rates:			
U.S. Vessels *	$10.4–$16.9	$121.8	$132.2–$138.6
Foreign Vessels **	40.9–52.6	8.3	49.2–61.0
Total Cost	51.3–69.5	130.1	181.4–199.6
3 Percent Discount Rate:			
U.S. Vessels *	12.3–20.1	143.5	155.8–163.7
Foreign Vessels **	48.1–62.4	9.8	58.0–72.2
Total Cost	60.4–82.5	153.4	213.8–235.9
AIS Benefits			
Injuries and Fatalities Avoided:	-		
7 Percent Discount Rate (6.3M VSL)		24.7	
3 Percent Discount Rate (6.3M VSL)		30.6	
Pollution Avoided (bbls): ***	-		
7 Percent Discount Rate		136	
3 Percent Discount Rate		169	

Totals may not sum due to independent rounding.
* Using three (and four for vessels ≤300 GT) and eight (and nine for vessels ≤300 GT) median and mean number of trips, respectively.
** Using two (and three for vessels ≤300 GT) and four (and five for vessels ≤300 GT) median and mean number of trips, respectively.
*** We did not find cases involving oil spills from foreign-flag vessels.

We do not expect quantifiable benefits for the NOAD portion of this proposed rule and benefits in this case are non-probabilistic (*i.e.*, not based on historical probabilities). We believe, however, that there are considerable inherent qualitative benefits resulting from the NOAD requirement.

The Coast Guard Intelligence Coordination Center provided an intelligence analysis to other internal Coast Guard offices and to the Department of Homeland Security (DHS) indicating terrorist organizations have the capability and the intention to conduct attacks on the U.S. using vessels as a delivery method for direct attacks on waterborne primary targets and as a delivery method for personnel and weapons in support of attacks on secondary targets. Vessels not currently covered under the applicability of NOAD and AIS regulations could pose a security risk to the maritime transportation system that terrorist organizations could exploit. Expanding the applicability of NOAD and AIS will enhance maritime domain awareness by lowering the potential security risks. We believe that having this proposed rule in place could prevent terrorist attacks in the future that might otherwise have occurred without the rule.

Since the security benefits noted above are difficult to quantify, we conducted a break-even analysis to determine what change in the reduction of risk would be necessary in order for the benefits of the rule to exceed the costs. Because the types of events that would be prevented by this regulation vary greatly, we calculate potential break-even results using a range of generic events that result in loss of life or casualties. We do expect that most events would also involve asset destruction or other capital loss. Events involving loss of capital in addition to casualties would cause the change in risk reduction to be smaller for costs to equal benefits.

We use $6.3 million as an estimate of a Value of a Statistical Life (VSL) to represent an individual's willingness to pay to avoid a fatality involving maritime transportation and calculate annualized benefits. Our VSL estimate is based on the 2008 report ''Valuing Mortality Risk Reductions in Homeland Security Regulatory Analyses'' prepared for the U.S. Customs and Border Protection. This report is available on the docket as detailed under **ADDRESSES**.

We subtract the annualized benefits of the NOAD and AIS portions of the proposed rule (7 percent discount rate over 10 years) from the annualized costs and divide these net costs by the value of casualties avoided to calculate an annual risk reduction range that would be required for the benefits of both portions of the rule to at least equal the costs.

The annual risk reductions required for the rule to breakeven are presented below for a range of casualties. As shown, depending on the casualties avoided, risk would have to be reduced 0.1 (1,000 casualties avoided) to 1.2 percent (100 casualties avoided) in order for the NOAD portion of the proposed rule to breakeven. For the AIS portion of the proposed rule, risk would have to be reduced 0.3 (1,000 casualties avoided) to 2.9 percent (100 casualties avoided) in order for the AIS requirements of the proposed rule to

breakeven. These small changes in risk reduction suggest the potential benefits of the proposed rule justify the costs.

ANNUAL PERCENT RISK REDUCTION REQUIRED FOR COSTS TO EQUAL BENEFITS

[Annualized at 7 percent over 10 years]

Casualties avoided	NOAD	AIS
100	1.2	2.9
250	0.5	1.2
500	0.2	0.6
750	0.2	0.4
1,000	0.1	0.3

See the ''Regulatory Analysis'' in Docket No. USCG–2005–21869 at *http://www.regulations.gov* for details of these calculations

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An Initial Regulatory Flexibility Analysis is available in the docket as indicated under the ''Public Participation and Request for Comments'' section of this preamble.

We have reviewed this proposed rule for potential economic impacts on small entities. From our analysis, we conclude that this proposed rule may affect a substantial number of small entities, as defined by the Small Business Administration (SBA). Small entities affected by this rulemaking are vessel owners and operators.

Due to the large number of vessels and vessel owners and operators potentially affected, we took a random sample of the total number of companies that could be affected by this rulemaking. We found that this rulemaking may affect as many as 14,506 U.S. companies that own and operate the 17,323 domestic vessels. Using 95 percent as our confidence level, we took a random sample of 375 small businesses. We researched approximately 3,300 companies in order to achieve our sample size of 375 small businesses, or about a 9 to 1 ratio. We found that some of the companies that we researched lacked company data such as revenues and employee size, which precluded us from using those companies in our analysis based on SBAs criteria for small companies. Based on the industry classification codes from the North American Industry Classification System (NAICS), we found that about 12 percent of the small businesses analyzed are classified under the NAICS code for ''navigational services to shipping'' companies. About 11 percent of the small businesses analyzed are classified under the NAICS code for ''scenic and sightseeing transportation'' companies. The remaining 77 percent of the small businesses analyzed represent a variety of different industry classification codes, each representing a small portion of the small businesses analyzed (for more details, see the Initial Regulatory Flexibility Act analysis available in the docket).

To estimate the impact on small businesses in the initial year, we multiplied the first year costs for implementing NOAD (includes capital, installation, and submission costs) and installing AIS (includes capital, installation, and training costs) by the number of vessels that each small business owns. We divided this cost by the average annual revenues for each small business to obtain a proportion of the initial cost to annual revenues. This allows us to determine the initial cost impact of this proposed rule on small businesses. We also estimated the annual cost impact on small businesses using the same methodology explained above. Again, we multiplied the annual costs that each small business would incur for implementing NOAD (includes operation and maintenance and submission costs) and installing AIS (includes operation and maintenance costs) by the number of vessels that each small business owns. We divided this cost by the average annual revenues for each small business to obtain a proportion of the annual costs to annual revenues.

Table 7 presents the initial and annual revenue impacts for the sample of 375 small companies that we researched with known average annual revenues.

TABLE 7—ESTIMATED REVENUE IMPACT OF THE PROPOSED RULE FOR SMALL BUSINESSES THAT OWN U.S.-FLAG SOLAS AND NON-SOLAS VESSELS

Percent impact on annual revenue	Initial		Annual	
	Number of small entities with known revenue data	Percent of small entities with known revenue data	Number of small entities with known revenue data	Percent of small entities with known revenue data
0–3	357	95	375	100
>3–5	10	3	0	0
>5–10	7	2	0	0
>10–20	1	0	0	0
>20	0	0	0	0
Total	375	100	375	100

As shown, the proposed rule would have a 3 percent or less impact on 95 percent of the small businesses that own vessels that would have to comply with both the NOAD and AIS portions of this proposed rule during the first year the rule is in effect. The proposed rule would have a 3 percent or less impact on 100 percent of the small businesses annually that we sampled. The data suggest this proposed rule would not have a significant impact on a substantial number of small entities and we request comments from the public on whether they believe this finding is correct. For more information on small entities, refer to the Regulatory Flexibility Analysis (RFA) portion of the regulatory analysis in the docket under docket number USCG–2005–21869.

The Coast Guard is interested in the impact of this rulemaking on small entities. If you are a small entity, we specifically request comments regarding the economic impact of this proposed rule on you.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rulemaking so that they can better evaluate its effects on them and participate in the rulemaking. If you think that this proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning these provisions or options for compliance, please consult with the Coast Guard personnel listed in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule. Note, the Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

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

D. Collection of Information

This proposed rule calls for the collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

This proposed rule modifies two existing OMB-approved collections, 1625–0100 (formerly 2115–0557), and 1625–0112. The request for approval of these Collections of Information are available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble.

The summary of the revised 1625–0100 collection follows:

Title: Advance Notice of Vessel Arrival and Departure.

OMB Control Number: 1625–0100.

Summary of the Collection of Information: The Coast Guard requires pre-arrival notices from certain vessels entering a port or place in the United States. This proposed rule would increase the number of vessels required to submit a NOA and establishes a NOD requirement.

Need for Information: To ensure port safety and security and to ensure the uninterrupted flow of commerce. To this end, the Coast Guard must modify its NOA regulations.

Proposed Use of Information: This information is required to control vessel traffic, develop contingency plans, and enforce regulations.

Description of the Respondents: Respondents are the owner, agent, master, operator, or person in charge of a vessel that arrives at or departs from a port or place in the United States.

Number of Respondents: The existing OMB-approved number of respondents is 9,206. This proposed rule would increase that number by 21,644. The total number of respondents would be 30,850.

Frequency of Response: The existing OMB-approved number of responses is 78,538. This proposed rule would increase that number by 78,584. The total number of responses would be 157,122.

Burden of Response: The existing OMB-approved burden of response is approximately 2.5 hours. This proposed rule would decrease that number by 60 percent, due to the mandated use of electronic reporting. The estimated burden of response is now 1 hour.

Estimate of Total Annual Burden: The existing OMB-approved total annual burden is 200,039 hours. This proposed rule would decrease that number by 42,917, due to the mandated use of electronic reporting. The estimated total annual burden would be 157,122 hours.

The summary of the revised 1625–0112 collection follows:

Title: Enhanced Maritime Domain Awareness via Electronic Transmission of Vessel Transit Data.

OMB Control Number: 1625–0112.

Summary of the Collection of Information: The Coast Guard plans to collect, store, and analyze data transmitted by AIS to enhance maritime domain awareness (MDA). Awareness and threat knowledge are critical for securing the maritime domain and the key to preventing adverse events. Domain awareness enables the early identification of potential threats and enhances appropriate responses, including interdiction at an optimal distance with capable prevention forces.

Need for Information: To ensure port safety and security and to ensure the uninterrupted flow of commerce. To this end, the Coast Guard must establish this new collection.

Proposed Use of Information: This information collection, storage, and analysis would greatly expand the breadth and depth of the Coast Guard's MDA. This enhanced MDA would enable quicker, more efficient responses to marine casualties and improve the Coast Guard's ability to prevent and respond to potential terrorist threats. It would also contribute an essential aspect to the Coast Guard's COP. The COP is the Coast Guard's system for sharing operational data among those who need it to perform their missions.

Description of the Respondents: Respondents are the operator or person in charge of a vessel that must carry AIS as mandated by the MTSA. The MTSA requires the following vessels carry AIS:

- A self-propelled commercial vessel of at least 65-feet in overall length.
- Vessels carrying more than a number of passengers for hire determined by the Secretary [herein, 50 or more passengers, or more than 12 for hire at speeds in excess of 30 knots].
- A towing vessel of more than 26 feet overall in length and 600 horsepower.
- Any other vessel for which the Secretary decides that an automatic identification system is necessary for the safe navigation of the vessel [herein, certain dredges or floating plants or engaged in moving certain dangerous cargoes].

Number of Respondents: The existing OMB-approved number of respondents is 450. This proposed rule would increase that number by 17,442. The total number of respondents would be 17,892.

Frequency of Response: The existing OMB-approved number of responses is 450. This proposed rule would increase that number by 169,944. The total number of responses would be 170,394.

Burden of Response: The estimated annual AIS-related burden of response is 1½ hour.

Estimate of Total Annual Burden: The existing OMB-approved total annual burden is 150 hours. This proposed rule would increase that number by 18,522. The estimated total annual burden would be 18,672.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this proposed rule to the Office of Management and Budget (OMB) for its review of the collection of information.

We ask for public comment on the collection of information to help us

determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date under **DATES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB.

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined, that to the extent States have a current requirement in effect for notices of vessel arrivals or departures to a State agency—for example, notices to pilot authorities for pilot services—we do not intend to preempt those requirements with this rule.

However, we reserve our position with respect to preemption of any prospective new State rule or legal requirement for a notice of arrival or submission of information requirements that are similar to those set forth in this rule. The U.S. Supreme Court in *United States* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (2000), held that pursuant to title I of the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221–1232), the authority for the NOAD portion of this proposed rule, the Coast Guard can preempt conflicting or similar State requirements on vessel operation. The Court held also that Congress had preempted the field of marine casualty reporting. Accordingly, based on the Supreme Court's holding in the Locke case, we believe that any prospective State requirement for a NOA or information gathering requirement directed at vessel owners or operators that is similar to that contained in this rule is inconsistent with the Federalism principles enunciated in that case and is preempted.

Regarding the AIS portion of this proposed rule, it is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled, now, that all of the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels), in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. In addition, under the authority of Title I of the PWSA (specifically 33 U.S.C. 1223) and the MTSA, this regulation will preempt any State action on the subject of AIS carriage requirements. (See Locke.) Our proposed AIS carriage requirements fall into the category of equipping of vessels. Because the States may not regulate within this category, preemption under Executive Order 13132 is not an issue for the AIS portion of this proposed rule.

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

This proposed rule would not require a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. We note that on March 20, 2006, a challenge to our existing AIS regulations was dismissed by the United States District Court for the District of Columbia, *MariTEL, Inc.* v. *Collins et al.,* 422 F.Supp.2d 188 (D.D.C. 2006). In that case, MariTEL, Inc., alleged, in part, that our 2003 AIS final rule constituted a taking of its property—radio frequencies it purchased at a Federal Communications Commission (FCC) auction. The court concluded that our AIS equipment requirements were authorized by the FCC and that because our existing AIS regulations did not specify frequency requirements, our AIS final rule did not constitute a taking.

H. Civil Justice Reform

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

I. Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

J. Indian Tribal Governments

This proposed rule would require certain vessels to submit NOADs and to install and operate AIS. Some of these vessels may be owned by Indian tribes, but the proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order. Although it is a ''significant regulatory action'' under Executive Order 12866, this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action; therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

L. Technical Standards

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

adopted by voluntary consensus standards bodies.

The Coast Guard will use the following new voluntary consensus standard from the International Electrotechnical Commission: IEC 62287–1, Maritime navigation and radiocommunication equipment and systems—Class B shipborne equipment of the automatic identification system (AIS)—Part 1: Carrier-sense time division multiple access (CSTDMA) techniques, dated February 9, 2006 in our type-approval process.

In addition, this proposed rule uses the following standards required to implement the AIS requirements of an international agreement, SOLAS:

1. IMO Resolution A.917(22), Guidelines for the Onboard Operational Use of Shipborne Automatic Identification System (AIS), dated January 25, 2002.
2. IMO SN/Circ.236, Guidance on the Application of AIS Binary Applications, dated May 20, 2004.
3. IMO SN/Circ.244, Guidance on the Use of the UN/LOCODE in the Destination Field in AIS Messages, dated December 15, 2004.
4. IMO SN/Circ.245, Amendments to the Guidelines for the Installation of a Shipborne Automatic Identification System (AIS)(SN/Circ.227), dated March 2, 2005.

M. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination under the Instruction that this action is not likely to have a significant effect on the human environment. An environmental analysis checklist supporting this preliminary determination is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects

33 CFR Part 160

Administrative practice and procedure, Harbors, Hazardous materials transportation, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Vessels, Waterways.

33 CFR Part 161

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

33 CFR Part 164

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

33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR parts 160, 161, 164, and 165 to read as follows:

PART 160—PORTS AND WATERWAYS SAFETY—GENERAL

Subpart C—Notification of Arrival and Departure, Hazardous Conditions, and Certain Dangerous Cargoes

1. The authority citation for part 160 is revised to read as follows:

Authority: 33 U.S.C. 1223, 1231; 46 U.S.C. Chapter 701; Department of Homeland Security Delegation No. 0170.1. Subpart C is also issued under the authority of 33 U.S.C. 1225 and 46 U.S.C. 3715.

2. Revise the heading to subpart C to read as shown above.

§ 160.5 [Amended]

3. In § 160.5(d), remove the phrase ''Commanding Officers, Vessel Traffic Services'' and add, in its place, the term ''Vessel Traffic Services Director''.

4. Revise § 160.201 to read as follows:

§ 160.201 General.

This subpart contains requirements and procedures for submitting a notice of arrival (NOA), a notice of departure (NOD), and a notice of hazardous condition. The sections in this subpart describe:

(a) Applicability and exemptions from requirements in this subpart;

(b) Required information in a NOA and a NOD;

(c) Required updates to a NOA and a NOD;

(d) Methods and times for submission of a NOA and a NOD and updates to a NOA and a NOD;

(e) How to obtain a waiver; and

(f) Requirements for submission of the notice of hazardous condition.

§§ 160.202 through 160.204 [Redesignated]

5. Redesignate § 160.202 as § 160.203, § 160.203 as § 160.204, and § 160.204 as § 160.202, respectively.

6. In redesignated § 160.202, add definitions, in alphabetical order, for ''commercial service'', ''continental United States'', ''disembark'', ''embark'', ''foreign vessel'', ''offshore supply vessel'', ''oil spill response vessel'', ''passenger vessel'', ''recreational vessel'', and ''towing vessels'', and revise the introductory text to read as follows:

§ 160.202 Definitions.

Terms in this subpart that are not defined in this section or in § 160.3 have the same meaning as those terms in 46 U.S.C. 2101. As used in this subpart—

* * * * *

Commercial service means any type of trade or business involving the transportation of goods or individuals, except service performed by a combatant vessel.

Continental United States means the contiguous 48 states, Alaska, and the District of Columbia.

* * * * *

Disembark means when a crewmember or a person in addition to the crew is detached from the vessel.

Embark means when a crewmember or a person in addition to the crew joins the vessel.

Foreign vessel means a vessel of foreign registry or operated under the authority of a country except the United States.

* * * * *

Offshore supply vessel means a motor vessel of more than 15 gross tons but less than 500 gross tons as measured under 46 U.S.C. 14502, or an alternate tonnage measured under 46 U.S.C. 14302 as prescribed by the Secretary under 46 U.S.C. 14104 that regularly carries goods, supplies, individuals in addition to the crew, or equipment in support of exploration, exploitation, or production of offshore mineral or energy resources.

Oil spill response vessel means a vessel that is designated in its certificate of inspection as such a vessel, or that is adapted to respond to a discharge of oil or a hazardous material.

* * * * *

Passenger vessel means a vessel of at least 100 gross tons as measured under 46 U.S.C. 14502, or an alternate tonnage measured under 46 U.S.C. 14302 as prescribed by the Secretary under 46 U.S.C. 14104—

(1) Carrying more than 12 passengers, including at least one passenger for hire;

(2) That is chartered and carrying more than 12 passengers; or

(3) That is a submersible vessel carrying at least one passenger for hire.

* * * * *

Recreational vessel means a vessel being manufactured or operated

primarily for pleasure; or leased, rented, or chartered to another for the latter's pleasure.

* * * * *

Towing vessel means a commercial vessel engaged in or intending to engage in pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside.

* * * * *

7. In redesignated § 160.203:

a. Revise paragraph (a);

b. Remove paragraph (b);

c. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c); and

d. In redesignated paragraph (c), following the two places where the term ''NOA'' is used, add the phrase ''or NOD''.

The revision reads as follows:

§ 160.203 Applicability.

(a) This subpart applies to U.S. vessels in commercial service and all foreign vessels that are bound for or departing from ports or places of the United States.

* * * * *

8. In redesignated § 160.204, lift the suspension of paragraphs (d) and (e), and revise § 160.204 to read as follows:

§ 160.204 Exemptions.

(a) Except for reporting notice of hazardous conditions, the following vessels are exempt from requirements in this subpart:

(1) A passenger or offshore supply vessel when employed in the exploration for or in the removal of oil, gas, or mineral resources on the continental shelf.

(2) An oil spill response vessel (OSRV) when engaged in actual spill response operations or during spill response exercises.

(3) A vessel required by 33 CFR 165.830 or 165.921 to report to the Inland River Vessel Movement Center (IRVMC).

(4) The following vessels neither carrying certain dangerous cargo nor controlling another vessel carrying certain dangerous cargo:

(i) A foreign vessel 300 gross tons or less not engaged in commercial service.

(ii) A vessel operating exclusively within a single Captain of the Port Zone. Captain of the Port zones are defined in 33 CFR part 3.

(iii) A U.S. towing vessel and a U.S. barge operating solely between ports or places of the continental United States.

(iv) A public vessel.

(v) Except for a tank vessel, a U.S. vessel operating solely between ports or places of the United States on the Great Lakes.

(vi) A U.S. vessel 300 gross tons or less, engaged in commercial service not coming from a foreign port or place.

(b) A vessel less than 500 gross tons need not submit the International Safety Management (ISM) Code Notice (Entry 7 in Table 160.206 of § 160.206).

(c) A U.S. vessel need not submit the International Ship and Port Facility Security (ISPS) Code Notice information (Entry 8 in Table 160.206 of § 160.206).

9. Add § 160.205 to read as follows:

§ 160.205 Notices of arrival and departure.

The owner, agent, master, operator, or person in charge of a vessel must submit notices of arrival and notices of departure consistent with the requirements in this subpart.

10. In § 160.206, lift the suspension of item (8) in table in paragraph (a) and revise § 160.206 to read as follows:

§ 160.206 Information required in a NOA.

(a) *Information required.* With the exceptions noted in paragraph (b) of this section, each NOA must contain all of the information items specified in Table 160.206. Vessel owners and operators should protect any personal information they gather in preparing notices for transmittal to the National Vessel Movement Center (NVMC) so as to prevent unauthorized disclosure of that information.

TABLE 160.206—NOA INFORMATION ITEMS

Required information	Vessels neither carrying CDC nor controlling another vessel carrying CDC	Vessels carrying CDC or controlling another vessel carrying CDC
(1) Vessel Information:		
(i) Name	X	X
(ii) Name of the registered owner	X	X
(iii) Country of registry	X	X
(iv) Call sign	X	X
(v) International Maritime Organization (IMO) international number or, if vessel does not have an assigned IMO international number, substitute with official number	X	X
(vi) Name of the operator	X	X
(vii) Name of charterer	X	X
(viii) Name of classification society	X	X
(ix) Maritime Mobile Service Identity (MMSI) number, if applicable; and	X	X
(x) Whether the vessel is 300 gross tons or less (yes or no)	X	X
(2) Voyage Information:		
(i) Names of last five foreign ports or places visited	X	X
(ii) Dates of arrival and departure for last five foreign ports or places visited	X	X
(iii) For the port or place of the United States to be visited, list the name of the receiving facility, the port or place, the city, and the state	X	X
(iv) For the port or place of the United States to be visited, the estimated date and time of arrival	X	X
(v) For the port or place in the United States to be visited, the estimated date and time of departure	X	X
(vi) The location (port or place and country) or position (latitude and longitude or waterway and mile marker) of the vessel at the time of reporting	X	X
(vii) The name and telephone number of a 24-hour point of contact	X	X
(viii) Whether the vessel's voyage time is less than 24 hours (yes or no)	X	X
(ix) Last Port of Call	X	X
(x) Dates of arrival and departure for last port or place visited; and	X	X
(xi) The estimated date and time of arrival to the entrance of the port, if applicable. List sea buoy, pilot station, or COLREGS demarcation line	X	X

TABLE 160.206—NOA INFORMATION ITEMS—Continued

Required information	Vessels neither carrying CDC nor controlling another vessel carrying CDC	Vessels carrying CDC or controlling another vessel carrying CDC
(3) Cargo Information:		
(i) A general description of cargo, other than CDC, onboard the vessel (*e.g.,* grain, container, oil, etc.)	X	X
(ii) Name of each CDC carried, including cargo UN number, if applicable; and		X
(iii) Amount of each CDC carried		X
(4) Information for each Crewmember Onboard:		
(i) Full name	X	X
(ii) Date of birth	X	X
(iii) Nationality	X	X
(iv) Passport* or mariner's document number (type of identification and number)	X	X
(v) Passport country of issuance*; and	X	X
(vi) Passport date of expiration*	X	X
(vii) Position or duties on the vessel; and	X	X
(viii) Where the crewmember embarked (list port or place and country)	X	X
(5) Information for each Person Onboard in Addition to Crew:		
(i) Full name	X	X
(ii) Date of birth	X	X
(iii) Nationality	X	X
(iv) Passport number*	X	X
(v) Passport country of issuance*	X	X
(vi) Passport date of expiration;* and	X	X
(vii) Where the person embarked (list port or place and country)	X	X
(6) Operational condition of equipment required by 33 CFR part 164 of this chapter (see note to table):	X	X
(7) International Safety Management (ISM) Code Notice:		
(i) The date of issuance for the company's Document of Compliance certificate that covers the vessel	X	X
(ii) The date of issuance for the vessel's Safety Management Certificate; and	X	X
(iii) The name of the Flag Administration, or the recognized organization(s) representing the vessel Flag Administration, that issued those certificates	X	X
(8) International Ship and Port Facility Security Code (ISPS) Notice:		
(i) The date of issuance for the vessel's International Ship Security Certificate (ISSC), if any	X	X
(ii) Whether the ISSC, if any, is an initial Interim ISSC, subsequent and consecutive Interim ISSC, or final ISSC	X	X
(iii) Declaration that the approved ship security plan, if any, is being implemented	X	X
(iv) If a subsequent and consecutive Interim ISSC, the reasons therefore	X	X
(v) The name and 24-hour contact information for the Company Security Officer; and	X	X
(vi) The name of the Flag Administration, or the recognized security organization(s) representing the vessel Flag Administration that issued the ISSC	X	X

Note to Table 160.206. For items with an asterisk (*), see paragraph (b) of this section. Submitting a response for item 6 does not serve as notice to the District Commander, Captain of the Port, or Vessel Traffic Center, under 33 CFR 164.53 that navigation equipment is not operating properly.

(b) *Exceptions.* If a crewmember or person on board other than a crewmember is not required to carry a passport for travel, then passport information required in Table 160.206 by items (4)(iv) through (vi), and (5) (iv) through (vi), need not be provided for that person.

11. Add § 160.207 to read as follows:

§ 160.207 Information required in a NOD.

(a) *Information required.* With the exceptions noted in paragraph (b) of this section, each NOD must contain all of the information items specified in Table 160.207. Vessel owners and operators should protect any personal information they gather in preparing notices for transmittal to the NVMC so as to prevent unauthorized disclosure of that information.

TABLE 160.207—NOD INFORMATION ITEMS

Required information	Vessels neither carrying CDC nor controlling another vessel carrying CDC	Vessels either carrying CDC or controlling another vessel carrying CDC
(1) Vessel Information:		
(i) Name	X	X
(ii) Name of the registered owner	X	X

TABLE 160.207—NOD INFORMATION ITEMS—Continued

Required information	Vessels neither carrying CDC nor controlling another vessel carrying CDC	Vessels either carrying CDC or controlling another vessel carrying CDC
(iii) Country of registry	X	X
(iv) Call sign	X	X
(v) International Maritime Organization (IMO) international number or, if vessel does not have an assigned IMO international number, substitute with official number	X	X
(vi) Name of the operator	X	X
(vii) Name of charterer	X	X
(viii) Name of classification society; and	X	X
(ix) Maritime Mobile Service Identity (MMSI) number	X	X
(2) Voyage Information:		
(i) The name of departing port or place of the United States, the estimated date and time of departure	X	X
(ii) Next port or place of call (including foreign), the estimated date and time of arrival; and	X	X
(iii) The name and telephone number of a 24-hour point of contact	X	X
(3) Cargo Information:		
(i) A general description of cargo, other than CDC, onboard the vessel (*e.g.*, grain, container, oil, etc.)	X	X
(ii) Name of each CDC carried, including cargo UN number, if applicable; and		X
(iii) Amount of each CDC carried		X
(4) Information for each Crewmember Onboard:		
(i) Full name	X	X
(ii) Date of birth	X	X
(iii) Nationality	X	X
(iv) Passport* or mariner's document number (type of identification and number)	X	X
(v) Passport country of issuance*	X	X
(vi) Passport date of expiration*	X	X
(vii) Position or duties on the vessel; and	X	X
(viii) Where the crewmember embarked (list port or place and country)	X	X
(5) Information for each Person Onboard in Addition to Crew:		
(i) Full name	X	X
(ii) Date of birth	X	X
(iii) Nationality	X	X
(iv) Passport number*	X	X
(v) Passport country of issuance*	X	X
(vi) Passport date of expiration* and	X	X
(vii) Where the person embarked (list port or place and country)	X	X

Note to Table 160.207. For items with an asterisk (*), see paragraph (b) of this section.

(b) *Exceptions.* If a crewmember or person on board other than a crewmember is not required to carry a passport for travel, then passport information required in Table 160.207 by items (4)(iv) through (vi), and (5) (iv) through (vi), need not be provided for that person.

12. In § 160.208, revise the section heading and paragraphs (a) and (c) to read as follows:

§ 160.208 Updates to a submitted NOA or NOD.

(a) Unless otherwise specified in this section, whenever events cause submitted NOA and NOD information to become inaccurate, vessels must submit an update within the times required in §§ 160.212 and 160.213.

* * * * *

(c) When reporting updates, revise and resubmit the NOA or NOD.

13. In § 160.210, lift the suspensions on the last sentence of paragraph (b), the last sentence of paragraph (c), and paragraph (d); and revise § 160.210 to read as follows:

§ 160.210 Methods for submitting a NOA or a NOD.

(a) *National Vessel Movement Center (NVMC).* Vessels must submit NOA and NOD information required by §§ 160.206 and 160.207 to the NVMC, by electronic Notice of Arrival and Departure (eNOAD) using methods specified at: *http://www.nvmc.uscg.gov.*

(b) *Saint Lawrence Seaway.* Those vessels transiting the Saint Lawrence Seaway inbound, bound for a port or place in the United States, may meet the submission requirements of paragraph (a) of this section by submitting the required information to the Saint Lawrence Seaway Development Corporation and the Saint Lawrence Seaway Management Corporation of Canada via eNOAD using methods specified at: *http://www.nvmc.uscg.gov.*

14. In § 160.212, lift the suspension of paragraph (c), and revise § 160.212 to read as follows:

§ 160.212 When to submit a NOA.

(a) *Submission of a NOA.* (1) Except as set out in paragraph (a)(2) and (a)(3) of this section, all vessels must submit NOAs within the times required in paragraph (a)(4) of this section.

(2) Towing vessels, when in control of a vessel carrying CDC and operating solely between ports or places of the continental United States, must submit a NOA before departure but at least 12

hours before arriving at the port or place of destination.

(3) U.S. vessels 300 gross tons or less, arriving from a foreign port or place, and whose voyage time is less than 24 hours must submit a NOA at least 60 minutes before departure from the foreign port or place.

(4) If your voyage time is—	Then you must submit a NOA—
(i) 96-hours or more; or....	At least 96-hours before arriving at the port or place of destination; or
(ii) Less than 96-hours.....	Before departure but at least 24-hours before arriving at the port or place of destination.

(b) *Submission of updates to a NOA.* (1) Except as set out in paragraphs (b)(2) and (b)(3) of this section, vessels must submit updates in NOA information within the times required in paragraph (b)(4) of this section.

(2) Towing vessels, when in control of a vessel carrying CDC and operating solely between ports or places in the continental United States, must submit updates to a NOA as soon as practicable but at least 6 hours before entering the port or place of destination.

(3) U.S. vessels 300 gross tons or less, arriving from a foreign port or place, whose voyage time is—

(i) Less than 24 hours but greater than 6 hours, must submit updates to a NOA as soon as practicable, but at least 6 hours before entering the port or place of destination.

(ii) Less than or equal to 6 hours, must submit updates to a NOA as soon as practicable, but at least 60 minutes before departure from the foreign port or place.

(4) Times for submitting updates to NOAs are as follows:

If your remaining voyage time is—	Then you must submit updates to a NOA—
(i) 96-hours or more.....	As soon as practicable, but at least 24-hours before arriving at the port or place of destination.
(ii) Less than 96-hours but not less than 24-hours; or.....	As soon as practicable, but at least 24-hours before arriving at the port or place of destination; or
(iii) Less than 24-hours.....	As soon as practicable, but at least 12-hours before arriving at the port or place of destination.

15. Add § 160.213 to read as follows:

§ 160.213 When to submit a NOD.

(a) *Submission of a NOD.* All vessels must submit a NOD no later than 60 minutes before departure.

(b) *Submission of updates to a NOD.* Vessels must submit updates in NOD information as soon as practicable but no later than 12 hours after departure.

§ 160.215 [Redesignated as § 160.216]

16. Redesignate § 160.215 as § 160.216, and add a new § 160.215 to read as follows:

§ 160.215 Force majeure.

When a vessel is bound for a port or place of the United States under force majeure, it must comply with the requirements in this section, but not other sections of this subpart. The vessel must report the following information to the nearest Captain of the Port as soon as practicable:

(a) The vessel master's intentions;

(b) Any hazardous conditions as defined in § 160.202; and

(c) If the vessel is carrying certain dangerous cargo or controlling a vessel carrying certain dangerous cargo, the amount and name of each CDC carried, including cargo UN number if applicable.

PART 161—VESSEL TRAFFIC MANAGEMENT

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

Authority: 33 U.S.C. 1223, 1231; 46 U.S.C. 70114, 70117; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

18. In § 161.2, revise the term ''VTS User'' to read as follows:

§ 161.2 Definitions.

* * * * *

VTS User means a vessel, or an owner, operator, charterer, master, or person directing the movement of a vessel within a VTS area, that is:

(1) Subject to the Vessel Bridge-to-Bridge Radiotelephone Act;

(2) Required to participate in a VMRS; or

(3) Equipped with a Coast Guard type-approved Automatic Identification System (AIS).

* * * * *

19. In § 161.5, revise paragraph (b) to read as follows:

§ 161.5 Deviations from the rules.

* * * * *

(b) Requests to deviate from any provision in this part due to circumstances that develop during a transit or immediately preceding a transit may be made to the appropriate Vessel Traffic Center (VTC). Requests to deviate must be made as far in advance as practicable. Upon receipt of the request, the VTC may authorize a deviation if it is determined that, based on vessel handling characteristics, traffic density, radar contacts, environmental conditions and other relevant information, such a deviation provides a level of safety equivalent to that provided by the required measure or is a maneuver considered necessary for safe navigation under the circumstances.

§ 161.12 [Amended]

20. In § 161.12(d)(5), remove the section reference ''§ 160.204'' and add, in its place, the section reference ''§ 160.202''.

21. In § 161.19, revise paragraph (f) to read as follows:

§ 161.19 Sailing Plan

* * * * *

(f) Dangerous cargo on board or in its tow, as defined in § 160.202 of this chapter.

PART 164—NAVIGATION SAFETY REGULATIONS

22. The authority citation for part 164 is revised to read as follows:

Authority: 33 U.S.C. 1222(5), 1223, 1231; 46 U.S.C. 2103, 3703; Department of Homeland Security Delegation No. 0170.1. Sec. 164.13 also issued under 46 U.S.C. 8502. Sec. 164.46 also issued under 46 U.S.C. 70114 and sec. 102 of Public Law 107–295. Sec. 164.61 also issued under 46 U.S.C. 6101.

23. In § 164.02, revise the introductory text of paragraph (a) to read as follows:

§ 164.02 Applicability exception for foreign vessels.

(a) Except for § 164.46(c), none of the requirements of this part apply to vessels that:

* * * * *

24. Revise § 164.03 to read as follows:

§ 164.03 Incorporation by reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Coast Guard must publish notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the National Archives and Records Administration (NARA). For more information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.* Also, it is available for inspection at the Coast Guard, Office of Navigation Systems (CG–5413), 2100 Second Street SW., Washington, DC 20593–0001, and is available from the sources listed below.

(b) *American Petroleum Institute (API),* 1220 L Street, NW., Washington, DC 20005.

(1) API Specification 9A, Specification for Wire Rope, Section 3, Properties and Tests for Wire and Wire Rope, May 28, 1984, IBR approved for § 164.74.

(2) [Reserved].

(c) American Society for Testing and Materials (ASTM), 100 Bar Harbor Drive, West Conshohocken, PA 19428–2959.

(1) ASTM D4268–93, Standard Test Method for Testing Fiber Ropes, IBR approved for § 164.74.

(2) [Reserved].

(d) Cordage Institute, 350 Lincoln Street, Hingham, MA 02043.

(1) CIA–3, Standard Test Methods for Fiber Roper Including Standard Terminations, Revised, June 1980, IBR approved for 164.74.

(2) [Reserved].

(e) International Maritime Organization (IMO), 4 Albert Embankment, London SE1 7SR, U.K.

(1) IMO Resolution A342(IX), Recommendation on Performance Standards for Automatic Pilots, November 12, 1975, IBR approved for § 164.13.

(2) IMO Resolution A.917(22), Guidelines for the Onboard Operational Use of Shipborne Automatic Identification System (AIS), January 25, 2002, IBR approved for § 164.46.

(3) Resolution MSC.74(69), Annex 3, Recommendation on Performance Standards for a Universal Shipborne Automatic Identification System (AIS), May 12, 1998, IBR approved for § 164.46.

(4) SN/Circ. 227, Guidelines for the Installation of a Shipborne Automatic Identification System (AIS), January 6, 2003, IBR approved for § 164.46.

(5) SN/Circ.244, Guidance on the Use of the UN/LOCODE in the Destination Field in AIS Messages, December 15, 2004, IBR approved for § 164.46.

(6) SN/Circ.245, Amendments to the Guidelines for the Installation of a Shipborne Automatic Identification System (AIS)(SN/Circ.227), March 2, 2005, IBR approved for § 164.46.

(7) SOLAS, International Convention for the Safety of Life at Sea, 1974, and 1988 Protocol relating thereto, 2000 Amendments, effective January and July 2002, (SOLAS 2000 Amendments), IBR approved for § 164.46.

(8) Conference resolution 1, Adoption of amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974, and amendments to Chapter V of SOLAS 1974, adopted on December 12, 2002, IBR approved for § 164.46.

(9) SN/Circ.236, Guidance on the Application of AIS Binary Applications, May 20, 2004, IBR approved for § 164.46.

(f) Radio Technical Commission for Maritime Services (RTCM), 655 Fifteenth Street, NW., Suite 300, Washington, DC 20005.

(1) RTCM Paper 12–78/DO–100, Minimum Performance Standards, Loran C Receiving Equipment, 1977, IBR approved for § 164.41.

(2) RTCM Paper 71–95/SC112–STD, RTCM Recommended Standards for Marine Radar Equipment Installed on Ships of Less Than 300 Tons Gross Tonnage, Version 1.1, October 10, 1995, IBR approved for § 164.72.

(3) RTCM Paper 191–93/SC112–X, RTCM Recommended Standards for Maritime Radar Equipment Installed on Ships of 300 Tons Gross Tonnage and Upwards, Version 1.2, December 20, 1993, IBR approved for § 164.72.

§ 164.43 [Removed]

25. Remove § 164.43.

26. Revise § 164.46 to read as follows:

§ 164.46 Automatic Identification System.

(a) *Definitions.* As used in this section—

Automatic Identification Systems or *AIS* means a maritime navigation safety communications system standardized by the International Telecommunication Union (ITU), adopted by the International Maritime Organization (IMO), that—

(1) Provides vessel information, including the vessel's identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft;

(2) Receives automatically such information from similarly fitted ships; monitors and tracks ships; and

(3) Exchanges data with shore-based facilities.

Gross tonnage means tonnage as defined under the International Convention on Tonnage Measurement of Ships, 1969.

International voyage means a voyage from a country to which the present International Convention for the Safety of Life at Sea (SOLAS), 1974 applies to a port outside such country, or conversely.

Properly installed, operational means an Automatic Identification System (AIS) that is installed and operated using the guidelines set forth by the International Maritime Organization (IMO) Safety of Navigation Circulars (SN/Circ.) 227, 236, 244, and 245, and Resolution A.917(22)(Incorporated by reference, see § 164.03).

(b) *AIS carriage.* The following vessels must have onboard a properly installed, operational, Coast Guard type-approved Automatic Identification System (AIS):

(1) A self-propelled vessel of 65 feet or more in length, engaged in commercial service;

(2) A towing vessel of 26 feet or more in length and more than 600 horsepower, engaged in commercial towing;

(3) A self-propelled vessel carrying 50 or more passengers, engaged in commercial service;

(4) A vessel carrying more than 12 passengers for hire and capable of speeds in excess of 30 knots;

(5) A dredge or floating plant engaged in or near a commercial channel or shipping fairway in operations likely to restrict or affect navigation of other vessels except for an unmanned or intermittently manned floating plant under the control of a dredge; and

(6) A self-propelled vessel carrying or engaged in the movement of certain dangerous cargoes as defined in § 160.202 of this subchapter.

Note to paragraph (b): Except for those vessels denoted in paragraph (c) of this section, use of Coast Guard type-approved AIS Class B is permissible, however, not well-suited, on vessels that are highly maneuverable, navigate at high speed, or routinely operate on or near very congested waterways or in close-quarter situations with other AIS equipped vessels.

(c) *SOLAS provisions.* The following self-propelled vessels must comply with International Convention for Safety of Life at Sea (SOLAS), as amended, Chapter V, regulation 19.2.1.6, 19.2.4 (AIS Class A), and 19.2.3.5 or 19.2.5.1 as applicable (Incorporated by reference, see § 164.03):

(1) A vessel of 500 gross tonnage or more;

(2) A vessel of 300 gross tonnage or more, on an international voyage; and

(3) A vessel of 150 gross tonnage or more, when carrying more than 12 passengers on an international voyage.

(d) *Operations.* The requirements in this paragraph are applicable to any vessel equipped with AIS.

(1) Use of AIS does not relieve the vessel of the requirements to sound whistle signals or display lights or shapes in accordance with the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), 28 U.S.T. 3459, T.I.A.S. 8587, or Inland Navigation Rules, 33 U.S.C. 2001 through 2073; nor of the radio requirements of the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C. 1201–1208, part 26 of this chapter, and 47 CFR part 80.

(2) AIS must be maintained in effective operating conditions which includes the:

(i) Ability to reinitialize the AIS should the need arise (this could require access and knowledge of the AIS power source and password);

(ii) Ability to access AIS information from the primary conning position of the vessel;

(iii) Accurate broadcast of a properly assigned Maritime Mobile Service Identity (MMSI) number;

(iv) Accurate input and upkeep of all AIS data and system updates; and

(v) Continual operation of AIS, and its associated devices (*e.g.*, GPS, gyro, converters), at all times the vessel is underway, at anchor, or moored in or near a commercial channel or shipping fairway in operations likely to restrict or affect navigation of other vessels, except—

(A) When use of AIS would compromise the safety or security of the vessel or a security incident is imminent.

(B) The AIS should be returned to continuous operation as soon as the compromise has been mitigated or the security incident has passed. At that time, those vessels denoted in paragraph (b), must report to the nearest U.S. Captain of the Port or Vessel Traffic Center, and record in the ship's official log, the AIS operational interruption and the reason for the interruption.

(3) AIS messaging must be conducted in English and solely to exchange or communicate navigation safety information (for example, SECURITE). Although not prohibited, it should not be relied upon as the primary means for broadcasting distress or urgent communications (for example, MAYDAY or PAN PAN). (47 CFR 80.1109, Distress, urgency, and safety communications).

Note to paragraph (d): AIS devices must be able to broadcast vessel position, course, and speed, and may require the input of an external positioning device (*e.g.*, DGPS) to do so. Although of great benefit, the integration of existing, or installation of, other external devices or displays (*e.g.*, transmitting heading device, gyro, rate of turn indicator, ECDIS/ECS, and radar) is highly recommended but is not currently required except as denoted in § 164.46(c).

(e) *Watchkeeping.* AIS is primarily intended for use of the master or person in charge of the vessel, or the person designated by the master or person in charge to pilot or direct the movement of the vessel, who must maintain a periodic watch for AIS information.

(f) *Portable AIS.* The use of a portable AIS is permissible only to the extent that electromagnetic interference does not affect the proper function of existing navigation and communication equipment on board and such that only one AIS unit may be in operation at any one time.

(g) *Pilot Port.* The AIS Pilot Port, on any vessel subject to pilotage, must be readily available and easily accessible from the primary conning position of the vessel and within at least 3 feet of a 120-volt 50/60 Hz AC power receptacle.

(h) *Exceptions.* Only those vessels that operate solely within a very confined area (*e.g.*, less than a one nautical-mile radius, shipyard, fleeting area), or on short and fixed schedules (*e.g.*, a bank-to-bank river ferry service), or that otherwise are not likely to encounter another AIS equipped vessel, may request a yearly deviation from this section as set forth in § 164.55.

(i) *Implementation date.* Those vessels identified in paragraph (b) of this section that were not previously subject to AIS carriage must install AIS no later than [date of the first day of the seventh month after publication of the final rule to be inserted].

§ 164.53 [Amended]

27. In § 164.53(b), following the word ''vessel's'', add the phrase ''automatic identification system (AIS),''.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

28. The authority citation for part 165 is revised to read as follows:

Authority: 33 U.S.C. 1226, 1231; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

§ 165.1704 [Amended]

29. In § 165.1704, in paragraph (c)(4), following the punctuation mark '';'', add the word ''and''; in paragraph (c)(5), following the term ''6 knots'', remove ''; and'' and add, in their place, the punctuation mark ''.''; and remove paragraph (c)(6).

Dated: December 2, 2008.

Thad W. Allen,

Admiral, U.S. Coast Guard Commandant.

[FR Doc. E8–29698 Filed 12–11–08; 4:15 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–1024]

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 March 16, 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–1024, 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	
Ventura County, California, and Incorporated Areas				
Arroya Santa Rosa	At the confluence with Conejo Creek	+232	+233	Unincorporated Areas of Ventura County.
	Approximately 0.6 mile upstream of East Las Posas Road.	+381	+378	
Arroyo Santa Rosa Tributary.	At the confluence with Arroyo Santa Rosa	+258	+250	Unincorporated Areas of Ventura County.
	Approximately 400 feet upstream of Santa Rosa Road	None	+379	
Calleguas Creek	Approximately 100 feet downstream of U.S. Highway 101.	+141	+143	Unincorporated Areas of Ventura County, City of Camarillo.
	Approximately 0.9 mile upstream of Seminary Road	+241	+248	
Camarillo Hills Drain	Approximately 40 feet upstream of West Ventura Boulevard.	+92	+95	City of Camarillo.
	At Arneill Road	None	+185	
Edgemore Drain	At the confluence with Camarillo Hills Drain	None	+117	City of Camarillo.
	Approximately 520 feet upstream of Getman Street	None	+153	
Mission Drain	At the confluence with Camarillo Hills Drain	None	+132	City of Camarillo.
	Approximately 430 feet downstream of Mission Drive	None	+173	
Peach Hill Wash	At the confluence with Arroyo Simi	+427	+426	City of Moorpark, Unincorporated Areas of Ventura County.
	Approximately 1,170 feet upstream of Country Hill Road.	+475	+477	
Somis Drain	At the confluence with Calleguas Creek	+165	+168	City of Camarillo.
	At Las Posas Road	None	+203	
West Camarillo Hills Tributary.	At the confluence with Camarillo Hills Drain	None	+124	City of Camarillo.

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 20 feet downstream of Las Posas Road	None	+155	

* 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 Camarillo
Maps are available for inspection at Camarillo City Hall, 601 Carmen Drive, Camarillo, CA.
City of Moorpark
Maps are available for inspection at Moorpark City Hall, 799 Moorpark Avenue, Moorpark, CA.
Unincorporated Areas of Ventura County
Maps are available for inspection at Ventura County Hall of Administration, 800 South Victoria Avenue, Ventura, CA.

Gage County, Nebraska, and Incorporated Areas

Big Blue River	Approximately 900 feet upstream of State Highway 8	None	+1195	Unincorporated Areas of Gage County.
	Approximately 0.5 mile upstream of State Highway 8	None	+1196	
Big Blue River Tributary 44	Upstream of South 25th Street	+1254	+1261	City of Beatrice.
	Downstream of Scott Street	None	+1273	
Big Blue River backwater on Bills Creek.	Approximately 1,200 feet downstream of South A Street.	None	+1217	City of Wymore.
	Approximately 600 feet downstream of South A Street	None	+1217	

* 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 Beatrice
Maps are available for inspection at City Hall, 400 Ella Street, Beatrice, NE 68310.
City of Wymore
Maps are available for inspection at City Office, 115 West East Street, Wymore, NE 68466.
Unincorporated Areas of Gage County
Maps are available for inspection at Gage County Highway Department, 823 South 8th Street, Beatrice, NE 68310.

Jackson County, North Carolina, and Incorporated Areas

Bumgarner Branch	At the confluence with Mill Creek (into Tuckasegee River).	None	+2114	Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 1,200 feet upstream of Big Orange Way	None	+2136	
Tuckasegee River	Approximately 150 feet downstream of the Jackson/Swain County boundary.	None	+1835	Town of Dillsboro, Unincorporated Areas of Jackson County.
	The confluence of Greenland Creek and Panthertown Creek.	None	+3654	

* 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 Dillsboro
Maps are available for inspection at Dillsboro Town Office, 42 Front Street, Dillsboro, NC.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Town of Sylva				
Maps are available for inspection at Sylva Town Hall, 83 Allen Street, Sylva, NC.				
Unincorporated Areas of Jackson County				
Maps are available for inspection at Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC.				
Pottawatomie County, Oklahoma, and Incorporated Areas				
Tributary #1 to Rock Creek	Confluence with Rock Creek and Tributary #1 to Rock Creek.	+973	+974	City of Shawnee.
	Approximately 1,565 feet upstream of Kickapoo Street	+985	+986	
Tributary #1 to Tributary #2 to Rock Creek.	Approximately 500 feet downstream of Union Street	None	+989	City of Shawnee.
	Intersection of 45th Street and Tributary #1 to Tributary #2 to Rock Creek.	None	+1021	

* 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 Shawnee
Maps are available for inspection at County Courthouse, 325 N. Broadway, Shawnee, OK 74801.

Monroe County, Tennessee, and Incorporated Areas				
Sweetwater Creek	121 feet upstream of State Highway 322	+903	+908	City of Sweetwater.
	290 feet downstream of State Highway 68	+917	+918	
	1,655 feet upstream of State Highway	None	+920	
Sweetwater Creek	1,430 feet downstream of North Main Street	None	+888	Unincorporated Areas of Monroe County, City of Sweetwater.
	248 Feet Upstream of State Highway	None	+920	

* 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 Sweetwater
Maps are available for inspection at 203 Monroe Street, Sweetwater, TN 37874.

Unincorporated Areas of Monroe County
Maps are available for inspection at 310 Tellico Street, Suite 2, Madisonville, TN 37354.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29763 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–1025]

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 March 16, 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–1025, 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:

State	City/town/ county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground	
				Existing	Modified
Town of Sparta, New York					
New York	Town of Sparta ...	Canaseraga Creek.	Just upstream of State Route 258/Flats Road	None	* 576
			Approximately 1.2 miles upstream of White Bridge Road	None	* 614

* 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 Sparta

Maps are available for inspection at 8302 Kysorville-Byersville Road, Dansville, NY 14437.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Powell County, Kentucky, and Incorporated Areas				
Red River (at City of Stanton).	Approximately 800 feet downstream Judy Creek	None	+641	Unincorporated Areas of Powell County.
	Approximately 5,400 feet upstream Hatcher Creek	None	+651	
Red River (at Clay City)	Approximately 3,900 feet downstream Bert T Combs-Mountain Parkway.	None	+623	Unincorporated Areas of Powell County.
	Approximately 5,800 feet downstream Hatton Creek	None	+632	

* 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 Powell County

Maps are available for inspection at 525 Washington Street, Stanton, KY 40380.

Okmulgee County, Oklahoma, and Incorporated Areas				
Duck Creek	Approximately 3,950 feet downstream from S. Yale Avenue.	None	+622	Unincorporated Areas of Okmulgee County, Town of Liberty.
	Approximately 1,377 feet upstream from Lewis Avenue ...	None	+642	

* 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 Liberty

Maps are available for inspection at 719 E. 8th St., Okmulgee, OK 74447.

Unincorporated Areas of Okmulgee County

Maps are available for inspection at 719 E. 8th St., Okmulgee, OK 74447.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29765 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7795]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; correction.

SUMMARY: On July 23, 2008, FEMA published in the **Federal Register** a proposed rule that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at FR Doc. E8–16811. The table provided here represents the flooding source, location of referenced elevation, effective and modified elevation, and communities affected for Surry County, North Carolina. Specifically, it addresses Ararat River.

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) publishes proposed determinations of Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), 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.

Correction

In the proposed rule published at FR Doc. E8–16811 in the July 23, 2008, issue of the **Federal Register**, FEMA published a table under the authority of 44 CFR 67.4. The table, entitled ''Surry County, North Carolina, and Incorporated Areas'' addressed Ararat River. That table contained inaccurate information as to the location of referenced elevation, effective and modified elevation in feet, or communities affected for these flooding sources. In this notice, FEMA is publishing a table containing the accurate information, to address these prior errors. The information provided below should be used in lieu of that previously published.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Surry County, North Carolina and Incorporated Areas				
Ararat River	At the confluence with Yadkin River	None	+803	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 1,500 feet upstream of Riverside Drive (State Road 104).	None	+1,094	

Dated: December 5, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29769 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 51, 54, 61, and 69

[WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45; DA 08–2631]

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

AGENCY: Federal Communications Commission.

ACTION: Proposed rule: extension of reply comment period.

SUMMARY: This document grants motions requesting an extension of time to file reply comments on the proposals contained in the appendices of the Commission's November 5, 2008 *Further Notice of Proposed Rulemaking* in the Intercarrier Compensation and Universal Service Reform, FCC 08–262.

DATES: Reply comments are due on or before December 22, 2008.

ADDRESSES: You may submit comments, identified by CC Docket Nos. 96–45, 99–200, 96–98, 01–92, 99–68; WC Docket Nos. 05–337, 03–109, 06–122, 04–36, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail: ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response. Include the docket number in the subject line of the message.
- *Mail:* Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order* released December 2, 2008. The complete text of the *Order* is available on the Commission's Internet site at *http://www.fcc.gov* and for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, e-mail *fcc@bcpiweb.com.* 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), 202–418–0432 (TTY).

The Commission received motions for extension of time to file reply comments in these proceedings (see 73 FR 66821, Nov. 12, 2008) from the National Association of State Utility Consumer Advocates (NASUCA) and the Rural Cellular Association (RCA). Although it is the policy of the Commission that motions for extension of time shall not be routinely granted, given the volume of comments to which parties are responding, the complexity of the issues involved, and the intervening holidays, the Commission finds that good cause exists to provide all parties an extension of time from December 3, 2008 to December 22, 2008 for filing reply comments in these proceedings.

Accordingly, *it is ordered* that, pursuant to Sections 4(i), 4(j), and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 155(c) and Sections 0.91, 0.291, and 1.46 of the Commission's rules, 47 CFR 0.91, 0.291, 1.46, reply comments in these proceedings shall be filed on or before December 22, 2008.

It is further ordered that the Motion for Extension of Time for Reply Comments by the National Association of State Utility Consumer Advocates and the Motion for Extension of Time filed by the Rural Cellular Association *are granted.*

Comment Filing Procedures

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR sections 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

• *Commercial* overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. *Postal* Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: 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), 202–418–0432 (TTY).

Federal Communications Commission.

Dana R. Shaffer,

Chief, Wireline Competition Bureau.

[FR Doc. E8–29798 Filed 12–15–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 2007–27027]

Conaway Hip-Hugger; Denial of Petition for Rulemaking

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition for rulemaking.

SUMMARY: This notice denies a petition for rulemaking submitted by Mr. Brian J. Conaway, which, among other things, requested that the NHTSA amend the language and definitions in Federal Motor Vehicle Safety Standard (FMVSS) No. 213, ''Child restraint systems,'' to apply the standard to products that are not yet defined by the standard, such as belt positioning devices. Alternatively, the petitioner asked the agency to adopt a new definition, which would allow his product, the Hip-Hugger, to be recognized and defined as a child restraint device under FMVSS No. 213. NHTSA is denying the petition because it does not see a safety need to apply a FMVSS to seat belt positioners and it does not believe that a denial would hamper child restraint system innovation or design. Furthermore, the agency is concerned that applying FMVSS No. 213 to seat belt positioners may actually degrade child occupant protection by promoting premature graduation to lap/shoulder belts.

FOR FURTHER INFORMATION CONTACT: *For technical issues:* Mr. Sean Doyle, NHTSA Office of Crashworthiness Standards. Telephone: (202) 366–1740. Facsimile: (202) 493–2990.

For legal issues: Ms. Deirdre Fujita, NHTSA Office of the Chief Counsel. Telephone: (202) 366–2992. Facsimile: (202) 366–3820.

Both officials can be reached by mail at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background

A. FMVSS No. 213

Federal Motor Vehicle Safety Standard (FMVSS) No. 213, ''Child restraint systems,'' has been in effect since January 1, 1970. It was established to ''minimize the likelihood of death and injury to children in vehicle crashes or sudden stops. * * *''[1] In 1979, the standard was upgraded to include certain dynamic performance requirements.[2] The standard applies to ''child restraint systems'' and stipulates several definitional requirements for the various child restraint systems used in motor vehicles. A ''child restraint system'' is defined in FMVSS No. 213 to be ''any device except Type I or Type II seat belts, designed for use in a motor vehicle or aircraft to restrain, seat, or position children. * * *''[3] Belt-positioning seats, built-in child restraint systems, backless child restraint systems, and car beds are among several of the applicable, defined ''child restraint systems'' covered by FMVSS No. 213. Seat belt positioning devices are not included in the definition of ''child restraint system'' in FMVSS No. 213, and are therefore not regulated by this standard.

B. The Petition

In a letter dated March 5, 2007, Mr. Brian Conaway petitioned the NHTSA to amend the language and definitional requirements of FMVSS No. 213 to permit what he said were advancements in child restraint design and to encourage new approaches to child protection. The petitioner believed that the effectiveness of the regulation is restricted by narrow definitions. The petitioner contended that there are many innovative child safety vehicle devices ''which do not '* * * restrain, seat, or position children * * *' in a manner consistent with any of the current definitions,'' yet these devices are fully capable of complying with Standard 213's dynamic performance requirements. The petitioner further alleged that the ''process of system 'definitions' * * * limits innovation and advancements in child restraint design to those approaches which already exist and fit a product type already defined in the standard.'' Mr. Conaway went on to say, ''this results in designing to a standard instead of designing to optimize a child's comfort and safety in the event of a crash.'' In particular, Mr. Conaway explained that the device which he developed, the *Hip-Hugger,* or *Conaway devise,* is excluded from FMVSS No. 213, ''not based on the crash data or protection it provides, but based on its inability to meet the definition of any of the recognized alternative and already existing approaches to child protection.'' The petitioner further noted, ''this is in spite of the fact that it outperforms booster seats when crash tested under FMVSS–213 dynamic test standards.'' As a result, Mr. Conaway specifically requested that FMVSS No. 213 be ''changed to allow for products not yet defined to be included as long as they meet the appropriate age, weight, and height related performance and labeling standards.'' Alternatively, Mr. Conaway petitioned the agency to adopt a new definition into FMVSS No. 213 that would permit his device to be recognized as a child restraint system.

Mr. Conaway's Hip Hugger device is a type of seat belt positioning device. Mr. Conaway first wrote to NHTSA about the Hip Hugger in 2001, asking whether it was a ''child restraint system'' under FMVSS No. 213. The following is a description of the device, taken from the agency's June 1, 2001, letter written in response to Mr. Conaway, in which we explained that the device was not a child restraint system:

You [Mr. Conaway] explained * * * that one part of the product performs similarly to

[1] 34 FR 1172, January 24, 1969. Originally the standard was called ''Child Seating Systems'' and applied to motor vehicle equipment for seating and restraining a child being transported in a passenger car.

[2] 44 FR 72131, December 13, 1979.

[3] Standard No. 209 defines a Type I seat belt as ''a lap belt for pelvic restraint,'' and a Type II seat belt as ''a combination of pelvic and upper torso restraints.''

a device called a ''locking clip'' used to secure some child restraint systems. A locking clip is a bracket into which the webbing of a Type II seat belt is threaded. A locking clip typically prevents movement of the latchplate and the webbing of the lap and/or shoulder belt. Your product is not used with child restraints, but acts similarly to a locking clip by ''locking'' the lap belt portion of the Type II belt over the child's lap. You would instruct parents to lock the lap belt tight enough over the child such that the child will not be able to slouch or scoot forward, even to bend his or her knees at the vehicle seat cushion's edge. Attached to the locking device is a plastic guide through which the shoulder belt portion of a Type II belt is threaded. The guide positions the shoulder belt ''so that it does not ride across the neck of the child.'' * * *

C. Agency Past Assessment of Seat Belt Positioners

NHTSA has considered regulating seat belt positioning devices on several occasions, but has declined to do so. In a notice of proposed rulemaking (NPRM) dated March 16, 1994 (59 FR 12225), the agency requested comments on whether FMVSS No. 213 should be applied to belt positioning devices, and if so, what requirements would be appropriate. After considering comments on the issue, on July 6, 1995, the agency published a document explaining that it decided against regulating belt positioning devices in FMVSS No. 213 because it needed to ''better assess the safety benefits of such rulemaking, and the feasibility of a test procedure and practicability of performance requirements'' (60 FR at 35137). On January 31, 1996, petition for rulemaking, the American Academy of Pediatrics (AAP) voiced concern that some belt positioning devices had a tendency to interfere with proper lap and shoulder belt fit and often introduced slack in the shoulder belt. The AAP contended that since belt positioners are generally marketed as child protection devices, they should be exposed to the same certification and testing as child restraint systems, and should thus be regulated by FMVSS No. 213. The agency responded to the AAP petition by declining to undertake rulemaking on FMVSS No. 213, for the reasons given below. Instead, the agency proposed amending its consumer information regulations (49 CFR Part 575) to require proper warnings and labeling of the products (August 13, 1999 (64 FR 44164)),[4] and requested comments on an alternative or additional approach to establishing a minimum dynamic performance requirement for belt positioners. NHTSA determined that it was inappropriate for belt positioners to be regulated by FMVSS No. 213 because the agency believed that doing so could have a negative net effect on child safety. The reasons for this conclusion were as follows:

- A comparison study of dynamic sled tests with the Hybrid II 3-year-old and 6-year-old dummies, restrained with either the lap/shoulder belt and one of three different belt positioners, or with a lap/shoulder belt only, indicated that belt positioning devices generally reduced belt performance of the lap/shoulder belt system, and led to increased head and chest injury criteria measurements, and head and knee excursions measurements for the 3-year-old dummy.[5] [6] Testing with the 6-year-old also revealed the dummy's tendency to roll out of the seat belt positioner and around the shoulder belt, not to mention the possible introduction of belt slack, when a belt positioner was used.[7]
- A comparison study of tests for belt positioning devices to FMVSS No. 213 compliance tests compiled between 1993 and 1998 for both the 3-year-old and the 6-year-old child dummies positioned in either convertible child restraints or belt-positioning booster seats indicated that children are typically afforded greater levels of protection when using either type of child restraint than when using a lap/shoulder belt system with a belt positioner.[8]
- It was unknown whether the requirements of FMVSS No. 213 could adequately assess belt positioners and discern between acceptable and unacceptable performance. Also, abdominal loading could not be evaluated because the applicable child dummies were not fitted with abdominal sensors and no abdominal injury criteria existed.
- Child restraint systems offered additional benefits for toddlers over seat belt positioners, including (1) A high back and side support, which permit neck support and support in side impacts, (2) an internal harness which diverts and distributes dynamic crash forces away from vulnerable soft tissues and organs, and (3) a comfortable fit, which discourages slouching and thus the repositioning of the lap belt over a child's soft abdominal area.
- Some consumers may prematurely graduate their child from a recommended age/size-appropriate child restraint such as a toddler seat or a belt-positioning booster seat to the lap/shoulder belt with seat belt positioner, thereby degrading the child's crash protection.[9]

In a **Federal Register** notice published on March 23, 2004 (69 FR 13503), the agency terminated the rulemaking regarding the consumer information requirement for seat belt positioners. The decision was made because crash data did not quantify a safety need to regulate seat belt positioners, and because NHTSA became concerned that the labeling proposed in the NPRM could be misconstrued by some parents as an agency recommendation that it would be acceptable to restrain 6-year-old children in a vehicle belt system if a belt-positioner were used. Such a conclusion would be contrary to the recommendation of the agency that 6-year-old children are best restrained when in a belt-positioning booster seat. Also, further testing was being planned for belt guidance devices pursuant to Anton's Law.[10] Section 3(b)(2) of Anton's Law directed the NHTSA to consider whether to establish injury performance requirements for seat belt fit when used with booster seats and other belt guidance devices.

In response to Section 3(b)(2) of Anton's Law, the agency analyzed several studies exploring the extent to which booster seats differ in how they affect the fit of a vehicle's belts on a child. The agency did determine that various booster seats could differ in how belts fit but was unable to conclude that the small differences translated into associated differences in the dynamic performance of a belt system in a crash. The agency also found that belt positioning devices improved belt fit, but was unable to conclude how these devices would affect belt performance when tested dynamically. The agency decided that proposing performance criteria for safety belt fit for booster

[4] In the NPRM, NHTSA proposed to define ''seat belt positioner'' as ''a device, other than a belt-positioning seat, that is manufactured to alter the positioning of Type I and/or Type II belt systems in motor vehicles.''

[5] These tests were conducted by the agency in 1994 in an attempt to better assess the benefits of a rulemaking for belt positioning devices as the Agency looked to amend FMVSS No. 213. See NHTSA Test Nos. 3101—3114.

[6] 64 FR 44166, August 13, 1999.

[7] ''Evaluation of Devices to Improve Shoulder Belt Fit,'' DOT HS 808 383, Sullivan and Chambers, August 1994. The report is available from the National Technical Information Service, Springfield, VA 22161.

[8] 64 FR 44168, August 13, 1999. FMVSS No. 213 compliance test data from 1993 to 1998 can be found through the National Technical Information Service, Springfield, VA 22161.

[9] NHTSA recommends that children weighing over 40 lbs. be restrained in a booster seat until they are tall enough so that they can, without the aid of a booster seat: (1) Wear the shoulder belt comfortably across their shoulder, and secure the lap belt across their pelvis, and (2) bend their legs over the front of the seat when their backs are against the vehicle seat back.

[10] Pub. L. 107–318, 116 Stat. 2772.

seats or belt guidance devices was unwarranted.

D. Correspondence on the Hip-Hugger

As noted above, the agency first corresponded with Mr. Brian J. Conaway about the Hip-Hugger in 2001. At that time, Mr. Conaway requested an interpretation of whether the Hip-Hugger, a small, plastic device which attaches to Type II seat belts to restrain children weighing between 50 and 100 pounds (lb), would be classified as a child restraint system under FMVSS No. 213, and alternatively if it would be considered a seat belt positioner. In an interpretation letter dated June 1, 2001, the agency informed Mr. Conaway that his product did not meet the definition of a child restraint system as set forth in FMVSS No. 213.[11] The agency explained that Mr. Conaway's device was designed to position a seat belt, not to restrain, seat, or position children. The agency noted that at that time, it did not have a standard or regulation for seat belt positioners, but acknowledged that the description of the Hip-Hugger did seem to conform to the definition of a seat belt positioner proposed in the August 13, 1999 NPRM (''a device, other than a belt-positioning seat, that is manufactured to alter the positioning of Type I and/or Type II belt systems in motor vehicles''). In 2006 and 2007, Mr. Conaway wrote follow-up letters to NHTSA raising the same issues as those raised in his 2001 letters, to which NHTSA replied on October 26, 2006, and March 12, 2007. In each of the agency's responses, NHTSA maintained the position that the Hip-Hugger did not meet the definition of a child restraint system set forth in FMVSS No. 213 because the Hip-Hugger does not itself restrain, seat, or position a child occupant in a crash.

III. Analysis of Petition

The Agency's opinion regarding Mr. Conaway's device has not changed since its first correspondence with him in 2001; the petitioner has not suggested that the design of this device has been altered. The Hip-Hugger is a belt positioning device. The petitioner seeks to revise FMVSS No. 213's definition of child restraint system to include devices such as belt-positioning devices.

We do not agree to this suggestion for several reasons. First, there is no evidence of a real-world safety problem with seat belt positioners. There is no safety need for an FMVSS to apply to seat belt positioners or a need to incorporate seat belt positioners into FMVSS No. 213. NHTSA has considered the safety need for the requested rulemaking, agency resources and agency priorities, and has determined that the petition should be denied.

Second, we do not believe that a denial ''limits innovation and advancements in child restraint design'' as the petitioner maintains. The main effect of the denial is that petitioner may not refer to it as a child restraint system or certify that it meets FMVSS No. 213. The petitioner may continue to produce and market his device even when FMVSS No. 213 does not apply to it. This denial does not hamper the production of the device in any way. Seat belt positioners are considered motor vehicle equipment and their manufacturers are thus subject to the requirements of 49 U.S.C. 30119 and 30120 concerning the recall and remedy of products with safety-related defects.

Third, we are denying the petition because the agency also remains concerned, as discussed in the August 13, 1999 NPRM, that FMVSS No. 213 is not an appropriate standard for the devices. Including seat belt positioners in FMVSS No. 213 could unintentionally encourage premature graduation to lap/shoulder belts with belt positioners, which could degrade a child's safety by inducing injuries, such as abdominal injuries, caused by submarining.[12] A recent study of abdominal injuries conducted by Partners for Child Passenger Safety showed that children aged four to eight years whose restraint use was suboptimal, were more than three times more likely to sustain an abdominal injury than optimally restrained children.[13] Additionally, since FMVSS No. 213 does not currently have abdominal injury limits, as none of the child test dummies have an abdominal insert capable of measuring injury levels, nor has an abdominal injury criterion been established for any of the child crash test dummies utilized in FMVSS No. 213, FMVSS No. 213 might not adequately distinguish ''acceptable'' performers from ''unacceptable'' ones, and thus a certification to the standard could be meaningless.

In April 2005, the Agency conducted dynamic testing in accordance with FMVSS No. 213 using the Hybrid III 6-year-old and 10-year-old dummies in booster seats, belt positioning devices, and vehicle lap/shoulder belts as part of the preparation for the August 31, 2005 NPRM (70 FR 51731) to incorporate the Hybrid III 10-year-old dummy into FMVSS No. 213. The results substantiated the agency's past concerns with incorporating belt positioners into the current standard. On average, this testing produced head and chest readings for both dummies that were as high or higher when belt positioning devices were used compared to when only a lap/shoulder belt or a belt positioning booster was used.[14] [15] Therefore, this data suggests that child belt positioning devices, which do not meet the standard's definitional requirements, do not generally perform better than other devices that do meet the standard's definitional requirements.

Contrary to Mr. Conaway's assertion that the definitions detailed in FMVSS No. 213 stifle child safety benefits, the current Standard has proven to be very effective. Real world crash data have shown that current child restraints, as defined by FMVSS No. 213, reduce the likelihood of fatalities in passenger car crashes by 71% for infants (less than one-year-old) and 54% for toddlers (one-to four-years-old). For infants and toddlers in light trucks, the corresponding reductions are 58% and 59%, respectively.[16] Also, belt-positioning booster seats lower the risk of injury to children aged four through seven years by 59 percent compared to the use of vehicle seat belts alone.[17]

IV. Conclusion

The agency has decided to deny Mr. Conaway's petition for rulemaking. For the reasons listed herein, the agency disagrees that the definitions in FMVSS No. 213 are too restrictive and therefore sees no reason to alter the definitional requirements at this time. Furthermore, because the agency does not believe that belt positioners offer the same level of occupant protection as age-appropriate child restraint systems, the agency is also denying Mr. Conaway's request to incorporate a new definition for belt positioning devices into FMVSS No. 213.

Authority: 49 U.S.C. 30162; delegations of authority at 49 CFR 1.50 and 49 CFR 501.8.

[11] *http://isearch.nhtsa.gov/files/Conawaylockingmechanism.html.*

[12] Submarining occurs when the pelvis becomes unrestrained by the lap belt portion of a safety belt assembly and then slides under the lap belt in a frontal impact. As a result, the belt is free to enter the abdominal cavity and cause injury to the unprotected internal organs and lumbar spine.

[13] Annals of Surgery, January 2004.

[14] Associated sled test data can be found along with this petition response in Docket # 2007–27027.

[15] In accords with that suggested in the August 31, 2005 NPRM, the Hybrid III–10C dummy was positioned in both an upright seating posture and a slouched posture to determine if posture has an effect on the performance of belts and belt positioning devices. This dummy has yet to be adopted into FMVSS No. 213.

[16] 2005 Traffic Safety Facts, NHTSA.

[17] Journal of American Medical Association, June 2003.

Issued on: December 11, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–29728 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–59–P

Notices

Federal Register

Vol. 73, No. 242

Tuesday, December 16, 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

Agricultural Marketing Service

[Docket No. FV–08–381]

Fruit and Vegetable Industry Advisory Committee

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: The purpose of this notice is to notify all interested parties that the Agricultural Marketing Service (AMS) will hold a Fruit and Vegetable Industry Advisory Committee (Committee) meeting that is open to the public. The U.S. Department of Agriculture (USDA) established the Committee to examine the full spectrum of issues faced by the fruit and vegetable industry and to provide suggestions and ideas to the Secretary of Agriculture on how USDA can tailor its programs to meet the fruit and vegetable industry's needs. This notice sets forth the schedule and location for the meeting.

DATES: Tuesday, February 24, 2009, from 8 a.m. to 5 p.m., and Wednesday, February 25, 2009, from 8 a.m. to 12 noon.

ADDRESSES: The first day of the Committee meeting will be held at the Crowne Plaza Hotel, 1480 Crystal Drive, Arlington, VA 22202, and the second day will be held at the USDA South Building, 1400 Independence Avenue, SW., Room 3501–S, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Andrew Hatch, Designated Federal Official, USDA, AMS, Fruit and Vegetable Programs. Telephone: (202) 690–0182. Facsimile: (202) 720–0016. E-mail: *andrew.hatch@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. App. II), the Secretary of Agriculture established the Committee in August 2001 to examine the full spectrum of issues faced by the fruit and vegetable industry and to provide suggestions and ideas to the Secretary on how USDA can tailor its programs to meet the fruit and vegetable industry's needs. The Committee was re-chartered in July 2003, June 2005 and again in May 2007 with new members appointed by USDA from industry nominations. This is the Committee's final meeting under the current 2-year charter.

AMS Deputy Administrator for Fruit and Vegetable Programs, Robert C. Keeney, serves as the Committee's Executive Secretary. Representatives from USDA mission areas and other government agencies affecting the fruit and vegetable industry will be called upon to participate in the Committee's meetings as determined by the Committee Chairperson. AMS is giving notice of the Committee meeting to the public so that they may attend and present their recommendations. Reference the date and address section of this announcement for the time and place of the meeting.

Topics of discussion at the Committee meeting will include: Perishable Agricultural Commodities Act license fees, labor and immigration legislation, the National Organic Program, and a review of products, including fresh-cut items, that USDA purchases for the National School Lunch Program and other domestic outlets. Additional agenda items can be expected.

Those parties that would like to speak at the meeting should register on or before February 6, 2009. To register as a speaker, please e-mail your name, affiliation, business address, e-mail address, and phone number to Mr. Andrew Hatch at: *andrew.hatch@usda.gov* or facsimile to (202) 720–0016. Speakers who have registered in advance receive priority. Groups and individuals may submit comments for the Committee's consideration to the same e-mail address. The meeting will be recorded, and information about obtaining a transcript will be provided at the meeting.

The Secretary of Agriculture selected a diverse group of members representing a broad spectrum of persons interested in providing suggestions and ideas on how USDA can tailor its programs to meet the fruit and vegetable industry's needs. Equal opportunity practices were considered in all appointments to the Committee in accordance with USDA policies.

If you require special accommodations, such as a sign language interpreter, please use the contact name listed above.

Dated: December 10, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–29657 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–LS–08–0101]

Notice of Opportunity To Participate in the Lamb Promotion, Research, and Information Program Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) is announcing that a referendum will be conducted under the Lamb Promotion, Research, and Information Order (Order) to determine whether those persons voting favor the continuance of the Order.

DATES: This referendum will be conducted during a 4-week period beginning on February 2, 2009, and ending on February 27, 2009. To be eligible to participate in the referendum, persons must certify and provide supporting documentation that shows they, or the entity they are authorized to represent, have been engaged in the production, feeding, or slaughter of lambs between January 1, 2008 and December 31, 2008.

Form LS–86, Lamb Promotion, Research, and Information Referendum, may be obtained by mail, fax, or in person from the Farm Service Agency (FSA) county offices from February 2, 2009 through February 27, 2009. Form LS–86 may also be obtained via the Internet at: *http://www.ams.usda.gov/LSMarketingPrograms* during the same time period. Completed forms and supporting documentation must be returned to the appropriate county FSA offices by fax or in person no later than close of business February 27, 2009, or if returned by mail must be postmarked

by midnight February 27, 2009, and received in the county FSA office by close of business on March 6, 2009.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch, on (202) 720–1115, fax (202) 720–1125, or by e-mail at *Kenneth.Payne@usda.gov* or Rick Pinkston, USDA, Farm Service Agency (FSA), Field Operations Staff, on (202) 720–1857, fax (202) 720–1096, or by e-mail on *rick.pinkston@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION: Pursuant to the Commodity Promotion, Research, and Information Act of 1996 (Act) (7 U.S.C. 7411–7425), it is hereby directed that a referendum be conducted to ascertain whether continuance of the Order is favored by those persons who have been engaged in the production, feeding, or slaughtering of lamb from January 1, 2008 through December 31, 2008. The Act requires that a referendum to ascertain approval of an Order must be conducted no later than 3 years after assessments first begin. Assessments began on July 1, 2002. A referendum of lamb producers, feeders, seedstock producers, and first handlers of lamb and lamb products was conducted from January 31, 2005 through February 28, 2005. A majority of the participants voted in favor of the continuation of the Order. The Act also requires a subsequent referendum on the Order be conducted no later than 7 years after assessments first begin. Thus, USDA is required to conduct a nationwide referendum among persons subject to the assessment by July 1, 2009. The Order will continue if a majority of those persons voting, who also represent a majority of the volume of lambs, vote in favor of continuing the program. If the continuation of the Order is not approved by eligible persons voting in the referendum, USDA will begin the process of terminating the program.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1, 2008 through December 31, 2008. Persons who were engaged in the production, feeding, or slaughtering of lambs and who provide documentation, such as a sales receipt or remittance form, showing that they were engaged in the production, feeding, or slaughter of lambs from January 1, 2008 through December 31, 2008 are eligible to vote.

Eligible voters will be provided the opportunity to vote at the county FSA office where FSA maintains and processes the eligible voter's administrative farm records. For the eligible voter not participating in FSA programs, the opportunity to vote will be provided at the FSA office serving the county where the person owns or rents land. Participation in the referendum is not mandatory.

Procedures used in conducting this referendum are set forth in 7 CFR part 1208, subpart E. A final rule amending this subpart is published in this issue of the **Federal Register**.

Pursuant to the Act, USDA is conducting the required referendum beginning February 2, 2009 through February 27, 2009.

Form LS–86 may be requested in person, by mail, or by facsimile from February 2, 2009 through February 27, 2009. Form LS–86 may also be obtained via the Internet at: *http://www.ams.usda.gov/LSMarketingPrograms* during the same 4-week period. Eligible voters would vote at the FSA office where FSA maintains and processes the person's, corporation's, or other entity's administrative farm records. For the person, corporation, or other entity eligible to vote that does not participate in FSA programs, the opportunity to vote would be provided at the FSA office serving the county where the person, corporation, or other entity owns or rents land.

Voters can determine the location of county FSA offices by contacting (1) The nearest FSA office, (2) the State FSA office, or (3) through an online search of FSA's Web site at: *http://www.fsa.usda.gov/pas/default.asp*. From the options available on this Web site select ''Your local office,'' click on your State, and click on the map to select a county.

Form LS–86 and supporting documentation may be returned in person, by mail, or facsimile to the appropriate county FSA office. Form LS–86, and accompanying documentation returned in person or by facsimile, must be received in the appropriate FSA office prior to the close of business on February 27, 2009. Form LS–86 and accompanying documentation returned by mail must be postmarked no later than midnight of February 27, 2009, and received in the county office by close of business on March 6, 2009.

In accordance with Paperwork Reduction Act (44 U.S.C. Chapter 35), the information collection requirements have been approved under OMB number 0581–0093.

Authority: 7 U.S.C. 7411–7425 and 7 U.S.C. 7401.

Dated: December 10, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–29693 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Finding of No Significant Impact on the Final Programmatic Environmental Assessment for 2008 Farm Bill Provisions Regarding the Conservation Reserve Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice; Finding of No Significant Impact.

SUMMARY: This notice announces that the Commodity Credit Corporation (CCC) has completed a Final Programmatic Environmental Assessment (PEA) and is issuing a Finding of No Significant Impact (FONSI) with respect to the implementation of changes to the Conservation Reserve Program (CRP) and changes to the Farmable Wetlands Program (FWP) authorized by the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). FWP operates as part of CRP.

DATES: We will consider comments that we receive by January 15, 2009.

ADDRESSES: We invite you to submit comments on this Final PEA. In your comments, include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *E-Mail: 2008crpfarmbill@geo-marine.com.*
- *Fax:* (202) 720–4619.
- *Mail:* 2008 Farm Bill PEA Comments, c/o Geo-marine Incorporated, 2713 Magruder Boulevard, Suite D, Hampton, Virginia 23666.
- *Hand Delivery or Courier:* Deliver comments to the above address.

Comments may be inspected in the Office of the Director, CEPD, FSA, USDA, 1400 Independence Ave., SW., Room 4709 South Building, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of the FONSI and Final PEA is available through the FSA home page at *http://www.fsa.usda.gov/FSA/webapp?*

area=home&subject=ecrc&topic=nep-cd.

FOR FURTHER INFORMATION CONTACT: Matthew Ponish, National Environmental Compliance Manager, USDA, FSA, CEPD, Stop 0513, 1400 Independence Ave., SW., Washington, DC 20250–0513, (202) 720–6853, or e-mail: *Matthew.Ponish@wdc.usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION: The Final PEA assesses the potential environmental impacts associated with implementing the mandatory changes to CRP (Proposed Action) required by sections 1604, 2106, and 2109 of the 2008 Farm Bill (Pub. L. 110–246) related to income limitations, FWP (a component of CRP), and cost-sharing provisions, respectively. FWP changes include the enrollment eligibility expansion to three new categories of land under FWP:

(1) Land on which a constructed wetland designed to provide nitrogen removal and other wetland functions is to be developed to receive flow from a row crop agricultural drainage system;

(2) Land that was devoted to commercial pond-raised aquaculture in any year during 2002 through 2007; and

(3) Land that, after January 1, 1990, and before December 31, 2002, was cropped during at least three of 10 years and was subject to the natural overflow of a prairie wetland.

In addition, the 2008 Farm Bill authorizes enrollment into CRP buffer land adjacent to a wetland that would enhance wildlife benefits, to the extent practicable in terms of upland to wetland ratios, as determined by the Secretary. The 2008 Farm Bill also changed provisions for income limitations and cost-sharing that apply to CRP as a whole. The new adjusted gross income limitation of $1 million applies to CRP; however, consistent with section 1001D of the 1985 Farm Bill, as amended by section 1604 of the 2008 Farm Bill, CCC may waive the average adjusted income limitation on a case-by-case basis to protect environmentally sensitive land of special significance.

The new cost sharing provisions relate to thinning of trees, windbreaks, shelterbelts, and wildlife corridors to improve resources on the land.

The final PEA analyzes the potential environmental impacts to CRP associated with implementing select provisions of the 2008 Farm Bill. FSA analyzed the No Action Alternative (continuation of CRP as currently implemented) as an environmental baseline.

The final PEA also provides a means for the public to voice any suggestions they may have about the program and any ideas for rulemaking. The final PEA can be reviewed online at: *http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ecrc&topic=nep-cd.*

The PEA was completed as required by NEPA, the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and FSA's policy and procedures (7 CFR part 799). Additional analysis under the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347) of potential impacts associated with certain implementation alternatives not included in the PEA may be conducted, as appropriate.

Determination

In consideration of the analysis documented in the Final PEA and the reasons outlined in the FONSI, the preferred alternative (Proposed Action) would not constitute a major State or Federal action that would significantly affect the human environment. In accordance with the NEPA, 40 CFR part 1502.4, ''Major Federal Actions Requiring the Preparation of Environmental Impact Statements,'' and 7 CFR Part 799, ''Environmental Quality and Related Environmental Concerns—Compliance with the National Environmental Policy Act,'' and implementing the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), I find that neither the proposed action nor any of the alternatives analyzed constitute a major Federal action significantly affecting the quality of the human environment. Therefore, no environmental impact statement will be prepared.

Signed in Washington, DC, on December 10, 2008.

Teresa C. Lasseter,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. E8–29654 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Apache-Sitgreaves National Forests; Arizona; Revised Land and Resource Management Plan

AGENCY: Forest Service, USDA.

ACTION: Notice of Initiation to revise the Apache-Sitgreaves National Forests' Land and Resource Management Plan.

SUMMARY: The Forest Service is revising the Apache-Sitgreaves National Forests' Land and Resource Management Plan (hereafter referred to as the forest plan). This notice describes the documents available for review and how to obtain them; summarizes the need to change the forest plan; provides information concerning public participation and collaboration, including the process for submitting comments; provides an estimated schedule for the planning process, including the time available for comments; and includes names and addresses for agency officials who can provide additional information.

DATES: Revision formally begins with the publication of this notice in the **Federal Register**. To be most beneficial to the planning process, your comments on the need for change should be submitted by February 16, 2009. A series of public meetings to build the proposed plan are tentatively planned for late spring 2009. The dates, times, and locations of these meetings will be posted on the forests' Web site: *http://www.fs.fed.us/r3/asnf/plan-revision/.*

ADDRESSES: Send written comments to: Apache-Sitgreaves National Forests, Attention: Forest Plan Revision Team, P.O. Box 640, Springerville, Arizona 85938. E-mail: *asnf.planning@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Michelle Davalos at (928) 333–6334 or Deryl Jevons at (928) 333–6261; or e-mail the plan revision team at: *asnf.planning@fs.fed.us.*

SUPPLEMENTARY INFORMATION:

Documents Available for Review

The Comprehensive Evaluation Report, the Ecological Sustainability Report, and the Economic and Social Assessment are the forest plan revision analyses documents that provide evaluations of social, economic, and ecological conditions and trends in and around the Apache-Sitgreaves National Forests. The information outlined in the Comprehensive Evaluation Report identifies the need to change or revise the 1987 forest plan. These documents are available for review and are located on the forests' Web site at *http://www.fs.fed.us/r3/asnf/plan-revision/documents.shtml* or by request.

Need for Change

The need for change has been organized into three revision topics: 1. Maintenance and Improvement of Ecosystem Health, 2. Managed Recreation, and 3. Community-Forest

Interaction. For each of the revision topics, there is a need for the revised forest plan to:

1. Maintenance and Improvement of Ecosystem Health

- Adequately describe desired conditions for the vegetative communities regarding: composition, structure, and cover; resilient, functioning ecosystems; fire regimes; and plant and animal diversity.
- Provide direction regarding invasive species.
- Address the emerging issue of climate change by incorporating adaptive management strategies and describing ecological conditions that are resilient to change.

2. Managed Recreation

- Update the spectrum of recreation opportunities and the suitability of areas for motorized vehicle use.
- Incorporate direction for existing special areas that were not included in the current forest plan.
- Identify rivers that are eligible for the National Wild and Scenic Rivers System.
- Evaluate lands for wilderness potential and, if appropriate, recommend designation by Congress.

3. Community-Forest Interaction

- Reduce the risk to communities and natural resources from wildfire and provide guidance for addressing urban interface demands (access, trailheads, special use permits).
- Address community expansion needs, preservation of open space, and water during land ownership adjustments.
- Address a sustainable supply of forest and rangeland resources that is consistent with achieving desired conditions and that supports local communities.
- Update the criteria for establishing new energy (utility) corridors.

(Reference: Comprehensive Evaluation Report.)

Public Participation and Opportunity To Comment

The revision process is designed to provide continued opportunities for public collaboration and open participation in the development of the revised forest plan. Additional information on the process, the documents being produced, and public participation opportunities can be found on the Apache-Sitgreaves National Forests' plan revision Web site at: *http://www.fs.fed.us/r3/asnf/plan-revision/.*

The Forest Service is seeking public comments on the need for change identified in the Comprehensive Evaluation Report. Substantive comments received by February 16, 2009 will be of the most value in evaluating public response to the adequacy of the need for change topics outlined in the report.

It is important to participate in the plan revision process as only those parties who participate following the publication of this notice through the submission of written comments can submit an objection later in the proposed plan development process pursuant to 36 CFR 219.13(a). Comments received during the planning process, including the names and addresses of those who commented will be part of the public record available for public inspection. The Responsible Official shall accept and consider comments submitted anonymously. Submit written comments to the address noted above.

Estimated Planning Process Schedule

The revision process for the Apache-Sitgreaves National Forests officially begins with the publication of this notice in the **Federal Register**. A series of public meetings to begin building the revised plan is tentatively planned for late spring 2009. The dates, times, and locations of these meetings will be posted on the forests' Web site: *http://www.fs.fed.us/r3/asnf/plan-revision/.* A draft proposed forest plan is currently scheduled to be issued for pre-decisional review in September 2009 and final plan approval in September 2010.

Responsible Official

The Forest Supervisor, Chris Knopp, is the Responsible Official (36 CFR 219.2(b)(1)).

(Authority: 36 CFR 219.9(b)(2)(i), 73 FR 21509, April 21, 2008)

Dated: December 8, 2008.

Chris Knopp,

Forest Supervisor.

[FR Doc. E8–29729 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Proposed Forest Plan Amendment for the Palomar Gasline Transmission Project; Mt. Hood National Forest; Oregon

AGENCY: Forest Service, USDA.

ACTION: Revised Notice of intent to prepare a forest plan amendment.

SUMMARY: On November 24, 2008 the USDA Forest Service, Mt. Hood National Forest published a Notice of Intent in the **Federal Register** (73 FR 70956) to prepare a forest plan amendment for the proposed Palomar Gasline Transmission Project (PGT). The Notice of Intent is being revised to extend the end of the scoping comment period from January 9, 2009 to February 4, 2009.

FOR FURTHER INFORMATION CONTACT: Mike Redmond, Environmental Coordinator, Mt. Hood National Forest, 16400 Champion Way, Sandy OR 97055 or by e-mailing *mredmond@fs.fed.us* or by calling (503) 668–1776.

Dated: December 8, 2008.

Kathryn J. Silverman,

Deputy Forest Supervisor, Mt. Hood National Forest.

[FR Doc. E8–29640 Filed 12–15–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596-AC39

Travel Management Directives; Forest Service Manual 2350, 7700, and 7710 and Forest Service Handbook 7709.55

Correction

In notice document E8–29041 beginning on page 74689 in the issue of Tuesday, December 9, 2008, make the following correction:

On page 74689, in the first column, in the **DATES** paragraph, in the second line, ''January 7, 2009'' should read ''January 8, 2009''.

[FR Doc. Z8–29041 Filed 12–15–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Manufacturers' Shipments, Inventories, and Orders (M3) Survey

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995,

Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before February 17, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Chris Savage, U.S. Census Bureau, Manufacturing and Construction Division, 4600 Silver Hill Rd., Room 7K071, Washington, DC 20233–6913, (301) 763–4834 or via the Internet at *john.c.savage@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to request an extension of the current Office of Management and Budget (OMB) clearance of the Manufacturers' Shipments, Inventories and Orders (M3) survey. The Manufacturers' Shipments, Inventories, and Orders (M3) survey requests data from domestic manufacturers on form M–3 (SD), which will be mailed at the end of each month. Data requested are shipments, new orders, unfilled orders, total inventory, materials and supplies, work-in-process, and finished goods. It is currently the only survey that provides broad-based monthly statistical data on the economic conditions in the domestic manufacturing sector.

The M3 survey is designed to measure current industrial activity and to provide an indication of future production commitments. The value of shipments measures the value of goods delivered during the month by domestic manufacturers. Estimates of new orders serve as an indicator of future production commitments and represent the current sales value of new orders received during the month, net of cancellations. Substantial accumulation or depletion of unfilled orders measures excess or deficient demand for manufactured products. The level of inventories, especially in relation to shipments, is frequently used to monitor the business cycle.

We do not plan any changes to the M–3 (SD) form. The estimated total annual burden hours have increased from 16,800 to 17,200 due to an increase in the number of respondents.

II. Method of Collection

Respondents submit data on form M–3 (SD) via mail, facsimile machine, Touchtone Data Entry (TDE), or via the Internet. Analysts call respondents who usually report, to obtain data in time for preparing the monthly estimates.

III. Data

OMB Control Number: 0607–0008.
Form Number: M–3 (SD).
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 4,300.
Estimated Time per Response: 20 minutes.
Estimated Total Annual Burden Hours: 17,200.
Estimated Total Annual Cost: $424,324.
Respondent's Obligation: Voluntary.
Legal Authority: Title 13 U.S.C. Sections 131 and 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 10, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–29734 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 0811251517–81520–01]

Annual Surveys in the Manufacturing Area

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of determination.

SUMMARY: The Bureau of the Census (Census Bureau) is conducting the 2008 Annual Surveys in the Manufacturing Area. The 2008 Annual Surveys consist of the Current Industrial Reports surveys, the Annual Survey of Manufactures, and the Business Research and Development (R&D) and Innovation Survey. We have determined that annual data collected from these surveys are needed to aid the efficient performance of essential governmental functions and have significant application to the needs of the public and industry. The data derived from these surveys, most of which have been conducted for many years, are not publicly available from non-governmental or other governmental sources.

ADDRESSES: The Census Bureau will furnish report forms to organizations included in each survey. Additional copies of the surveys are available upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

FOR FURTHER INFORMATION CONTACT: Thomas E. Zabelsky, Chief, Manufacturing and Construction Division, on (301) 763–4598.

SUPPLEMENTARY INFORMATION: The Census Bureau is authorized to conduct mandatory surveys necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code (U.S.C.), Sections 61, 81, 131, 182, 193, 224, and 225.

These surveys will provide continuing and timely national statistical data on manufacturing for the period between economic censuses. The data collected in the surveys will be within the general scope and nature of those inquiries covered in the economic censuses. The next economic censuses will be conducted for the year 2012.

Current Industrial Reports

Most of the following commodity or product surveys provide data on shipments or production, stocks, unfilled orders, orders booked, consumption, and so forth. Reports will be required of all, or a sample of, establishments engaged in the production of the items covered by the following list of surveys:

SURVEY TITLE	
MA311D	Confectionery
MA314Q	Carpets and Rugs
MA321T	Lumber Production and Mill Stocks
MA325F	Paint and Allied Products

SURVEY TITLE—Continued

MA325G	Pharmaceutical Preparations, except Biologicals
MA327C	Refractories
MA327E	Consumer, Scientific, Technical, and Industrial Glassware
MA331B	Steel Mill Products
MA332Q	Antifriction Bearings
MA333A	Farm Machinery and Lawn and Garden Equipment
MA333D	Construction Machinery
MA333F	Mining Machinery and Mineral Processing Equipment
MA333M	Air-conditioning and Refrigeration
MA333N	Fluid Power Products for Motion Control (Including Aerospace)
MA333P	Pumps and Compressors
MA334A	Electromedical Equipment and Analytical Instruments
MA334C	Control Instruments
MA334D	Defense, Navigational, and Aerospace Electronics
MA334M	Consumer Electronics
MA334Q	Semiconductors, Printed Circuit Boards, and other Electronic Components
MA334T	Meters and Test Devices
MA335E	Electric Housewares and Fans
MA335F	Major Household Appliances
MA335J	Insulated Wire and Cable
MA335K	Wiring Devices and Supplies
MA336G	Aerospace Industries (Orders, Sales, and Backlog)

The following list of surveys represents annual counterparts of monthly and quarterly surveys, and will cover only those establishments that are not canvassed, or do not report, in the more frequent surveys. Accordingly, there will be no duplication in reporting. The content of these annual reports (listed below) will be identical with that of the monthly and quarterly reports:

SURVEY TITLE

M311C ...	Corn (Wet & Dry Producers of Ethanol)
M311H ...	Fats and Oils (Warehouse)
M311J	Oilseeds, Beans, and Nuts (Primary Producers)
M311L	Fats and Oils (Renderers)
M311M ...	Fats and Oils (Consumers)
M311N ...	Fats and Oils (Producers)
M313P ...	Consumption on the Cotton System and Stocks
M313N ...	Cotton and Raw Linters in Public Storage
M327G ...	Glass Containers
M336G ...	Civil Aircraft and Aircraft Engines
MQ311A	Flour Milling Products
MQ313A	Textiles
MQ315A	Apparel
MQ315B	Socks
MQ325A	Inorganic Chemicals
MQ325B	Fertilizer Materials
MQ325F	Paint, Varnish, and Lacquer
MQ327D	Clay Construction Products
MQ333W	Metalworking Machinery
MQ334P	Telecommunications

SURVEY TITLE—Continued

MQ334R	Computers and Peripheral Equipment

Annual Survey of Manufactures

The Annual Survey of Manufactures collects industry statistics, such as total value of shipments, employment, payroll, workers' hours, capital expenditures, cost of materials consumed, supplemental labor costs, and so forth. This survey, conducted on a sample basis, covers all manufacturing industries, including data on plants under construction but not yet in operation.

Business R&D and Innovation Survey

The Business R&D and Innovation Survey (BRDIS) measures spending on research and development activities in U.S. businesses. This survey replaces the Survey of Industrial Research and Development that has been collected since the 1950's. The BRDIS will collect global as well as domestic spending information, more detailed information about the R&D workforce, and information regarding innovation and intellectual property from U.S. businesses. The Census Bureau collects and compiles this information in accordance with a joint project agreement between the National Science Foundation (NSF) and the Census Bureau. The NSF publishes the results in its publication series. All data items are collected on a mandatory basis under the authority of Title 13, U.S.C.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a current, valid Office of Management and Budget (OMB) control number. In accordance with the PRA, 44 U.S.C., Chapter 35, the OMB approved the 2008 Annual Surveys under the following OMB control numbers: Current Industrial Reports—0607–0476; Annual Survey of Manufactures—-0607–0449; and Business R&D and Innovation Survey—0607–0912.

Based upon the foregoing, I have directed that the Annual Surveys in the Manufacturing Area be conducted for the purpose of collecting these data.

Dated: December 10, 2008.

Steve H. Murdock,

Director, Bureau of the Census.

[FR Doc. E8–29687 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–469–814)

Chlorinated Isocyanurates from Spain: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 16, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

On July 10, 2008, the Department of Commerce (''the Department'') published the preliminary results of the antidumping duty administrative review of chlorinated isocyanurates from Spain, covering the period June 1, 2006, through May 31, 2007. *See Chlorinated Isocyanurates from Spain: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 39650 (July 10, 2008). On November 10, 2008, the Department extended the due date for this administrative review by 33 days, until December 10, 2008. *See Chlorinated Isocyanurates from Spain: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 73 FR 66594 (November 10, 2008).

Extension of Time Limits for Final Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''Act''), and 19 CFR 351.213(h)(1), the Department shall issue the final results of an administrative review within 120 days after the date on which the notice of the preliminary results was published in the **Federal Register**. See section 751(a)(3)(A) of the Act and19 CFR 351.213(h)(1). However, if the Department determines that it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) allow the Department to extend the 120-day period to 180 days.

The Department finds that it is not practicable to complete the review within the current deadline due to further analysis that is required in this case. In particular, the Department

needs additional time to examine the parties' arguments regarding Aragonesas Industrias y Energia S.A.'s reported levels of trade. Therefore, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), the Department is extending the deadline for the final results of review, by an additional eight days, to 161 days from the date on which the notice of the preliminary results was published. The final results will now be due no later than December 18, 2008.

This notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: December 10, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–29774 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–832

Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 9, 2008, the Department published its preliminary results in the antidumping duty administrative review of pure magnesium from the PRC.[1] The period of review (''POR'') for the administrative review is May 1, 2006, through April 30, 2007. We have determined that both mandatory respondents, Shanxi Datuhe Coke & Chemicals, Co., Ltd. (''Datuhe'') and Tianjin Magnesium International Co., Ltd.(''TMI''), made sales in the United States at prices below normal value (''NV''). There are no other respondents covered by this review. We invited interested parties to comment on our preliminary results in this review. Based on our analysis of the comments we received in the administrative review, we made certain changes to our calculations for both mandatory respondents. The final dumping margins for this review are listed in the ''Final Results Margins'' section below.

EFFECTIVE DATE: December 16, 2008.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Katharine Huang, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4243 or (202) 482–1271, respectively.

Background

The Department published its preliminary results on June 9, 2008.[2] We invited parties to comment on the *Preliminary Results*. We received comments from Petitioner[3], Datuhe and TMI. Interested parties submitted case and rebuttal briefs on July 17 and July 23, 2008, respectively. On September 29, 2008, the Department extended the deadline for the final results of review to December 8, 2008.[4] We held a hearing on October 30, 2008, in which all interested parties participated. We issued a supplemental questionnaire to TMI on November 17, 2008, requesting that it document the amount of by–products sold as reported in its section D response. TMI responded to the Department's request on November 20, 2008. On November 26, 2008, Petitioner provided comments on TMI's November 20, 2008, submission.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this review are addressed in the memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to David M. Spooner, Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review and New Shipper Review of Pure Magnesium from the People's Republic of China,'' dated December 8, 2008, which is hereby adopted by this notice (''Issues and Decision Memorandum''). A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit (''CRU''), Main Commerce Building, Room 1117, and is accessible on the Web at http://ia.ita.doc.gov/frn/. The paper copy and electronic version of the memorandum are identical in content.

Period of Review

The POR is May 1, 2006, through April 30, 2007.

Scope of the Order

Merchandise covered by this order is pure magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of this order. Pure magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure magnesium is used as an input in producing magnesium alloy. Pure magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents: (1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as ''ultra pure'' magnesium); (2) Products that contain less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as ''pure'' magnesium); and (3) Products that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium (generally referred to as ''off–specification pure'' magnesium).

''Off-specification pure'' magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8% by weight. It generally does not contain, individually or in combination, 1.5% or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.

Excluded from the scope of this order are alloy primary magnesium (that meets specifications for alloy magnesium), primary magnesium anodes, granular primary magnesium (including turnings, chips and powder) having a maximum physical dimension (*i.e.*, length or diameter) of one inch or less, secondary magnesium (which has pure primary magnesium content of less than 50% by weight), and remelted magnesium whose pure primary magnesium content is less than 50% by weight.

Pure magnesium products covered by this order are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings

[1] *See Pure Magnesium from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 32549 (June 9, 2008) (''*Preliminary Results*'').

[2] *See Preliminary Results.*

[3] United States Magnesium LLC.

[4] *See Pure Magnesium From the People's Republic of China: Extension of Time for the Final Results of the Antidumping Duty Administrative Review*, 73 FR 56553 (September 29, 2008).

8104.11.00, 8104.19.00, 8104.20.00, 8104.30.00, 8104.90.00, 3824.90.11, 3824.90.19 and 9817.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Surrogate Country

In the *Preliminary Results*, we stated that we selected India as the appropriate surrogate country to use in this review for the following reasons: (1) it is a significant producer of comparable merchandise; (2) it is at a similar level of economic development comparable to that of the PRC; and (3) we have reliable data from India that we can use to value the factors of production.[5] For the final determination, we received no comments and made no changes to our findings with respect to the selection of a surrogate country.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes in the margin calculations. For the final results, the Department has made the following changes:

General Issues

Calculation of Surrogate Financial Ratios

- We determined the surrogate financial ratios using only the financial statements of Madras Aluminium Company Limited (''MALCO'').

Recalculation of Surrogate Values

- We based the surrogate value for dolomite on the average purchase price for dolomite reflected in the financial statements for Tata Steel Ltd. and Tata Sponge Iron Limited as of March 31, 2007.
- We valued TMI's magnesium scrap using the HTS 8104.11.00, for material unwrought containing 99.8 percent magnesium.
- We multiplied the value of truck freight by one thousand to express the freight rates in metric tons.
- We based the surrogate value for magnesium chloride and flux no. 2 on the values reported for magnesium chloride, potassium chloride and sodium chloride in *Chemical Weekly*.
- We continued to use the Heat Content percentage methodology. However, we calculated a ratio using the heat value Datuhe reported for its coal gas and the heat value of natural gas derived from the Ministry of Petroleum and Natural Gas of the Indian Government, and applied this ratio to the natural gas value derived from the World Trade Atlas Thailand import statistics as the surrogate value for the coal gas.

Company–Specific Issues

Datuhe

- For the *Preliminary* Results, we granted Datuhe a by–product offset in full. For the final results, we granted Datuhe a by–product offset for magnesium residue sales substantiated by the sales receipts it provided.

TMI

- We revised our calculation of NV to include a by–product offset for TMI.

Final Results Margins

We determine that the following weighted–average percentage margins exist for the POR:

PURE MAGNESIUM FROM THE PRC

Exporter	Weighted–Average Margin (Percent)
Datuhe	111.73%
TMI	0.63%
PRC–Wide	108.26%

Assessment Rates

The Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. For customers/importers of the respondents for whom we do not have entered value, we have calculated customer/importer–specific antidumping duty assessment amounts based on the ratio of the total amount of antidumping duties calculated for the examined sales of subject merchandise to the total quantity of subject merchandise sold in those transactions. For customers/importers of the respondents that reported entered value, we have calculated customer–specific antidumping duty assessment amounts based on customer/importer–specific *ad valorem* rates in accordance with 19 CFR 351.212(b)(1). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of administrative review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: 1) for the exporters listed above, the cash deposit rate will be the rates shown for those companies; 2) for previously investigated or reviewed PRC and non–PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; 3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 108.26 percent; and 4) for all non–PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non–PRC exporter. These deposit requirements shall remain in effect until further notice.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing these final results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[5] *See Preliminary Results.*

Dated: December 8, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix I

List of Issues

Surrogate Values

Comment 1: Dolomite
Comment 2: Magnesium Chloride and Flux No. 2
Comment 3: Magnesium Scrap
Comment 4: Coal Gas
Comment 5: Truck Freight

Surrogate Financial Statements

Comment 6: Surrogate Financial Statements
A. Sterlite
B. MALCO
C. HINDALCO and NALCO
D. Zinc, Copper, Brass and Ferro–Alloys as Comparable Products
E. Zinc Producers: Binani, Hindustan Zinc and Rose Zinc
F. Extruded Aluminum and Downstream Copper–Products Producers
Comment 7: Calculation Issues with Respect to Surrogate Financial Statements
A. Investment Income for MALCO
B. The Valuation of Self–Generated Electrical Power for MALCO
C. The Deduction of Interest Income from Interest expense for MALCO
D. Interest Income Offset for HINDALCO and NALCO

Company Specific Issues

Comment 8: By–Product Offset for Datuhe
Comment 9: By–Product Offset for TMI
Comment 10: Combination Rate for TMI

[FR Doc. E8–29775 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of Inventions Available for Licensing.

SUMMARY: The inventions listed below are owned in whole or part by the U.S. Government, as represented by the Secretary of Commerce. The U.S. Government's interest in these inventions is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR Part 404 to achieve expeditious commercialization of results of federally funded research and development.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on these inventions may be obtained by writing to: National Institute of Standards and Technology, Office of Technology Partnerships, *Attn:* Mary Clague, Building 222, Room A240, Gaithersburg, MD 20899. Information is also available via telephone: 301–975–4188, fax 301–975–3482, or *e-mail: mary.clague@nist.gov.* Any request for information should include the NIST Docket number and title for the invention as indicated below.

SUPPLEMENTARY INFORMATION: NIST may enter into a Cooperative Research and Development Agreement (''CRADA'') with the licensee to perform further research on the inventions for purposes of commercialization. The inventions available for licensing are:

[*Nist Docket Number:* 07–016].

Title: Far Ultraviolet Dosimeter for Slow Neutron Detection.

Abstract: This invention is jointly owned by the Department of Commerce and University of Maryland. The invention consists of a method for detecting slow neutrons by monitoring Lyman alpha radiation produced by the n(^{3}He,t)p nuclear reaction induced by neutrons incident on a gas cell containing ^{3}He or a mixture of ^{3}He and ^{4}He.

[*Nist Docket Number:* 07–017].

Title: Compact Atomic Magnetometer and Gyroscope Based on a Diverging Laser Beam.

Abstract: This invention is jointly owned by the Department of Commerce, the Defense Advanced Research Projects Agency, the University of California, Protiro, Inc., and Honeywell. A design for an atomic magnetometer that simultaneously achieves high sensitivity, simple fabrication and small size is described. This design is based on a diverging (or converging) beam of light (in a single spatial optical mode) that passes through an alkali atom vapor cell and that contains a distribution of beam propagation vectors. The existence of more than one propagation direction permits longitudinal optical pumping of the atomic system and simultaneous detection of the transverse atomic polarization. The design could be implemented with a micromachined alkali vapor cell and light from a single semiconductor laser. A small modification to the cell contents and excitation geometry allows for use as a gyroscope.

[*Nist Docket Number:* 07–021].

Title: Simple Matrix Method for Stray-Light Correction in Imaging Instruments.

Abstract: This method uses stray light correction matrix derived from point spread functions (PSF) of an instrument. The correction of stray light errors is simply a matrix multiplication to the measured raw image. The correction is fast and can be used for correction of stray light errors in any types of measured images.

[*Nist Docket Number:* 07–022]

Title: Covalently Immobilized Fluorinated Carboxylic Acid Stationary Phases for Liquid Chromatography.

Abstract: This invention relates to stationary phases for liquid chromatography, and more particularly, to fluorinated stationary phases for improved separation of constituents in the mobile phase and methods of making.

[*Nist Docket Number:* 07–025].

Title: Doubling the Service Life of Concrete—Reducing Diffusion Rates via Modification of the Hydrodynamic Friction of the Pore Solution.

Abstract: The invention consists of a unique method to reduce diffusion rates in concrete by increasing the hydrodynamic friction on ionic species in the concrete pore solution. This novel approach involves changing the properties of the pore solution, rather than the microstructure. Conventionally, diffusion rates for concrete structures have been reduced by densifying the cement paste matrix component of the concrete via a reduction in water-to-cement ratio and/or the addition of fine pozzolanic materials such as silica fume and/or fly ash. Still, in every case, the pathways for diffusion are through the interconnected pore solution that saturates the porosity at all scales. By appropriately increasing the hydrodynamic friction, the diffusion rates of all ionic species (sulfates, chlorides, alkalis) can be reduced. Theory indicates that these diffusion rates will be inversely proportional to the solution's hydrodynamic friction coeffcient, so that doubling the hydrodynamic friction will reduce the diffusion coeffcients by a factor of two, which in turn should lead to a doubling of the service life for many degradation modes (sulfate attack, corrosion, etc.).

[*Nist Docket Number:* 07–027].

Title: Harvesting of Processed Carbon Nanotubes.

Abstract: This invention is jointly owned by the Department of Commerce and the University of Maryland. The invention provides a cost-effective, multi-step, scalable process employing grit shearing to remove the amorphous carbon shell and external catalyst contaminant from carbon nanotubes, separate bundles of nanotubes, and shorten the tubes.

Dated: December 8, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–29746 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Technology Innovation Program (TIP) Seeks White Papers

AGENCY: National Institute of Standards and Technology (NIST), Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology's (NIST) Technology Innovation Program (TIP) announces that it is seeking white papers from any interested party, including academia; federal, state, and local governments; industry; national laboratories; and professional organizations/societies. White papers will be used to identify and select areas of critical national need to be addressed in future TIP competitions.

DATES: The due dates for submission of white papers are January 15, 2009, March 9, 2009, May 11, 2009, and July 13, 2009.

ADDRESSES: White papers must be submitted to TIP as follows:

Paper submission: Send to National Institute of Standards and Technology, Technology Innovation Program, 100 Bureau Drive, Stop 4750, Gaithersburg, MD 20899–4750. Attention: Critical National Needs Ideas.

Electronic (e-mail) submission: tipwhitepaper@nist.gov.

FOR FURTHER INFORMATION CONTACT: Thomas Wiggins at 301–975–5416 or by e-mail at *thomas.wiggins@nist.gov.*

SUPPLEMENTARY INFORMATION:

Background Information. The Technology Innovation Program (TIP) at the National Institute of Standards and Technology (NIST) was established for the purpose of assisting U.S. businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutions, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of Critical National Need. The TIP statutory authority is Section 3012 of the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act, Pub. L. 110–69 (August 9, 2007), 15 U.S.C.A. 278n (2008). The TIP implementing regulations are published at 15 CFR Part 296 (73 FR 35913 (June 25, 2008)).

TIP holds competitions for funding based on areas of critical national need. TIP identifies and selects topics for areas of critical national need based on input from within NIST, the TIP Advisory Board, the science and technology communities, and from the public. TIP is interested in receiving input on the identification and definition of problems that are sufficiently large in magnitude that they have the potential to inhibit the growth and well-being of our nation today. This announcement explains the requirements and process for submitting white papers to TIP by interested parties. White papers from experts in our sister federal agencies are welcomed and also valuable, and will enable TIP to complement the efforts of other mission agencies and avoid duplication of their efforts, as well as leverage resources to benefit the nation.

The key concepts, enumerated below, are the foundation of TIP and should form the basis of an effective white paper:

a. An *area of critical national need* means an area that justifies government attention because the magnitude of the problem is large and the associated societal challenges that need to be overcome are not being addressed, but could be addressed through high-risk, high-reward research.

b. A *societal challenge* is a problem or issue confronted by society that when not addressed could negatively affect the overall function and quality of life of the Nation, and as such, justifies government action. A societal challenge is associated with barriers preventing the successful development of solutions to the area of critical national need. TIP's mission is to tackle the technical issues that can be addressed through high-risk, high-reward research. The results of the high-risk, high-reward research should have the potential for transformational results.

c. A *transformational result* is a potential project outcome that enables disruptive changes over and above current methods and strategies. Transformational results have the potential to radically improve our understanding of systems and technologies, challenging the status quo of research approaches and applications.

The white papers are expected to contain: A description of an area of critical national need and the associated societal challenge(s) (what is the problem, why is it a problem, and why is it challenging), why government support is needed, and what could happen if that support is not provided in the proposed timeframe, and a high level discussion of potential technical solutions and an indication of the types of entities or groups who might be interested in developing proposal submissions to fund these solutions. Do not include ideas for specific proposals in the white paper.

White papers must not contain proprietary information.

Information contained in these white papers will be considered and combined with information from other resources—including the vision of the Administration, NIST, other government agencies, technical communities, the TIP Advisory Board, and other stakeholders—to select the scope of future competitions and to shape TIP's collaborative outreach. White papers are a valuable resource that adds to TIP's understanding of the significance and scope of critical national needs and associated societal challenges.

For detailed instructions on how to prepare and submit white papers, refer to ''*A Guide for Preparing and Submitting White Papers on Areas of Critical National Need.*'' The *Guide* is available on the TIP Web site at *http://www.nist.gov/tip/guide_for_white_papers.pdf.*

In this call for white papers, TIP is seeking information in all areas of critical national need, but also seeks information to assist TIP in further defining several topic areas under development. White papers that address any of the following areas may further develop the definition and scope of the critical national need suggested by these topic areas, and should additionally identify and explain specific societal challenges within these critical national need areas that require a technical solution. White papers may discuss any critical national need area of interest to the submitter, or may address any of the following topic areas:

Civil Infrastructure: Civil infrastructure constitutes the basic fabric of the world in which we live and work. It is the combination of fundamental systems that support a community, region, or country. The civil infrastructure includes systems for transportation (airport facilities, roads, bridges, rail, waterway locks); and systems for water distribution and flood control (water distribution systems, storm and waste water collection, dams, and levees). New construction approaches and materials to improve the infrastructure and for mitigating the expense of repairing or replacing existing infrastructure appear to be areas with the potential for specific societal

challenges within this area of critical national need.

Examples could include challenges such as: advanced materials for repair and rehabilitation of existing infrastructure, advanced inspection and monitoring technologies that assist public safety officials in determining the condition of structures, or areas of sustainability of infrastructure construction.

Complex networks and complex systems: Society is increasingly dependent on complex networks like those used for energy delivery, telecommunication, transportation, and finance over which we have very imperfect control. No single organization and no collection of organizations have the ability to effectively control these multi-scale, distributed, highly interactive networks. Complex network theory will also be important in modeling neural systems, molecular physiological response to disease, and environmental systems. The current technical and mathematical methodologies that underpin our ability to simulate and model physical systems are unable to predict and control the behavior of complex systems. Stability and control of these networks can have far reaching consequences to our quality of life.

Examples could include challenges such as: theoretical advances and/or proof-of-concept applications; or capabilities that can potentially address and advance the use of complex network analyses in the following areas—sustainable manufacturing models, resource management and environmental impacts (energy, water, agriculture), intelligent transportation systems, biological systems, communications networks, security systems, personalized healthcare, and others.

Energy: From agriculture to manufacturing, all endeavors require energy as input. Escalating energy demands throughout the world can lead to national security challenges, financially challenge national economies, and contribute to environmental alterations. Although heavily supported projects exist in energy research, there remain technical roadblocks that affect full deployment of new and emerging energy technologies.

Examples could include challenges such as: technologies for improved manufacturing of critical components for alternative energy production; replacement of fossil-fuel derived fuels with non-food, renewably produced fuels; or improved technologies for stable connections of many power sources to the electrical grid.

Ensuring Future Water Supply: As the Nation's population and economy grow, greater demands are being placed on freshwater resources. At the same time, temporary or permanent drought conditions and water access rights affect regional freshwater availability. Water needs threaten to outstrip available freshwater, now and in the future. Water quality, both in terms of decontamination and disinfection of water supplies, is also being pressured by emerging contaminants that must either be removed from distributed water or converted to harmless forms of waste. Food contaminations are often traced back to water contaminations, either in the field or in processing. Municipal waste streams and irrigation runoff waste resources that are not recovered.

Examples could include challenges such as: means to provide future fresh water supplies without undue consumption of energy resources; means that determine and assure the safety of water and food from waterborne contamination; or means to economically recover resources from wastewater streams and lower the energy cost of producing freshwater and potable water from marginalized water resources.

Manufacturing: Manufacturing is a vital part of our nation's economy, which now is facing increasing global competitiveness challenges, regulations and controls over environmental and resource issues, and other economic pressures. Technical advances have at times been able to address productivity and other issues, but the recent pressures on the manufacturing community have hindered their ability to focus the necessary resources on longer term solutions that could lead to economic growth in this sector which the nation needs.

Examples could include challenges such as: manufacturing systems that have shorter innovation cycles, more flexibility, and are rapidly reconfigurable; accelerating commodization of next generation, high-performance materials, such as nanomaterials, composites, and alloys to specification, in a consistent, efficient and effective manner; or life cycle assessment tools, an aid toward sustainable manufacturing; and better robotics solutions.

Nanomaterials/nanotechnology: The unique properties of nanomaterials provide extraordinary promise. There is a need for greater understanding and solutions to overcome the barriers associated with manufacturing nanomaterials and their incorporation into products, while maintaining the unique functionality of the nanomaterial. Although many processes are achievable in the laboratory, the scale-up to industrial production without compromising the quality of the produced material can be highly problematic.

Examples could include challenges such as: methods required for manufacturing nanomaterials with pre-specified functionality and morphology; methods for inspection and real-time monitoring the processing of nanomaterials; or methods for incorporation of nanomaterial into products without compromising the material's required properties.

Personalized Medicine: Healthcare spending per capita in the United States is high and rising and currently approved drugs work only in a fraction of the population. Doctors are unable to select optimal drug treatments and dosages based on the patient's unique genetics, physiology, and metabolic processes, resulting in a trial and error component in treatment. As a consequence, significant expenditures go for drugs that are ineffective on subsets of patients, and a clearer understanding of which patients may suffer side effects from prescribed medicine is lacking. The key to patient response lies in greater understanding of both genetic variability and environmental influences on disease mechanisms.

Examples could include challenges such as: cost effective advanced tools and techniques for genomics and proteomics research that provide greater understanding of complex biological systems, biomarker identification, and targeted drug and vaccine delivery systems; improved and low cost diagnostic and therapeutic systems; or better methods of integration and analysis of biological data, especially when combined with environmental and patient history data.

Sustainable Chemistry: The products and processes created through chemical transformations underpin virtually every facet of our economy today, from healthcare to materials to energy. Many industrial-scale chemical processes, however, can have significant negative impacts on the environment that require costly waste prevention controls. These chemical processes also can pose safety risks to human health that might be mitigated through new chemicals. In addition, many processes are highly energy intensive which contributes to increasing costs. Sustainable chemistry seeks to lessen such impacts by the use of safer materials in chemical processes, by substitution of new products with similar properties to existing products,

and by reducing the energy intensity of the unit operations within the chemical manufacturing industry.

Examples could include challenges such as: novel, advanced process chemistries and technologies that are inherently safer and cleaner, while creating products and processes with attributes superior to conventional methods; advanced chemical separations; and energy and material efficient technologies for chemical processing.

Dated: December 11, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–29745 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Cordell Bank National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applicants for the following vacant seats on the Cordell Bank National Marine Sanctuary Advisory Council (Council): Conservation Alternate and Primary, Maritime Activities Alternate and Primary. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve 2–3 year terms, pursuant to the Council's Charter.

DATES: Applications are due by January 30th, 2009.

ADDRESSES: Application kits may be obtained on the Cordell Bank Web site at: *http://cordellbank.noaa.gov,* and from Cordell Bank National Marine Sanctuary, Rowena Forest, P.O. Box 159, Olema, CA 94950. Completed applications should be sent to the above mailing address or faxed to (415) 663–0315.

FOR FURTHER INFORMATION CONTACT: Rowena Forest/CBNMS, *Rowena.forest@noaa.gov,* P.O. Box 159 Olema, CA 94950, (415) 663–0314 x105.

SUPPLEMENTARY INFORMATION: NOAA established the Advisory Council for Cordell Bank in 2002. The Council has members representing education, research, conservation, maritime activity, and community-at-large. The government seats are held by representatives from the National Marine Fisheries Service, the United States Coast Guard, and the managers of the Gulf of the Farallones, Monterey Bay and Channel Islands National Marine Sanctuaries. The Council holds four regular meetings per year, and one annual retreat.

Authority: 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: December 8, 2008.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Services, National Oceanic and Atmospheric Administration.

[FR Doc. E8–29649 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

[Docket No. 0811251527–81528–01]

RIN 0648–ZC03

NOAA Bay Watershed Education and Training (B–WET) Program

AGENCY: Office of Education (OED), Office of the Under Secretary (USEC), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of funding availability.

SUMMARY: NOAA B–WET is an environmental education program that promotes locally relevant, experiential learning in the K–12 environment. Funded projects provide meaningful watershed educational experiences for students, related professional development for teachers, and helps to support regional education and environmental priorities in the Pacific Northwest, the northern Gulf of Mexico and New England.

DATES: Proposals must be submitted by 5 p.m. Eastern Time on January 26, 2009. See Sections IV C and F of this announcement for more information on submission requirements.

ADDRESSES: Electronic application packages are strongly encouraged and are available at: *http://www.grants.gov/.* Paper application packages are available on the NOAA Grants Management Web site at: *http://www.ago.noaa.gov/ago/grants/forms.cfm.* If the applicant has difficulty accessing Grants.gov or downloading the required forms from the NOAA Web site, the applicant should contact: Bronwen Rice, B–WET National Coordinator, by phone at 202–482–6797 or e-mail at *bronwen.rice@noaa.gov.* Grants.gov requires applicants to register with the system prior to submitting an application. This registration process can take several weeks and involves multiple steps. In order to allow sufficient time for this process, you should register as soon as you decide to apply, even if you are not yet ready to submit your proposal. If an applicant has problems downloading the application forms from Grants.gov, contact Grants.gov Customer Support at 1–800–518–4726 or *support@grants.gov.* For non-Windows computer systems, please see *http://www.grants.gov/MacSupport* for information on how to download and submit an application through Grants.gov.

FOR FURTHER INFORMATION CONTACT: For the Pacific Northwest, please contact Seaberry Nachbar at 831–647–4201, or via e-mail at *seaberry.nachbar@noaa.gov.* For the northern Gulf of Mexico, Stephanie Bennett at 808–522–7481, or via e-mail at *stephanie.bennett@noaa.gov.* For New England, Shannon Sprague, at 410–267–5664, or via e-mail at *shannon.sprague@noaa.gov.* Questions about this opportunity may also be directed to Bronwen Rice, B–WET National Coordinator, by phone at 202–482–6797 or e-mail at *bronwen.rice@noaa.gov.*

SUPPLEMENTARY INFORMATION: The NOAA Bay Watershed Education and Training (B–WET) Program is an environmental education program that supports experiential learning through local competitive grant awards in specific geographic regions. Prior to 2008 NOAA B–WET Programs were established for the Chesapeake Bay, California, and the Hawaiian Islands. As of 2008, three new programs are in place in New England, the northern Gulf of Mexico, and the Pacific Northwest. In FY09, it is anticipated that funds will be available for each of these three regions. Proposals are currently being solicited from the Pacific Northwest region, the northern Gulf of Mexico region, and the New England region. For the purposes of this solicitation, these three regions are defined as follows:

a. Pacific Northwest—the states of Oregon and Washington;

b. Northern Gulf of Mexico—the states of Florida, Alabama, Mississippi, Louisiana, and Texas;

c. New England—the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut.

NOAA recognizes that knowledge and commitment built from firsthand experience, especially in the context of one's community and culture, is essential for achieving environmental stewardship. Carefully selected experiences driven by rigorous academic learning standards, engendering discovery and wonder, and nurturing a sense of community will further connect students with their watershed, help reinforce an ethic of responsible citizenship, and promote academic achievement. Experiential learning techniques, such as those supported by the NOAA B–WET Program, have been shown to increase interest in science, technology, engineering, and math (STEM), thus contributing to NOAA's obligations under the America COMPETES Act (33 U.S.C. 893a(a)).

Electronic Access

The full text of the full funding opportunity announcement for this program can be accessed via the Grants.gov Web site at *http://www.grants.gov.* The announcement will also be available by contacting the program officials identified under **FOR FURTHER INFORMATION CONTACT**. Applicants must comply with all requirements contained in the full funding opportunity announcement.

Statutory Authority

Under 33 U.S.C. 893a(a), the Administrator of the National Oceanic and Atmospheric Administration is authorized to conduct, develop, support, promote, and coordinate formal and informal educational activities at all levels to enhance public awareness and understanding of ocean, coastal, Great Lakes, and atmospheric science and stewardship by the general public and other coastal stakeholders, including underrepresented groups in ocean and atmospheric science and policy careers. In conducting those activities, the Administrator shall build upon the educational programs and activities of the agency.

Catalog of Federal Domestic Assistance (CFDA) Number: *11.469, Congressionally Identified Awards and Projects.*

Funding Availability

It is anticipated that approximately $2,000,000 will be available in FY 2009 for new awards. The distribution of available funds among the three regions will depend on the number of high-quality proposals received from each region. NOAA anticipates making approximately 5 to 15 new awards during FY 2009. NOAA will consider only projects with a duration of 1 to 3 years. The total Federal amount that may be requested from NOAA shall not exceed $100,000 per year and $300,000 for all years of the proposed project. The minimum Federal amount that must be requested from NOAA for all years is $50,000. Applications requesting Federal support from NOAA of less than $50,000 total or more than $100,000 per year and $300,000 total for the duration of the project will not be considered for funding. There is no guarantee that sufficient funds will be available to make awards for all qualified projects. The exact amount of funds that may be awarded will be determined in pre-award negotiations between the applicant and NOAA representatives. Publication of this notice does not oblige NOAA to award any specific project or to obligate any available funds. If applicants incur any costs prior to an award being made, they do so at their own risk of not being reimbursed by the government. Notwithstanding verbal or written assurance that may have been received, there is no obligation on the part of NOAA to cover pre-award costs unless approved by the Grants Officer as part of the terms when the award is made.

Eligibility

Eligible applicants are K–12 public and independent schools and school systems, institutions of higher education, community-based and nonprofit organizations, state or local government agencies, interstate agencies, and Indian tribal governments. The Department of Commerce/National Oceanic and Atmospheric Administration (DOC/NOAA) is strongly committed to broadening the participation of historically black colleges and universities, Hispanic serving institutions, tribal colleges and universities, and institutions that service underserved areas. While applicants do not need to be from the targeted geographical regions specified in the program objectives, they must be working with target audiences in these areas.

Cost Sharing Requirements

No cost sharing is required under this program, however, the NOAA B-WET Program strongly encourages applicants include a 25 percent or higher match. Funds from other Federal awards may not be considered matching funds. The nature of the contribution (cash vs. in-kind) and the amount of matching funds will be taken into consideration during the review process. Priority selection is given to proposals that propose cash rather than in-kind services.

Evaluation and Selection Procedures

The general evaluation criteria and selection factors that apply to full applications to this funding opportunity are summarized below. The evaluation criteria for full applications will have different weights and details. Further information about the evaluation criteria and selection factors can be found in the full funding opportunity announcement at *www.grants.gov* and the B-WET Web site at *http://www.oesd.noaa.gov/BWET./*

Evaluation Criteria For Projects

1. *Importance and/or relevance and applicability of proposal to the program goals (30 points):* This criterion ascertains whether there is intrinsic value in the proposed work and/or relevance to NOAA, federal, regional, state, or local activities. For the NOAA B-WET Program, the following questions are posed to each reviewer: Does the project make a direct connection to the greater marine or estuarine environment? Does the proposal make an intentional connection to the watershed system and how actions within that system can affect the marine and estuarine environment? What is the likelihood of the proposed environmental activities to improve the general understanding of the environment? Does the experience focus around questions, problems, or issues pertaining to specific region? Is the project design project-oriented, hands-on, investigative, and part of a sustained activity? Does the project include pre- and post-project activities? Does the project address multiple disciplines?

2. *Technical merit (35 points):* This criterion assesses whether the approach is technically sound and/or innovative, if the methods are appropriate, and whether there are clear project goals and objectives. For the NOAA B-WET Program, the following questions are posed to each reviewer:

Does the proposal clearly outline how the project is an integral part of the instructional program?

For exemplary programs only: Does the project combine Teacher Professional Development with long-term classroom-integrated Meaningful Watershed Educational Experiences for their Students?

For student programs only: Is the project aligned with academic learning standards in science and other disciplines?

For teacher professional development programs only: Does the teacher receive the needed support to fully participate in the program (*i.e.*, continuing education credit, substitute teachers, stipends, etc.)? Is this support reasonable and necessary?

Does the applicant utilize NOAA programs, lesson plans, or a curriculum focused on marine and estuarine issues?

Does the applicant use NOAA personnel to enhance their project?

Does the applicant demonstrate how their project is aligned and supports the goals and strategies of the NOAA Education Plan?

Does the applicant show a knowledge and understanding of the

NOAA Education Plan (*http://www.oesd.noaa.gov/NOAA_Ed_Plan.pdf*)?

Is the project aligned with environmental literacy principles (*e.g.*, Ocean Literacy, *http://www.coexploration.org/oceanliteracy/documents/OceanLitChart.pdf* and Climate Literacy, *http://climateliteracynow.org/files/Climate_Literacy_K–12.pdf*) where appropriate (note: estuarine and watershed concepts should be tied to the Ocean Literacy principles)?

Are the objectives in the proposal clearly defined and focused?

Does the applicant demonstrate that the objectives are realistic and can be reached within the proposed project period?

Are the project outcomes measurable and have significant and lasting benefits for teachers and students?

Does the evaluation component of the project focus on measuring changes in participants (changes can be in knowledge, attitudes, skills or conservation actions)?

Do the changes measured in participants (outcomes) match the project goals and objectives, which include engaging participants in meaningful watershed educational experiences?

3. *Overall qualifications of applicants (10 points)*: This criterion ascertains whether the applicant possesses the necessary education, experience, training, facilities, and administrative resources to accomplish the project. For the NOAA B–WET Program, the following questions are posed to each reviewer:

Does the applicant show the capability and experience in successfully completing similar projects?

Does the proposal include resumes of the Principle Investigators and other staff members?

Does the applicant demonstrate knowledge of the target audience?

Does the applicant demonstrate knowledge of the Content Standards for their state?

Does the applicant document past collaborations with schools or school systems?

Does the applicant show the capability and experience in successfully completing similar projects?

Are the partners involved in the project qualified?

4. *Project costs (20 points)*: This criterion evaluates the budget to determine if it is realistic and commensurate with the project needs and time frame. For the NOAA B–WET Program, the following questions are posed to each reviewer:

Does the applicant demonstrate the ability to leverage other resources?

Is the nature of the cost share cash or in-kind?

Is the budget request reasonable and does the applicant justify the proposed budget request?

Is a significant percentage of the budget directly related to bringing students and teachers in contact with the environment?

Are requested funds for salaries and fringe benefits only for those personnel who are directly involved in implementing the proposed project and/or are directly related to specific products or outcomes of the proposed project?

Does the applicant demonstrate sustainability beyond the project period?

Does the applicant demonstrate that the project will continue after NOAA funding has expired?

5. *Outreach and education (5 points)*: This criterion assesses whether the project provides a focused and effective education and outreach strategy regarding NOAA's mission to protect the Nation's natural resources. For the NOAA B–WET Program, the following questions are posed to each reviewer:

Does the project involve external sharing and communication?

Does the target audience share their findings, experiences, or results to their peers or their community?

Review And Selection Process

Upon receipt of a proposal by NOAA, an initial administrative review will be conducted to determine compliance with requirements and completeness of the proposal. All proposals that meet the minimum eligibility requirements will be evaluated and scored by a panel of independent reviewers. Three separate review panels may be held—one for each geographical region described in I.B.4 of the Full Funding Opportunity. Reviewers serving on each panel may be Federal or non-Federal experts, each having expertise in areas relevant to the priority under consideration. The reviewers will score each proposal assigned to them using the evaluation criteria and relative weights provided above. The individual reviewers' ratings will be averaged for each application to establish rank order for that region. No consensus advice will be given by the review panels. Scores from separate panels will not be combined to establish an overall rank order among all geographical regions. The Program Officer will neither vote nor score applications as part of the review panels. The Program Officer will make his/her recommendations for funding based on rank order of each panel and the selection factors listed below to the Selecting Official for final funding decisions.

Selection Factors For Projects

The B–WET Program Managers will review the ranking of the proposals and recommendations of the review panels. The average numerical ranking from the review panel will be the primary consideration in deciding which of the proposals will be recommended for funding to the Selecting Official. The Selecting Official shall award in rank order unless the proposal is justified to be selected out of rank order based upon one or more of the following factors:

1. Availability of funding;
2. Balance/distribution of funds;
   a. Geographically
   b. By type of institutions
   c. By type of partners
   d. By research areas
   e. By project types
3. Whether this project duplicates other projects funded or considered for funding by NOAA or other Federal agencies;
4. Program priorities and policy factors as set out in Section I.B.1–5 and Section III.B. of the Full Funding Opportunity;
5. Applicant's prior award performance;
6. Partnerships and/or participation of targeted groups;
7. Adequacy of information necessary for NOAA staff to make a NEPA determination and draft necessary documentation before recommendation for funding are made to the Grants Officer.

Selected applicants may be asked to modify objectives, project plans or

budgets, and provide supplemental information required by the agency prior to the award. When a decision has been made (whether an award or declination), verbatim anonymous copies of reviews and summaries of review panel deliberations, if any, will be made available to the applicant.

Intergovernmental Review

Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Limitation of Liability

In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

National Environmental Policy Act (NEPA)

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA Federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA Web site: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216_6_TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm*. Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (*e.g.*, the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation.

Paperwork Reduction Act

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, and SF–LLL and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

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

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements for the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: December 11, 2008.

Maureen E. Wylie,

Acting Director, Acquisition and Grants Office, National Oceanic and Atmospheric Administration.

[FR Doc. E8–29797 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Olympic Coast National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applicants for the following three vacant seats on the Olympic Coast National Marine Sanctuary Advisory Council (council): Research, Marine Business/Ports/Industry, and Conservation/Environmental. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members and alternates should expect to serve 3-year terms, pursuant to the council's Charter.

DATES: Applications are due by January 15, 2009.

ADDRESSES: Application kits may be obtained from Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 E. Railroad Ave., Suite 301, Port Angeles, WA 98362. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 5. Railroad Ave., Suite 301, Port Angeles, WA 98362, (360) 452–6622 ext. 15, *andrew.palmer@noaa.gov*.

SUPPLEMENTARY INFORMATION: Sanctuary Advisory Council members and alternates serve three-year terms. The Advisory Council meets bi-monthly in public sessions in communities in and around the Olympic Coast National Marine Sanctuary. The Olympic Coast National Marine Sanctuary Advisory Council was established in December

1998 to assure continued public participation in the management of the sanctuary. Serving in a volunteer capacity, the advisory council's 15 voting members represent a variety of local user groups, as well as the general public. In addition, five Federal government agencies and one federally funded program serve as non-voting, ex officio members. Since its establishment, the advisory council has played a vital role in advising the sanctuary and NOAA on critical issues. In addition to providing advice on management issues facing the Sanctuary, the Council members serve as a communication bridge between constituents and the Sanctuary staff.

Authority: 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: December 8, 2008.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. E8–29651 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Stellwagen Bank National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applicants for the following vacant seats on the Stellwagen Bank National Marine Sanctuary Advisory Council (council): Business and Industry (Alternate). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve two-to-three-year terms, pursuant to the council's Charter.

DATES: Applications are due by 23 February 2009.

ADDRESSES: Application kits may be obtained from *Elizabeth.Stokes@noaa.gov* Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate, MA 02066. Telephone 781–545–8026 X20l. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: For further questions contact: *Nathalie.Ward@noaa.gov,* External Affairs Coordinator. Telephone: 781–545–8026 X206.

SUPPLEMENTARY INFORMATION: The Stellwagen Bank National Marine Sanctuary Advisory Council was established in March 2001 to assure continued public participation in the management of the Sanctuary. The Advisory Council's 21 members represent a variety of local user groups, as well as the general public, plus seven local, state and federal government agencies. Since its establishment, the Council has played a vital role in advising the Sanctuary and NOAA on critical issues and is currently focused on the sanctuary's new five-year Management Plan.

The Stellwagen Bank National Marine Sanctuary encompasses 842 square miles of ocean, stretching between Cape Ann and Cape Cod. Renowned for its scenic beauty and remarkable productivity, the sanctuary supports a rich diversity of marine life including 22 species of marine mammals, more than 30 species of seabirds, over 60 species of fishes, and hundreds of marine invertebrates and plants.

Authority: 16 U.S.C. Sections 1431, *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: December 12, 2008.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. E8–29648 Filed 12–15–08; 8:45 am]

BILLING CODE 3510–NK–M

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice to Renew an Existing Collection—3038–0033.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before January 15, 2009.

FOR FURTHER INFORMATION OR A COPY CONTACT: Lynn A. Bulan, Office of General Counsel, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, (202) 418–5143; FAX: (202) 418–5567; e-mail: *lbulan@cftc.gov* and refer to OMB Control No. 3038–0033.

SUPPLEMENTARY INFORMATION: This is a request for extension of a currently approved information collection.

Abstract: Title: Notification of Pending Legal Proceedings Pursuant to 17 CFR 1.60, OMB Control No. 3038–0033—Extension

The rule is designed to assist the Commission in monitoring legal proceedings involving the responsibilities imposed on contract markets and their officials and futures commission merchants and their principals by the Commodity Exchange Act, or otherwise. These rules are promulgated pursuant to the Commission's rulemaking authority contained in Sections 4a(a), 4i, and 8a(5) of the Act, 7 U.S.C. 6a(1), 6i, and 12a(5).

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 the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on October 2, 2008 (73 FR 57338).

Burden statement: The respondent burden for this collection is estimated to average.10 hours per response.

Respondents/Affected Entities: 157.

Estimated number of responses: 1.

Estimated total annual burden on respondents: .10 hours.

Frequency of collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0033 in any correspondence.

Lynn A. Bulan, Office of General Counsel, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: December 9, 2008.

David Stawick,

Secretary of the Commission.

[FR Doc. E8–29684 Filed 12–15–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Department of Defense Adoption of a Program Comment for DoD Rehabilitation Treatment Measures

AGENCY: Department of Defense.

ACTION: Notice of Department of Defense (DoD) Adoption of a Program Comment for DoD Rehabilitation Treatment Measures (Program Comment).

SUMMARY: This provides notice of the DoD adoption of the Advisory Council on Historic Preservation's (ACHP's) Program Comment for DoD Rehabilitation Treatment Measures. The Program Comment provides DoD with an alternative way to comply with its responsibilities under Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, and its implementing regulations, 36 CFR part 800 (Section 106), with regard to the effects of rehabilitation treatment measures.

DATES: The Program Comment went into effect on November 14, 2008.

ADDRESSES: Copies of the Program Comment are available on the Defense Environmental Network Information eXchange (DENIX) Web site at *https://www.denix.osd.mil/ProgramAlternatives.*

FOR FURTHER INFORMATION CONTACT: Brian Lione, Deputy Federal Preservation Officer, Department of Defense, 3400 Defense Pentagon Room 5C646, Washington, DC 20301–3400. Fax (703) 607–3124. *brian.lione@osd.mil.*

Dated: December 10, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

SUPPLEMENTARY INFORMATION: On November 14, 2008, the ACHP approved and issued to DoD a Program Comment for DoD Rehabilitation Treatment Measures. The following information includes the full text of the Program Comment. Copies of appurtenant rehabilitation treatment measures are available at the DENIX Web address listed above.

Program Comment for Department of Defense

Rehabilitation Treatment Measures

I. *Establishment and Authority:* This Program Comment was issued by the ACHP on November 14, 2008 pursuant to 36 CFR 800.14(e).

It provides DoD with an alternative way to comply with its responsibilities under Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, and its implementing regulations, 36 CFR part 800 (Section 106), with regard to the effects of rehabilitation treatment measures [available at *https://www.denix.osd.mil/ProgramAlternatives*] to this Program Comment.

The intent of this Program Comment is to reduce compliance timeframes for routine repair and maintenance undertakings involving historic properties where DoD chooses to repair and maintain those resources in accordance with the Secretary of the Interior's Standards for Rehabilitation, 36 CFR part 67 (Secretary's Standards for Rehabilitation).

II. *Applicability to Department of Defense:* Only DoD may use this Program Comment.

III. *Date of Effect:* This Program Comment [went] into effect on November 14, 2008.

IV. *Use of Rehabilitation Treatment Measures To Comply With Section 106 Regarding Their Effects:*

(1) DoD may comply with Section 106 regarding the effects of rehabilitation treatment measures on historic properties, and those properties whose eligibility has not yet been determined, by:

(i) Conducting such work as provided by the relevant rehabilitation treatment measure(s) [available at *https://www.denix.osd.mil/ProgramAlternatives*], in conformance with the implementation guidance documents numbered 01060.01 and 01091.01 in those [documents];

(ii) Ensuring that all work described in the rehabilitation treatment measures is conducted under the supervision and approval of a cultural resources professional who meets the relevant standards outlined in the Secretary of the Interior's Professional Qualification Standards, pursuant to 36 CFR part 61 (Secretary's Standards on Professional Qualification); and

(iii) Keeping a record, at the relevant DoD installation, detailing each use of a rehabilitation treatment measure under this Program Comment for no less than five years from the final date of the implementation of the rehabilitation treatment measure. Each record must include the following information:

(a) A description of the implementation of the rehabilitation treatment measure (including the specific location of the treatment);

(b) The date(s) when the rehabilitation treatment measure was implemented;

(c) The name(s) of the personnel that carried out and/or supervised the use of the rehabilitation treatment measure;

(d) A summary of the treatment implementation, indicating how the rehabilitation treatment measure was carried out, any problems that arose, and the final outcome; and

(e) A summary of any refinements to the rehabilitation treatment measures that the installation and relevant State Historic Preservation Officer (SHPO) has agreed upon per Stipulation IV(4), below.

DoD must provide copies of these records, within a reasonable timeframe, when requested by the ACHP or the relevant SHPO.

(2) Before it begins using this Program Comment, a DoD installation must provide written notification to the relevant SHPO stating that it intends to begin using it and specifying which rehabilitation treatment measures it deems appropriate for use with regard to the historic properties at the installation. The installation may begin using this Program Comment 30 days after such notification.

(3) A DoD installation must also provide written notification to the relevant SHPO when it intends to begin using a rehabilitation treatment measure that has been added to this Program Comment per Stipulation VI. The installation may begin using such an added rehabilitation treatment measure 30 days after such notification.

(4) If, in the opinion of a DoD personnel or DoD contractor meeting the Secretary's Standards on Professional Qualification, quantifiable scientific or qualitative historic data indicates that a rehabilitation treatment measure covered by this Program Comment should be refined to accommodate a specific material or rehabilitation technique that is more suitable for the relevant historic properties at the installation and/or that more specifically meets the intent of the Secretary's Standards for Rehabilitation, the installation shall notify the relevant SHPO of that proposed refinement. (An example of a refinement would be the selection of a mortar joint profile appropriate for the historic property under consideration.) If, within 30 days of receiving that notification, the

relevant SHPO disputes whether the proposed refinement to the rehabilitation treatment measure meets the Secretary's Standards for Rehabilitation, the installation and the relevant SHPO shall consult to attempt to resolve that dispute. If the relevant SHPO and the installation agree to a proposed refinement, or the relevant SHPO fails to dispute it within the 30 day period, the installation may proceed in accordance with the proposed refinement. Consultation about, and agreement or disagreement regarding, proposed refinements does not affect the ability of an installation to continue using this Program Comment and any of its existing rehabilitation treatment measures.

V. *Program Comment Does not Cover Aspects of Undertakings Beyond the Specific Rehabilitation Treatment Measures:* While DoD may comply with Section 106 regarding the effects of rehabilitation treatment measures on historic properties in accordance with this Program Comment, the effects of those aspects of its undertakings that are not specifically covered by the appended rehabilitation treatment measures must still undergo Section 106 review in accordance with the process found at 36 CFR 800.3 through 800.7, or applicable alternatives under 36 CFR 800.14 other than this Program Comment. For example, a DoD undertaking that includes the treatment of the exterior masonry of a historic building (in accordance with a rehabilitation treatment measure of this Program Comment) and the demolition of its interior walls, will still have to undergo Section 106 review outside this Program Comment for those aspects of the undertaking involving the demolition of the interior walls.

VI. *Process for Adding or Updating Rehabilitation Treatment Measures:* While this Program Comment, as originally adopted, was limited to five rehabilitation treatment measures, the ACHP expects more rehabilitation treatment measures to be added to it. The ACHP also expects that rehabilitation treatment measures included in the Program Comment may eventually need updating. Accordingly, rehabilitation treatment measures may be added to this Program Comment, or updated, as follows:

(1) DoD will notify the ACHP, the National Conference of State Historic Preservation Officers (NCHSPO), and DOI (collectively, parties) that it wants to add a rehabilitation treatment measure to the Program Comment, or to update a rehabilitation treatment measure that is already a part of the Program Comment. Such a notification will include a draft of the proposal.

(2) The parties will provide a copy of the draft to the National Trust for Historic Preservation, the American Institute of Architects, the American Institute for the Conservation of Historic and Artistic Works, and the Association for Preservation Technology, and consult with them before finalizing the proposal. The parties may invite other entities, including members of professional associations with expertise on the particular subject matter of the proposed rehabilitation treatment measure or update, to the consultation.

(3) After such consultation, DoD will submit the finalized version to DOI with a request for confirmation from DOI that the proposed rehabilitation treatment measure or update meets the criteria set forth in the Secretary's Standards for Rehabilitation. DOI will have 45 days to provide a written response to DoD. Should DOI determine that the proposed rehabilitation treatment measure or update does not meet the Secretary's Standards for Rehabilitation, DoD may consult with those listed on sub-stipulations (1) and (2), above, and revise the proposal for reconsideration by DOI.

(4) After DOI confirmation that the proposal meets the Secretary's Standards for Rehabilitation, or after the allotted 45 days pass without a DOI response (at which point, DOI confirmation will be assumed), DoD may submit the finalized version to the ACHP Executive Director. If the ACHP Executive Director approves it, the ACHP will publish a notice of availability of the approved addition or update in the **Federal Register**. The addition or update will go into effect upon such publication.

VII. *Process for Removing Rehabilitation Treatment Measures:* The ACHP may remove a rehabilitation treatment measure from the Program Comment by publishing a **Federal Register** notice to that effect. The Program Comment will continue to operate with the other rehabilitation treatment measures that have not been removed.

VIII. *Latest Version of the Program Comment:* DoD and/or the ACHP will include the most current version of the Program Comment (with the latest amendments and updates) in a publicly accessible Web site. The latest Web address for that site will be included in each of the **Federal Register** notices for amending, removing or updating rehabilitation treatment measures in the Program Comment. This document and its appended rehabilitation measures will initially be available at *https://www.denix.osd.mil/ProgramAlternatives.*

IX. *Annual Reports and Meetings:* The parties shall meet once a year, in November, to discuss the implementation of the Program Comment and to consider whether rehabilitation treatment measures that have not been updated in five years should be updated in accordance with Stipulation VI. At least 60 days prior to such meetings, the parties may request of DoD more information on any issues at specific military installations. DoD will collect information from these military installations on their experience, for the previous twelve months, on how often and where the Program Comment has been utilized, examples of successful implementation, and examples of failures or problems with implementation.

X. *Amendment:* The ACHP may amend this Program Comment (other than the * * * rehabilitation treatment measures themselves, which are amended according to Stipulations VI and VII, above) after consulting with the parties and publishing a **Federal Register** notice to that effect.

XI. *Termination:* The ACHP may terminate this Program Comment by publication of a notice in the **Federal Register** 30 days before the termination takes effect.

XII. *Sunset Clause:* This Program Comment will terminate on its own accord on November 1, 2018, unless it is amended before that date to extend that period.

XIII. *Historic Properties in Tribal Lands and Historic Properties of Significance to Indian Tribes and Native Hawaiian Organizations:* This Program Comment does not apply in connection with effects to historic properties that are located on tribal lands and/or that are of religious and cultural significance to Indian tribes or Native Hawaiian organizations.

XIV. *Definitions:* The definitions found at 36 CFR part 800 apply to the terms used in this Program Comment.

XV. *Rehabilitation Treatment Measure Appendices:* [see *https://www.denix.osd.mil/ProgramAlternatives*].

Authority: 36 CFR 800.14(e).

Dated: Date of submission.

Signed: Maureen Sullivan,

Director, Environmental Management.

[FR Doc. E8–29667 Filed 12–15–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2008–0049]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Delete a System of Records.

SUMMARY: The Department of the Air Force proposes to delete a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective on January 15, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Air Force proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 10, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F033 AFCA B

SYSTEM NAME:

Air Force Computer Based Training (CBT) System (October 2, 2000, 65 FR 58735).

REASON:

This records collection for this system is now covered by F033 AFCA C, USAF Information Technology E-Learning System published on December 8, 2008, 73 FR 74471. Accordingly, this Privacy Act System of Records Notice will be deleted from the Air Force's inventory.

[FR Doc. E8–29669 Filed 12–15–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the Proposed Arboretum Project, in Rancho Cordova, Sacramento County, CA, Permit Application Number SPK–2007–00133

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers, Sacramento District, (Corps) will prepare an Environmental Impact Statement (EIS) for The Arboretum project, a mixed-use residential and commercial development in Rancho Cordova, Sacramento County, CA. Lewis Operating Corp. has applied for a Department of the Army permit to fill approximately 31.78 acres of waters of the United States, including wetlands, to construct the project.

ADDRESSES: Please send written comments to Angela De Paoli Conn, U.S. Army Corps of Engineers, Sacramento District, 1325 J Street, Room 1480, Sacramento, CA 95814–2922.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and EIS should be addressed to Angela De Paoli Conn, (916) 557–6782, e-mail: *angela.l.conn@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Lewis Operating Corp. has applied for a Department of the Army permit under Section 404 of the Clean Water Act to construct a mixed-use development on a 1,349-acre parcel situated in the eastern portion of the City of Rancho Cordova in eastern Sacramento County, CA. The proposed action includes approximately 5,000 new residential units; nearly 80 acres of public and private use parks and related facilities; two 10-acre elementary school sites; one 75-acre joint use middle/high school site; and 465,000 square feet of targeted commercial development. The total development area would encompass approximately 900 acres of the project site. The remaining 449 acres, or nearly 33 percent, of the project site would be devoted to passive and multiple use open space, including the preservation and enhancement of the Laguna Creek stream corridor and its associated jurisdictional features.

Approximately 117.03 acres of water of the United States have been identified on the proposed project site, including 22.18 acres of vernal pools, 6.79 acres of seasonal wetlands, 58.44 acres of lake, 9.96 acres of ponds, 8.99 acres of channels, 9.48 acres wet swales, 0.34 acre of drainage ditches, and 0.91 acre irrigation ditches. The applicant has applied for a permit to fill 31.78 acres of these waters. Wetlands proposed to be preserved and not directly impacted by the project are within the 449 acres of open space and wetland preserve and would contain approximately 85.25 acres of wetlands, approximately 73 percent of wetlands on site.

The EIS will include an evaluation of a reasonable range of alternatives. Currently, the following alternatives are expected to be analyzed in detail: (1) The no action alternative (no permit issued), (2) the applicant's preferred project (proposed action), and (3) a different location (off-site) alternative. The no action alternative assumes limited development would occur on the site with all waters of the United States avoided. The off-site alternative assumes the proposed project would be developed at a different but suitably sized site in the region. Currently the Corps is in the process of developing an analysis of alternatives sufficient to demonstrate compliance with Section 404(b)(1) of the Clean Water Act, therefore additional alternatives are likely to be analyzed.

The Corps' scoping process for the EIS includes a public involvement program with several opportunities to provide oral and written comments. In addition to public meetings and notifications in the **Federal Register**, the Corps will issue public notices when the draft and final EISs are available. Affected federal, state, and local agencies, Native American tribes, and other interested private organizations and parties are invited to participate.

Potentially significant issues to be analyzed in the EIS include, but are not limited to: Hydrology, water supply, water quality, cultural resources, biological resources, traffic and transportation, and air quality. The Corps is the lead agency for preparation of the EIS under the requirements of the National Environmental Policy Act (NEPA). Currently no other agencies have agreed to be cooperating agencies. The Corps will coordinate with other agencies, such as the City of Rancho Cordova.

Other environmental review and consultation requirements for the proposed action include the need for the applicant to obtain water quality certification under Section 401 of the Clean Water Act from the California Central Valley Regional Water Quality Control Board. In addition, because the proposed project may affect federally listed species, the Corps will formally

consult with the U.S. Fish and Wildlife Service in accordance with Section 7 of the federal Endangered Species Act. The Corps will also be consulting with the State Historic Preservation Officer under Section 106 of the National Historic Preservation Act concerning properties listed, or potentially eligible for listing, on the National Register of Historic Places.

A public scoping meeting for the EIS will be held on January 29, 2009, from 4 p.m. to 7 p.m. The meeting will be held at the Rancho Cordova City Hall, 2729 Prospect Park Drive, American River Room—South, Rancho Cordova, CA 95670. Interested parties can provide oral and written comments at the meetings. Interested parties may also submit written comments on this notice. Scoping comments should be submitted before March 15, 2009 but may be submitted at any time prior to publication of the Draft EIS.

Interested parties may register for the Corps' public notice e-mail notification lists at: *http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pnlist.html*.

Dated: December 5, 2008.

Thomas C. Chapman,

Colonel, U.S. Army, District Engineer.

[FR Doc. E8–29730 Filed 12–15–08; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Chief of Engineers Environmental Advisory Board

AGENCY: Department of the Army, U.S. Army Corps of Engineers DoD.

ACTION: Notice of open meeting.

SUMMARY: In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following committee meeting:

Name of Committee: Chief of Engineers Environmental Advisory Board (EAB).

Topic: The EAB will discuss national considerations related to ecosystem restoration through integrated water resources management with emphasis on building collaborative partnerships, and the implementation of the Environmental Operating Principles.

Date of Meeting: January 15, 2009.

Place: Marines' Memorial Club and Hotel, 609 Sutter Street, San Francisco, CA

Time: 9 a.m. to 12 p.m.

Thirty minutes will be set side for public comment. Members of the public who wish to speak are asked to register prior to the start of the meeting. Registration will begin at 8:30. Statements are limited to 3 minutes.

FOR FURTHER INFORMATION CONTACT: Ms. Rennie Sherman, Executive Secretary, *rennie.h.sherman@usace.army.mil*, 202–761–7771.

SUPPLEMENTARY INFORMATION: The EAB advises the Chief of Engineers by providing expert and independent advice on environmental issues facing the Corps of Engineers. The public meeting will include discussion between the EAB and the Chief of Engineers as well as presentations by the EAB and Corps staff. The meeting is open to the public, and public comment is tentatively scheduled for 30 minutes beginning at 11:15 a.m.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–29732 Filed 12–15–08; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 15, 2009.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

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.

Dated: December 10, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Extension.

Title: 2007–2008 Teacher Compensation Survey.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 30.

Burden Hours: 7,396.

Abstract: This is a request for the Teacher Compensation Survey, which is part of the system clearance for cognitive, pilot, and field test studies. This survey will collect data from approximately 30 states on salary, benefits and teaching experience of public school teachers in the United States. State Education Agencies will submit this data electronically to the National Center for Education Statistics (NCES) through a secure Web site using a predetermined record layout.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3855. 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 the Internet address *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. E8–29681 Filed 12–15–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Proposed Information Collection

AGENCY: National Assessment Governing Board.

ACTION: Notice and request for comments.

SUMMARY: The National Assessment Governing Board, 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 Governing Board is soliciting comments concerning a survey of higher education institutions it is conducting in connection with designing the National Assessment of Educational Progress (NAEP) to report on the preparedness of 12th grade students for placement into entry-level college-credit coursework.

DATES: Written comments should be received on or before February 17, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Ray Fields, National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the draft survey should be directed to Ray Fields through the Internet at *Ray.Fields@ed.gov*, at the National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC, 20002, or at 202–357–0395.

SUPPLEMENTARY INFORMATION:

Title: Survey of Placement Tests and Cut-Scores in Higher Education Institutions.

Abstract: The congressionally authorized National Assessment of Educational Progress (NAEP) reports to the public on the achievement of students at grades 4, 8, and 12 in core subjects. The National Assessment Governing Board oversees and sets policy for NAEP. NAEP and the Governing Board are authorized under the National Assessment of Educational Progress Authorization Act (Pub. L. 107–279).

Among the Board's responsibilities is ''to improve the form, content, use, and reporting of [NAEP results].'' Toward this end, the Governing Board plans to enable NAEP at the 12th grade to report on the academic preparedness of 12th grade students in reading and mathematics for entry level college credit coursework.

The Governing Board has planned a program of research studies to support the validity of statements about 12th grade student preparedness that would be made in NAEP reports, beginning with the 2009 assessments in 12th grade reading and mathematics. Among the studies planned is a survey of 2-year and 4-year institutions of higher education about the tests and test scores used to place students into entry level college credit coursework leading to a degree and into non-credit remedial or developmental programs in reading and/or mathematics. The data resulting from this survey will be used to help develop valid statements that can be made about the preparedness of 12th grade students in NAEP reports.

Current Actions: There are no current actions.

Type of Review: New Information Collection.

Affected Public: Institutions of Higher Education.

Estimated Number of Respondents: 3,700.

Estimated Time per Respondent: 25 minutes.

Estimated Total Annual Burden Hours: 1,542 hours, one time only.

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. There is no requirement for recordkeeping. Information provided by respondents will be kept confidential; there will be no reporting of results by individual institution.

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;

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information;

(f) Issues to consider in defining the terms ''remedial'' and/or ''developmental'' as they apply to preparatory or non-credit coursework in reading and mathematics at any institution providing postsecondary coursework;

(g) Issues to consider in defining the term postsecondary ''entry-level, credit-bearing coursework leading to a degree'';

(h) Methods for identifying exemplar programs, *i.e.*, occupations that do not require an Associate's or higher degree, but do require training beyond high school and the remedial/developmental as well as entry-level courses in those programs; and

(i) The names of, or methods for identifying, the most common entry-level programs at two-year colleges, four-year colleges/universities, and vocational/technical and occupational colleges.

Dated: December 11, 2008.

Ray Fields,

Authorized Agency Paperwork Contact, National Assessment Governing Board.

[FR Doc. E8–29699 Filed 12–15–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Safe and Drug-Free Schools; Overview Information; Grant Competition for the Cooperative Civic Education and Economic Education Exchange Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.304A.

DATES

Applications Available: December 16, 2008.

Deadline for Transmittal of Applications: January 15, 2009.

Deadline for Intergovernmental Review: March 16, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Cooperative Civic Education and Economic

Education Exchange Program provides grants to improve the quality of civic education through cooperative civic education exchange programs with emerging democracies.

Note: This competition invites applications that address only civic education.

Priorities: This competition includes one absolute priority and one invitational priority. In accordance with 34 CFR 75.105(b)(2)(iv), the absolute priority is from section 2345(c) of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6715(c)).

Absolute Priority: For FY 2009, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Each applicant must propose to carry out each of the following activities:

(1) Provide to the participants from eligible countries—

(A) Seminars on the basic principles of United States constitutional democracy, including seminars on the major governmental institutions and systems in the United States, and visits to such institutions;

(B) Visits to school systems, institutions of higher education, and nonprofit organizations conducting exemplary programs in civics and government education, in the United States;

(C) Translations and adaptations with respect to United States civics and government education, curricular programs for students and teachers, and in the case of training programs for teachers, translations and adaptations into forms useful in schools in eligible countries, and joint research projects in such areas; and

(D) Independent research and evaluation assistance to determine the effects of the cooperative education exchange programs on students' development of the knowledge, skills, and traits of character essential for the preservation and improvement of constitutional democracy.

(2) Provide to the participants from the United States—

(A) Seminars on the histories and systems of government of eligible countries;

(B) Visits to school systems, institutions of higher education, and organizations conducting exemplary programs in civics and government education, located in eligible countries;

(C) Assistance from educators and scholars in eligible countries in the development of curricular materials on the history and government of such countries that are useful in United States classrooms;

(D) Opportunities to provide onsite demonstrations of United States curricula and pedagogy for educational leaders in eligible countries; and

(E) Independent research and evaluation assistance to determine the effects of the cooperative education exchange programs assisted through this grant on students' development of the knowledge, skills, and traits of character essential for the preservation and improvement of constitutional democracy.

(3) Assist participants from eligible countries and the United States to participate in international conferences on civics and government education for educational leaders, teacher trainers, scholars in related disciplines, and educational policymakers.

Within this absolute priority, we are particularly interested in applications that address the following invitational priority.

Invitational Priority: Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Performance Data

The Secretary is particularly interested in projects that use pre- and post-intervention testing, or more rigorous methods, to measure the effects of the Cooperative Civic Education Program on the knowledge and skills of students and the classroom practice(s) of participating teachers.

Program Authority: 20 U.S.C. 6711–6716.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration's budget request for FY 2009 does not include funds for this program. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates funds for this program.

Estimated Range of Awards: $500,000–$1,000,000.

Estimated Average Size of Awards: $1,000,000.

Estimated Number of Awards: 1–2.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* Organizations in the United States experienced in the development of curricula and programs in civics and government education for students in elementary schools and secondary schools in countries other than the United States.

2. *Eligible Country:* For the purpose of this grant competition, the term *eligible country* means a Central European country, an Eastern European country, Lithuania, Latvia, Estonia, the independent states of the former Soviet Union as defined in section 3 of the FREEDOM Support Act (22 U.S.C. 5801), the Republic of Ireland, the province of Northern Ireland in the United Kingdom, and any developing country (as such term is defined in section 209(d) of the Education for the Deaf Act (20 U.S.C. 4359a(d))) if the Secretary, with the concurrence of the Secretary of State, determines that such developing country has a democratic form of government. (See 20 U.S.C. 6715(g)). A list of the countries is included in the application package.

3. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

4. *Other:* Primary participants in the cooperative education exchange programs assisted through this grant shall be educational leaders in the areas of civics and government education, including teachers, curriculum and teacher training specialists, scholars in relevant disciplines, educational policymakers, and government and private sector leaders from the United States and eligible countries. (See 20 U.S.C. 6715(d).)

IV. Application and Submission Information

1. *Address to Request Application Package:* Rita Foy Moss, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza (PCP), room 10006, Washington, DC 20202. Telephone: (202) 245–7866 or by e-mail: *rita.foy.moss@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in

the application package for the Cooperative Civic Education and Economic Education Exchange Program competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative [Part III] to no more than 25 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section [Part III].

Our reviewers will not read any pages of your application that exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: December 16, 2008.

Deadline for Transmittal of Applications: January 15, 2009. Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 16, 2009.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We are participating as a partner in the Governmentwide Grants.gov Apply site. The Grant Competition for the Cooperative Civic Education and Economic Education Exchange Program, CFDA Number 84.304A, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Grant Competition for the Cooperative Civic Education and Economic Education Exchange Program at www.Grants.gov. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.304, not 84.304A).

Please note the following:

- Your participation in Grants.gov is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/Grantsgov SubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) Registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your

application in electronic format, nor will we penalize you if you submit your application in paper format.

- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must attach any narrative sections of your application as files in a.DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll-free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.304A), LBJ Basement Level 1, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Application by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.304A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR part 75.210 in EDGAR and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial

information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary in 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measure:* If funded, applicants will be expected, consistent with one of the statutory purposes of this program (see 20 U.S.C. 6715(b)(5)(A)), to provide information on the results of any independent research and evaluation assistance supported to determine the effects of the Cooperative Civic Education and Economic Education Exchange Program on students' development of the knowledge, skills, and traits of character essential for the preservation and improvement of constitutional democracy. In addition, funded applicants responding to the Invitational Priority are encouraged to collect and submit data on the effects of the program on the knowledge and skills of students, and the classroom practice(s) of participating teachers.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Rita Foy Moss, U.S. Department of Education, 400 Maryland Avenue, SW., PCP, room 10006, Washington, DC 20202. Telephone: (202) 245–7866 or by e-mail: *rita.foy.moss@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: December 10, 2008.

Deborah A. Price,

Assistant Deputy Secretary for Safe and Drug-Free Schools.

[FR Doc. E8–29766 Filed 12–15–08; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

December 10, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 15, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0991.

Title: AM Measurement Data.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities.

Number of Respondent and Responses: 1,900 respondents; 4,568 responses

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in Sections 154(i) of the Communications Act of 1934, as amended.

Estimated Time per Response: 0.5—25 hours.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement.

Total Annual Burden: 30,795 hours.

Total Annual Costs: $826,500.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On September 24, 2008, the Commission adopted the Second Report and Order and Second Further Notice of Proposed Rulemaking, In the Matter of An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional

Antenna Performance Verification, MM Docket No. 93–177, FCC 08–228. The Second Report and Order permits AM stations using directional antennas to use computer modeling techniques to verify AM directional antenna performance, thereby reducing the regulatory burden on these stations.

Directional AM stations use antennas which suppress radiated field in some directions and enhance it in others. Under our current rules, an AM licensee operating with a directional antenna must perform a proof of performance to demonstrate that the antenna pattern conforms to 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. Typically, a full proof requires measurement of the AM station's field strength on six to 12 critical bearings, ranging to distances of 15 kilometers or more from the antenna. Subsequent graphical analysis of proof measurements also requires substantial time and expense. In contrast, the computer modeling techniques authorized in the Second Report and Order are based on internal measurements, making the proof process less time-consuming and expensive for AM licensees.

In order to control interference between stations and assure adequate community coverage, AM stations must conduct various engineering measurements to demonstrate that the antenna system operates as authorized. The following rule sections are included in this collection.

The revised information collection requirements are as follows:

47 CFR 73.61(a) states each AM station using a directional antenna with monitoring point locations specified in the instrument of authorization must make field strength measurements at the monitoring point locations specified in the instrument of authorization, as often as necessary to ensure that the field at those points does not exceed the values 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.

47 CFR 73.61(b) states if the AM license was granted on the basis of field strength measurements performed pursuant to Sec. 73.151(a), partial proof of performance measurements using the procedures described in Sec. 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.

47 CFR 73.68(c) states a station having an antenna sampling system constructed according to the specifications given in paragraph (a) of this section may obtain approval of that system by submitting an informal letter request to the FCC in Washington, DC, Attention: Audio Division, Media Bureau. The request for approval, signed by the licensee or authorized representative, must contain sufficient information to show that the sampling system is in compliance with all requirements of paragraph (a) of this section.

47 CFR 73.68(d) states in the event that the antenna monitor sampling system is temporarily out of service for repair or replacement, the station may be operated, pending completion of repairs or replacement, for a period not exceeding 120 days without further authority from the FCC if all other operating parameters and the field monitoring point values are within the limits specified on the station authorization.

47 CFR 73.68(e)(1) Special Temporary Authority (see Sec. 73.1635) shall be requested and obtained from the Commission's Audio Division, Media Bureau in Washington to operate with parameters at variance with licensed values pending issuance of a modified license specifying parameters subsequent to modification or replacement of components.

47 CFR 73.68 (e)(4) states request for modification of license shall be submitted to the FCC in Washington, DC, within 30 days of the date of sampling system modification or replacement. Such request shall specify the transmitter plate voltage and plate current, common point current, base currents and their ratios, antenna monitor phase and current indications, and all other data obtained pursuant to this paragraph.

47 CFR 73.68(f) states if an existing sampling system is found to be patently of marginal construction, or where the performance of a directional antenna is found to be unsatisfactory, and this deficiency reasonably may be attributed, in whole or in part, to inadequacies in the antenna monitoring system, the FCC may require the reconstruction of the sampling system in accordance with requirements specified above.

47 CFR 73.151(c)(1)(ix) states 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.

47 CFR 73.151(c)(2)(i) describes techniques for moment method modeling, sampling system construction, and measurements that must be taken as part of a moment method proof. A description of the sampling system and the specified measurements must be filed with the license application.

47 CFR 73.151(c)(3) states 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.

47 CFR 73.155 states 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.

47 CFR 73.155(c) states the results of the periodic directional antenna performance recertification measurements shall be retained in the station's public inspection file. The existing information collection requirements for this information collection are as follows:

47 CFR Section 73.54(c) requires that AM licensees file a letter notification with the FCC when determining power by the direct method. In addition, Section 73.54(c) requires that background information regarding antenna resistance measurement data for AM stations must be kept on file at the station.

47 CFR Section 73.54(d) requires AM stations using direct reading power meters to either submit the information required by (c) or submit a statement indicating that such a meter is being used.

47 CFR Section 73.61(c) requires a station may be directed to make a partial

proof of performance by the FCC whenever there is an indication that the antenna is not operating as authorized.

47 CFR Section 73.62(b) requires an AM station with a directional antenna system to measure and log every monitoring point at least once for each mode of directional operation within 24 hours of detection of variance of operating parameters from allowed tolerances.

47 CFR Section 73.69(c) requires AM station licensees with directional antennas to file an informal request to operate without required monitors with the Media Bureau in Washington, D.C., when conditions beyond the control of the licensee prevent the restoration of an antenna monitor to service within a 120 day period. This request is filed in conjunction with Section 73.3549.

47 CFR Section 73.69(d)(1) requires that AM licensees with directional antennas request to obtain temporary authority to operate with parameters at variance with licensed values when an authorized antenna monitor is replaced pending issuance of a modified license specifying new parameters.

47 CFR Section 73.69(d)(5) requires AM licensees with directional antennas to submit an informal request for modification of license to the FCC within 30 days of the date of antenna monitor replacement.

47 CFR Section 73.154 requires the result of the most recent partial proof of performance measurements and analysis to be retained in the station records and made available to the FCC upon request. Maps showing new measurement points shall be associated with the partial proof in the station's records and shall be made available to the FCC upon request.

47 CFR Section 73.158(b) requires a licensee of an AM station using a directional antenna system to file a request for a corrected station license when the description of monitoring point in relation to nearby landmarks as shown on the station license is no longer correct due to road or building construction or other changes. A copy of the monitoring point description must be posted with the existing station license.

47 CFR Section 73.3538(b) requires a broadcast station to file an informal application to modify or discontinue the obstruction marking or lighting of an antenna supporting structure.

47 CFR Section 73.3549 requires licensees to file with the FCC requests for extensions of authority to operate without required monitors, transmission system indicating instruments, or encoders and decoders for monitoring and generating the Emergency Alert System codes. Such requests musts contain information as to when and what steps were taken to repair or replace the defective equipment and a brief description of the alternative procedures being used while the equipment is out of service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–29668 Filed 12–15–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 9, 2009.

A. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. High Country Bancorp, Inc., to become a bank holding company by acquiring 100 percent of the voting shares of High Country Bank, both of Salida, Colorado.

Board of Governors of the Federal Reserve System, December 11, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–29707 Filed 12–15–08; 8:45 am]

BILLING CODE 6210–01–S

Federal Reserve System

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 2:30 p.m., Thursday, December 18, 2008.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th Street entrance between Constitution Avenue and C Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

We ask that you notify us in advance if you plan to attend the open meeting and provide your name, date of birth, and social security number (SSN) or passport number. You may provide this information by calling 202–452–2474 or you may **register online**. You may pre–register until close of business December 17, 2008. You also will be asked to provide identifying information, including a photo ID, before being admitted to the Board meeting. The Public Affairs Office must approve the use of cameras; please call 202–452–2955 for further information. If you need an accommodation for a disability, please contact Penelope Beattie on 202–452–3982. For the hearing impaired only, please use the Telecommunication Device for the Deaf (TDD) on 202–263–4869.

Privacy Act Notice: Providing the information requested is voluntary; however, failure to provide your name, date of birth, and social security number or passport number may result in denial of entry to the Federal Reserve Board. This information is solicited pursuant to Sections 10 and 11 of the Federal Reserve Act and will be used to facilitate a search of law enforcement databases to confirm that no threat is posed to Board employees or property. It may be disclosed to other persons to evaluate a potential threat. The information also may be provided to law enforcement agencies, courts, and others, but only to the extent necessary to investigate or prosecute a violation of law.

MATTERS TO BE CONSIDERED:

Discussion Agenda:

1. Amendments to Consumer Regulations Affecting Credit Card Accounts and Overdraft Services.

Note:

1. The staff memo to the Board will be made available to the public in paper and the background material will be made available on a computer disc in Word format. If you require a paper copy of the document, please call Penelope Beattie on 202–452–3982.

2. This meeting will be recorded for the benefit of those unable to attend. Computer discs (CDs) will then be available for listening in the Board's Freedom of Information Office, and copies can be ordered for $4 per disc by calling 202–452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 for a **recorded announcement** of this meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an **electronic announcement**. (The Web site also includes procedural and other information about the open meeting.)

Board of Governors of the Federal Reserve System, December 11, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–29823 Filed 12–12–08; 11:15 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–0038]

Advisory Committees; Filing of Closed Meeting Reports

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that, as required by the Federal Advisory Committee Act, the agency has filed with the Library of Congress the annual reports of those FDA advisory committees that held closed meetings during fiscal year 2008.

ADDRESSES: Copies are available from the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, 301–827–6860.

FOR FURTHER INFORMATION CONTACT: Theresa L. Green, Committee Management Officer, Advisory Committee Oversight and Management Staff (HF–4), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1220.

SUPPLEMENTARY INFORMATION: Under section 10(d) of the Federal Advisory Committee Act (5 U.S.C. app.1) and 21 CFR 14.60(d), FDA has filed with the Library of Congress the annual reports for the following FDA advisory committees that held closed meetings during the period October 1, 2007, through September 30, 2008:

Center for Biologics Evaluation and Research:

Blood Products Advisory Committee,

Cellular, Tissue and Gene Therapies Advisory Committee,

Vaccines and Related Biological Products Advisory Committee,

Center for Drugs Evaluation and Research:

Anesthetic and Life Support Drugs Advisory Committee,

Oncologic Drugs Advisory Committee,

Center for Devices and Radiological Health:

Medical Devices Advisory Committee (consisting of reports for Circulatory Drugs Devices Panel, Obstetrics and Gynecology Devices Panel and the Radiological Devices Panel),

National Center for Toxicological Research:

Science Board to the National Center for Toxicological Research.

Annual Reports are available for public inspections between 9 a.m. and 4 p.m., Monday through Friday at the following locations:

1. The Library of Congress, Madison Bldg., Newspaper and Current Periodical Reading Room, 101 Independence Ave. SE., rm. 133, Washington, DC; and

2. The Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Dated: December 9, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–29679 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0512]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Devices: Humanitarian Use Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 15, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submissions@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0332. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Medical Devices: Humanitarian Use Devices—21 CFR Part 814 (OMB Control Number 0910–0332)—Extension

This collection of information implements the humanitarian use device (HUD) provision of section 520(m) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360j(m)) and subpart H, part 814 (21 CFR part 814). Under section 520(m) of the act, FDA is authorized to exempt a HUD from the effectiveness requirements of sections 514 and 515 of the act (21 U.S.C. 360d and 360e) provided that the device: (1) Is used to treat or diagnose a disease or condition that affects fewer than 4,000 individuals in the United States; (2) would not be

available to a person with such a disease or condition unless an exemption is granted, because there is no comparable device other than another HUD approved under this exemption that is available to treat or diagnose the disease or condition; and (3) will not expose patients to an unreasonable or significant risk of illness or injury with the probable benefit to health from using the device outweighing the risk of injury or illness from its use. This takes into account the probable risks and benefits of currently available devices or alternative forms of treatment.

The information collected will assist FDA in making determinations on the following: (1) Whether to grant HUD designation of a medical device; (2) exempt a HUD from the effectiveness requirements under sections 514 and 515 of the act, provided that the device meets requirements set forth under section 520(m) of the act; and (3) whether to grant marketing approval(s) for the HUD. Failure to collect this information would prevent FDA from making a determination on the factors listed previously in this document. Further, the collected information would also enable FDA to determine whether the holder of a HUD is in compliance with the HUD provisions under section 520(m) of the act.

In the **Federal Register** of October 1, 2008 (73 FR 57108), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
814.102	14	1	14	40	560
814.104	6	1	6	320	1,920
814.106	6	2	12	50	600
814.108	32	1	32	80	2,560
814.116(e)(3)	1	1	1	1	1
814.124(a)	5	1	5	1	5
814.124(b)	4	1	4	2	8
814.126(b)(1)	45	1	45	120	5,400
Total					11,054

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours Per Record	Total Hours
814.126(b)(2)	45	1	45	2	90
Total					90

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The number of respondents in tables 1 and 2 of this document are an average from data for the previous 3 years, i.e., fiscal year 2005–2007. The number of annual reports submitted under § 814.126(b)(1) in table 1 reflects an increase to 45 respondents with approved HUD applications. Likewise, under § 814.126(b)(2) in table 2, the number of recordkeepers increased to 45.

Dated: December 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29672 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0633]

Agency Information Collection Activities; Proposed Collection; Comment Request; Postmarketing Adverse Drug Experience Reporting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on postmarketing adverse drug experience reporting and recordkeeping requirements.

DATES: Submit written or electronic comments on the collection of information by February 17, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets

Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Postmarketing Adverse Drug Experience Reporting—21 CFR 310.305 and 314.80 (OMB Control Number 0910–0230)—Extension

Sections 201, 502, 505, and 701 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321, 352, 355, and 371) require that marketed drugs be safe and effective. In order to know whether drugs that are not safe and effective are on the market, FDA must be promptly informed of adverse experiences occasioned by the use of marketed drugs. In order to help ensure this, FDA issued regulations at §§ 310.305 and 314.80 (21 CFR 310.305 and 314.80) to impose reporting and recordkeeping requirements on the drug industry that would enable FDA to take the action necessary to protect the public health from adverse drug experiences.

All applicants who have received marketing approval of drug products are required to report to FDA serious, unexpected adverse drug experiences, as well as followup reports when needed (§ 314.80(c)(1)). This includes reports of all foreign or domestic adverse experiences as well as those based on information from applicable scientific literature and certain reports from postmarketing studies. Section 314.80(c)(1)(iii) pertains to such reports submitted by non-applicants. Under § 314.80(c)(2), applicants must provide periodic reports of adverse drug experiences. A periodic report includes, for the reporting interval, reports of serious, expected adverse drug experiences and all nonserious adverse drug experiences and an index of these reports, a narrative summary and analysis of adverse drug experiences and a history of actions taken because of adverse drug experiences. Under § 314.80(i), applicants must keep records of all adverse drug experience reports known to the applicant for 10 years.

For marketed prescription drug products without approved new drug applications or abbreviated new drug applications, manufacturers, packers, and distributors are required to report to FDA serious, unexpected adverse drug experiences as well as followup reports when needed (§ 310.305(c)). Section 310.305(c)(5) pertains to the submission of followup reports to reports forwarded by FDA. Under § 310.305(f), each manufacturer, packer, and distributor shall maintain for 10 years records of all adverse drug experiences required to be reported.

The primary purpose of FDA's adverse drug experience reporting system is to provide a signal for potentially serious safety problems with marketed drugs. Although premarket testing discloses a general safety profile of a new drug's comparatively common adverse effects, the larger and more diverse patient populations exposed to the marketed drug provide the opportunity to collect information on rare, latent, and long-term effects. Signals are obtained from a variety of sources, including reports from patients, treating physicians, foreign regulatory agencies, and clinical investigators. Information derived from the adverse drug experience reporting system contributes directly to increased public health protection because the information enables FDA to make important changes to the product's labeling (such as adding a new warning), decisions about risk evaluation and mitigation strategies or the need for postmarket studies or clinical trials, and when necessary, to initiate removal of a drug from the market.

Respondents to this collection of information are manufacturers, packers, distributors, and applicants. FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
310.305(c)(5)	1	1	1	1	1
314.80(c)(1)(iii)	5	1	5	1	5
314.80(c)(2)	642	17.88	11,478	60	688,680
Total					688,686

[1] The reporting burden for §§ 310.305(c)(1), (c)(2), and (c)(3), and 314.80(c)(1)(i) and (c)(1)(ii) was reported under OMB No. 0910–0291. The capital costs or operating and maintenance costs associated with this collection of information are approximately $25,000 annually.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
310.305(f)	25	1	25	16	400
314.80(i)	642	623	400,000	16	6,400,000
Total					7,088,680

[1]There are no capital costs or operating costs associated with this collection of information. There are maintenance costs of $22,000 annually.

These estimates are based on FDA's knowledge of adverse drug experience reporting, including the time needed to prepare the reports, and the number of reports submitted to the agency.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: December 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29664 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0490]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Cosmetic Registration Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 15, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0030. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Voluntary Cosmetic Registration Program—(OMB Control Number 0910–0030)—Extension

The Federal Food, Drug, and Cosmetic Act (the act) provides FDA with the authority to regulate cosmetic products in the United States. Cosmetic products that are adulterated under section 601 of the act (21 U.S.C. 361) or misbranded under section 602 of the act (21 U.S.C. 362) may not be distributed in interstate commerce. To assist FDA in carrying out its responsibility to regulate cosmetics, the agency has developed the Voluntary Cosmetic Registration Program (VCRP). In part 720 (21 CFR part 720), FDA requests that firms that manufacture, pack, or distribute cosmetics file with the agency an ingredient statement for each of their products. Ingredient statements for new submissions (§§ 720.1 through 720.4) are reported on Form FDA 2512, ''Cosmetic Product Ingredient Statement,'' and on Form FDA 2512a, a continuation form. Amendments to product formulations (§§ 720.3, 720.4, and 720.6) also are reported on Forms FDA 2512 and FDA 2512a. When a firm discontinues the commercial distribution of a cosmetic, FDA requests that the firm file Form FDA 2514, ''Discontinuance of Commercial Distribution of Cosmetic Product Formulation'' (§§ 720.3 and 720.6). If any of the information submitted on or with these forms is confidential, the firm may submit a request for confidentiality under § 720.8.

FDA's online filing system, intended to make it easier to participate in the VCRP, was made available industry-wide on December 1, 2005. The online filing system is available on FDA's VCRP Web site at *http://www.cfsan.fda.gov/~dms/cos-regn.html*. The online filing system contains the electronic versions of Forms FDA 2512, 2512a, and 2514, which are collectively found within the electronic version of Form FDA 2512. The agency strongly encourages electronic filing of Form FDA 2512 because it is faster and more convenient. A filing facility will receive confirmation of electronic filing by e-mail. Submission of the paper version of Forms FDA 2512, 2512a, and 2514 remains an option as described in *http://www.cfsan.fda.gov/~dms/cos-reg2.html*. However, due to the high volume of online participation, the VCRP is allocating its limited resources primarily to electronic filings.

FDA places cosmetic product filing information in a computer data base and uses the information for evaluation of cosmetic products currently on the market. Because filing of cosmetic product formulations is not mandatory, voluntary filings provide FDA with the best information available about cosmetic product ingredients and their frequency of use, businesses engaged in the manufacture and distribution of cosmetics, and approximate rates of product discontinuance and formula modifications. The information assists FDA scientists in evaluating reports of alleged injuries and adverse reactions from the use of cosmetics. The information also is used in defining and planning analytical and toxicological studies pertaining to cosmetics.

Information from the database is releasable to the public under FDA compliance with the Freedom of Information Act. FDA shares nonconfidential information from its files on cosmetics with consumers, medical professionals, and industry.

In the **Federal Register** of September 17, 2008 (73 FR 53877), FDA published a 60-day notice requesting public comment on the information collection

provisions. FDA received two letters in response to the notice, each containing one or more comments. One comment suggested that FDA make the voluntary cosmetic registration program mandatory. FDA responds that it has no statutory authority to require mandatory cosmetic product reporting. The remaining comments received were not responsive to the comment request on the four specified aspects of the collection of information. These non-responsive comments will not be addressed in this document.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
720.1 through 720.4 (new submissions)	FDA 2512[2]	141	31	4,371	.33	1,442
720.4 and 720.6 (amendments)	FDA 2512	109	7	763	.17	130
720.3, 720.6 (notices of discontinuance)	FDA 2512	55	41	2,255	.1	226
720.8 (requests for confidentiality)		1	1	1	1.5	1.5
Total						1,800

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] The term "Form FDA 2512" refers to both the paper Forms FDA 2512, 2512a, and 2514 and electronic Form FDA 2512 in the electronic system known as the Voluntary Cosmetic Registration Program, which is available at *http://www.cfsan.fda.gov/~dms/cos-regn.html*.

The estimated number of respondents is based on submissions received from fiscal years 2005 to 2007. The estimated time required for each submission is based upon information from cosmetic industry personnel and FDA experience entering data submitted on paper Forms FDA 2512, 2512a, and 2514. The increase in total annual responses is due to increased participation by cosmetic companies, because of a renewed industry commitment to the program, and implementation of the online filing system on December 1, 2005. The decrease in hours per response is due to the ease of online filing.

Dated: December 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29685 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0629]

Draft Guidance for Industry on Genotoxic and Carcinogenic Impurities in Drug Substances and Products: Recommended Approaches; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled "Genotoxic and Carcinogenic Impurities in Drug Substances and Products: Recommended Approaches." This draft guidance is intended to inform pharmaceutical manufacturers of the agency's thinking regarding genotoxic and carcinogenic impurities in drug substances and drug products, including biologic products that are regulated by the Center for Drug Evaluation and Research (CDER), and to provide recommendations on how to evaluate the safety of these impurities during clinical development and for marketing applications. This draft guidance, when finalized, will clarify FDA's additional testing and exposure threshold recommendations for situations in which genotoxic or carcinogenic impurities are present. This draft guidance addresses synthetic impurities and degradants in drug substances, but does not otherwise address the genotoxicity or carcinogenicity of actual drug substances or intended drug product ingredients. This draft guidance also applies to known starting materials or anticipated reaction products.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by February 17, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: David Jacobson-Kram, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 6488, Silver Spring, MD 20993–0002, 301–796–0175.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Genotoxic and Carcinogenic Impurities in Drug Substances and Products: Recommended Approaches." This draft guidance is intended to inform pharmaceutical manufacturers of the agency's thinking regarding genotoxic and carcinogenic impurities in drug substances and drug products, including biologic products regulated by CDER,

and to provide recommendations on how to evaluate the safety of these impurities. Genotoxic compounds, because of their ability to induce genetic mutations, chromosomal breaks, and/or chromosomal rearrangements, have the potential for being carcinogenic to humans.

Regulatory issues related to the presence of genotoxic or carcinogenic impurities have arisen with greater frequency because of enhanced technological capability in identifying impurities and an increased focus on their potential for negatively affecting human health. FDA guidance documents that address issues related to impurities and residual solvents include the following International Conference on Harmonisation (ICH) guidances for industry: ''Q3A(R2) Impurities in New Drug Substances,'' ''Q3B(R2) Impurities in New Drug Products,'' and ''Q3C(R3) Impurities: Guideline for Residual Solvents.'' However, these ICH guidances do not fully address situations in which genotoxic or carcinogenic impurities are present.

This draft guidance describes acceptable approaches for initially evaluating the genotoxic potential of impurities as well as approaches for handling impurities with known genotoxic or carcinogenic potential. These approaches include prevention of the impurity formation, reduction of the impurity level to an acceptable threshold, or additional characterization of the genotoxic and carcinogenic risk. The draft guidance also discusses various factors that should be considered in the overall risk assessment based on the drug indication, duration of use, and the clinical development stage.

FDA has developed this draft guidance because these types of impurities are being identified more frequently and because FDA has received a number of questions from industry regarding acceptable approaches.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on recommended approaches for genotoxic and carcinogenic impurities in drug substances and products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 312 and 314 have been approved under OMB Control Numbers 0910–0014 and 0910–0001, respectively.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: December 8, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29674 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0626]

Draft Guidance for Industry on Bioequivalence Recommendation for Vancomycin HCl; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Bioequivalence Recommendation for Vancomycin HCl.'' The recommendation provides specific guidance on the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs) for vancomycin HCl capsules.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by February 17, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Doan T. Nguyen, Center for Drug Evaluation and Research (HFD–600), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9314.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of May 31, 2007 (72 FR 30388), FDA announced the availability of a draft guidance for industry, ''Bioequivalence Recommendations for Specific Products,'' which explained the process that would be used to make product-specific BE recommendations available to the public on FDA's Web site at *http://www.fda.gov/CDER/GUIDANCE/bioequivalence/default.htm*. As described in that draft guidance, FDA adopted this process as a means to develop and disseminate product-specific BE recommendations and provide a meaningful opportunity for the public to consider and comment on those recommendations. This notice announces the availability of the agency's draft BE recommendation for vancomycin HCl capsules.

Vancocin (vancomycin HCl) oral capsules, approved by FDA in April 1986, are indicated for the treatment of

enterocolitis caused by *Staphylococcus aureus* (including methicillin-resistant strains) and antibiotic-associated pseudomembranous colitis caused by *Clostridium difficile*. Vancocin oral capsules are designated the reference listed drug (RLD) and therefore any ANDA for generic vancomycin HCl oral capsules must demonstrate BE to Vancocin prior to approval. There are no approved ANDAs for vancomycin HCl capsules.

Vancomycin acts locally in the lower gastrointestinal (GI) tract. After oral administration, a vancomycin capsule releases the drug in the stomach and upper GI tract, the released drug is completely solubilized in GI fluids, and it is transported along with GI fluids to its site of action in the lower GI tract. As set forth in the Clinical Pharmacology section of the approved product labeling for Vancocin, vancomycin is poorly absorbed after oral administration and does not usually enter the systemic circulation. Thus, plasma and urine concentrations of vancomycin are generally undetectable following oral administration, and traditional BE studies with pharmacokinetic (PK) measurements are of limited utility. Accordingly, in 1996, FDA recommended an in vivo BE study with clinical endpoints in patients to demonstrate BE of generic vancomycin HCl oral capsules.

In October 2004, FDA asked its Advisory Committee for Pharmaceutical Science to consider when dissolution testing could be used to establish BE for locally-acting GI drugs. The committee concluded that dissolution testing along with PK studies should be acceptable to establish BE for such products. In light of the committee's conclusions, after obtaining data showing that vancomycin HCl is highly soluble at pH conditions encountered in the GI tract and expected to be in solution long before it reaches the site of action in the lower GI tract, the FDA revised its recommendation in early 2006 to include in vitro dissolution studies to demonstrate BE of generic vancomycin HCl oral capsules. This approach would provide FDA's Office of Generic Drugs with information about drug availability at the site of action and would be more sensitive than clinical trials in detecting differences in product performance. In accordance with its practice prior to publication of the draft guidance ''Bioequivalence Recommendations for Specific Products,'' FDA provided its 2006 revised BE recommendations to those parties that had requests pending with FDA for this information. In March 2006, Viropharma, Inc., the manufacturer of the RLD Vancocin, filed a petition for stay of action (PSA) challenging FDA's revised recommendation (Docket No. FDA–2006–P–0007).[1]

In the draft ''Bioequivalence Recommendation for Vancomycin HCl,'' FDA further clarifies its recommendations on the design of BE studies to support ANDAs for vancomycin HCl capsules. Because generic applicants may use different inactive ingredients, which may affect the transport, absorption, and/or effectiveness of the drug, FDA is currently recommending in vitro dissolution studies only for test formulations that are qualitatively (Q1) and quantitatively (Q2) the same as the RLD with respect to inactive ingredients. For test formulations that are not Q1 and Q2 the same as the RLD with respect to inactive ingredients, FDA is recommending in vivo BE studies with clinical endpoints. The draft BE recommendation for vancomycin HCl capsules is consistent with the 2004 advisory committee's conclusion. PK studies are not appropriate in this case, however, because vancomycin levels are generally not detectable in the plasma or urine due to very limited absorption.

Comments on this draft guidance will also be considered by FDA as it addresses the complicated issues raised in Viropharma, Inc.'s PSAs. FDA will carefully consider such comments before responding to the petition and finalizing its BE recommendation for vancomycin HCl. Because of the lengthy history of FDA's consideration of bioequivalence methodologies for vancomycin HCl capsules, the pendency of the PSAs, and the complexity of the issues involved, the availability of this draft guidance is being announced in a drug product-specific notice, and the recommendations include a significant amount of background information and explanation of the reasons for the bioequivalence recommendations.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the design of BE studies to support ANDAs for vancomycin HCl. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

[1] This PSA was originally assigned Docket No. 2006P–0124. The number was changed to FDA–2006–P–0007 as a result of FDA's transition to its new docketing system (Regulations.gov) in January 2008. This docket also includes a second PSA and numerous supplements filed by ViroPharma.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: December 8, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29692 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0614]

Draft Guidance for Industry on Changes to Approved New Animal Drug Applications—New Animal Drug Applications Versus Category II Supplemental New Animal Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry #191 entitled ''Changes to Approved NADAs—New NADAs vs. Category II Supplemental NADAs''. This guidance is intended to assist sponsors who wish to apply for approval of changes to approved new animal drugs

that require FDA to reevaluate safety and/or effectiveness data. The goal of this guidance is to create greater consistency in how such applications are handled by sponsors and by FDA's Center for Veterinary Medicine (CVM).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by February 17, 2009.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Suzanne J. Sechen, Center for Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8105, e-mail: suzanne.sechen@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry #191 entitled ''Changes to Approved NADAs—New NADAs vs. Category II Supplemental NADAs''. In the past, applications for changes to approved new animal drugs may have been handled inconsistently by sponsors and the agency. Inconsistency in handling such applications has been confusing for sponsors and for CVM, particularly when reviewing and referencing the history of specific new animal drug applications (NADAs). This guidance is intended to improve consistency in the way applications for changes are handled. We believe that consistent handling of these types of applications also will help maintain clarity in the administrative record, which is an important part of protecting the public health.

When proposing a change to an approved new animal drug that may affect the safety and/or effectiveness of the drug, such changes generally must be submitted to FDA either as a new NADA or a supplemental application to the original NADA. Category II supplemental NADAs are the type of supplement that is used to propose changes that may require a reevaluation of certain safety or effectiveness data in the parent application. Specific changes meeting the requirements for a Category II supplemental NADA are described in 21 CFR 514.106(b)(2). This guidance provides examples and makes specific recommendations about when a change to an approved NADA that requires FDA to review safety and/or effectiveness data should be submitted as a new NADA and when such a change should be submitted as a Category II supplemental NADA. In addition, the guidance addresses how to handle submissions relating to certain types of proposed changes at the investigational stage.

II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information have been approved under OMB Control No. 0910–0032.

IV. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

V. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cvm* or *http://www.regulations.gov*.

Dated: Decmeber 8, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29691 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0610]

Draft Guidance for Industry on Postmarketing Adverse Event Reporting for Medical Products and Dietary Supplements During an Influenza Pandemic; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Postmarketing Adverse Event Reporting for Medical Products and Dietary Supplements During an Influenza Pandemic.'' The draft guidance discusses FDA's intended approach to enforcement of adverse event reporting requirements for drugs, biologics, medical devices, and dietary supplements during the Federal Government Response Stages of an influenza pandemic. The agency makes recommendations to industry for focusing limited resources on reports related to influenza-related products and other specific types of reports indicated in the draft guidance.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by February 17, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire

Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002; or the Office of Communication, Training and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Regarding pandemic influenza: Carmen Maher, Office of Counterterrorism and Emerging Threats (HF–29), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4067.

Regarding human drug products: Solomon Iyasu, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 4447, Silver Spring, MD 20993–0002, 301–796–2370.

Regarding human biological products: Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210.

Regarding medical device products: Deborah Moore, Center for Devices and Radiological Health (HFZ–533), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240–276–3442.

Regarding dietary supplements: John Sheehan, Center for Food Safety and Applied Nutrition (HFS–315), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1488.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Postmarketing Adverse Event Reporting for Medical Products and Dietary Supplements During an Influenza Pandemic.'' FDA anticipates that during an influenza pandemic, industry and FDA workforces may be reduced while reporting of adverse events related to widespread use of influenza-related products may increase, although the extent of these possible changes is unknown. This draft guidance discusses FDA's intended approach to enforcement of adverse event reporting requirements for drugs, biologics, medical devices, and dietary supplements in the event of an influenza pandemic. The draft guidance provides recommendations to permit industry to focus their limited resources on reports related to influenza-related products and other specific types of reports. The draft guidance indicates FDA's intention not to object if, during Federal Government Response Stage 5, certain required adverse event reports are not provided within the timeframes required by statute and regulation, as long as any delayed reports are then provided during Federal Government Response Stage 6.

This draft guidance does not address monitoring and reporting of adverse events that might be imposed as a condition of authorization for products authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360bbb-3). This draft guidance also does not address monitoring and reporting of adverse events as required by regulations establishing the conditions for investigational use of drugs, biologics, and devices. (See 21 CFR parts 312 and 812.)

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on postmarketing adverse event reporting for medical products and dietary supplements during pandemic influenza. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

III. Paperwork Reduction Act of 1995

The draft guidance explains FDA's approach to enforcement of adverse event reporting requirements for drugs, biologics, medical devices, and dietary supplements during the Federal Government Response Stages of an influenza pandemic, including an intent not to object to changes in the timing of submission of certain reports during some stages of the pandemic response. The draft guidance refers to reporting requirements found in 21 CFR 310.305, 314.80, 314.98, 600.80, 606.170, 640.73, 1271.350, and part 803. These regulations contain collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and are approved under OMB control numbers 0910–0116, 0910–0291, 0910–0230, 0910–0308, and 0910–0543.

The draft guidance also refers to adverse event reports required under sections 760 and 761 of the act (21 U.S.C. 379aa and 379aa-1), which are addressed in two draft guidances for industry. FDA's October 15, 2007, notices of availability for those draft guidances, entitled ''Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed Without an Approved Application'' (72 FR 58316) and ''Questions and Answers Regarding Adverse Event Reporting and Recordkeeping for Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act'' (72 FR 58313), describe related proposed collections of information. As required by the PRA, FDA published analyses of the information collection provisions of the October 2007 draft guidances and will submit the collection of information analyses to OMB for approval prior to issuing final guidances.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/cber/guidelines.htm* or *http://www.fda.gov/cdrh/guidance.html* or *http://www.cfsan.fda.gov/~dms/*

guidance.html or *http://www.regulations.gov*.

Dated: December 3, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29742 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0365] (formerly Docket No. 2007D–0117)

Guidance for Industry on Orally Disintegrating Tablets; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Orally Disintegrating Tablets.'' The guidance provides pharmaceutical manufacturers of new and generic products with an agency perspective on the definition of an orally disintegrating tablet (ODT) and also provides recommendations to applicants who would like to designate proposed products as ODTs.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Frank O. Holcombe, Jr., Center for Drug Evaluation and Research (HFD–600), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–9310.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Orally Disintegrating Tablets.'' The guidance provides pharmaceutical manufacturers of new and generic drug products with an agency perspective on the definition of an ODT and also provides recommendations to applicants who would like to designate proposed products as ODTs.

On April 9, 2007 (72 FR 17563), FDA announced the availability of the draft version of this guidance. The public comment period closed on June 8, 2007. The draft guidance also was discussed at an Advisory Committee for Pharmaceutical Science meeting held on July 22 and 23, 2008. A number of comments were received from the public and during the meeting, all of which the agency considered carefully as it finalized the guidance and made appropriate changes. Any changes to the guidance were minor and made to clarify statements in the draft guidance.

In an effort to develop drug products that are more convenient to use and to address potential issues of patient compliance for certain product indications and patient populations, pharmaceutical manufacturers have developed products that can be ingested simply by placing them on the tongue. The products are designed to disintegrate or dissolve rapidly on contact with saliva, thus eliminating the need to chew the tablet, swallow an intact tablet, or take the tablet with liquids. This mode of administration was initially expected to be beneficial to pediatric and geriatric patients, to people with conditions related to impaired swallowing, and for treatment of patients when compliance may be difficult (e.g., for psychiatric disorders).

As firms started developing additional products using different technology and formulations, many of these later products exhibited wide variation in product characteristics from the initial products. Because this shift in product characteristics can affect suitability for particular uses, the agency developed this guidance for industry.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on orally disintegrating tablets. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: December 8, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29688 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0628]

Microbiological Testing for Contact Lens Care Products; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Microbiological Testing for Contact Lens Care Products.'' FDA is co-sponsoring the public workshop with the American Academy of Ophthalmology, the American Academy of Optometry, the American Optometric Association, and the Contact Lens Association of Ophthalmologists. The purpose of the public workshop is to discuss test method parameters for evaluating the activity of contact lens care products against *Acanthamoeba*

and to discuss elements of microbiological test methods that simulate ''real world'' consumer use conditions.

Date and Time: The public workshop will be held on January 22 and 23, 2009, from 8 a.m. to 5 p.m. Participants are encouraged to arrive by 7:30 a.m. to allow enough time for parking and security screening. Security Screening will begin at 7 a.m.

Location: The public workshop will be held at the Food and Drug Administration, White Oak Conference Center, 10903 New Hampshire Ave., Bldg. 2 (Central Shared Use Building), Silver Spring, MD. Attendees should follow the directions provided in the *Registration Information* section of this document.

Contact: Daryl L. Kaufman, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4200, FAX: 240–276–4234, e-mail: *Daryl.Kaufman@fda.hhs.gov*, or

Marc Robboy, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–4200, FAX: 240–276–4234, e-mail: *Marc.Robboy@fda.hhs.gov*.

Agenda: The purpose of the conference is to discuss test methods for evaluating the anti-microbial activity of contact lens care products.

On January 22, 2008, we hope to reach consensus on critical test method parameters for evaluating the activity of contact lens care products against *Acanthamoeba*. These parameters include organism species and strain, trophozoite culture and cyst production, microbial challenge level, and assay method for survivors.

On January 23, 2008, we hope to present and discuss critical elements for new or modified disinfection efficacy test methods that simulate ''real world'' consumer use conditions. These elements include contact lens and lens case uptake of preservative and other solution ingredients, solution evaporation, minimal consumer compliance, biofilm formation and clinical isolates as challenge organisms.

Background information on the public workshop, registration information, the agenda, information about lodging, and other relevant information will be posted on the Internet at *www.jcahpo.org/clmw*.

Registration Information: Registration must be completed online at *www.jcahpo.org/clmw*. Please pre-register no later than January 8, 2009 (see instructions in this paragraph). There will be no onsite registration. Non-U.S. citizens are subject to additional security screening and should pre-register at least 3 weeks in advance. There is a registration fee of $250 for this workshop. Early registration is recommended because seating is limited.

If you need special accommodations due to a disability, please contact Ms. Janice Prestwood at 800–284–3937, ext. 229 (toll free), 651–731–7229 (direct) or 651–731–0410 (fax) at least 7 days before the public workshop. Lodging, travel, and security clearance information are also available from the registration Web site. Persons without Internet access may contact Ms. Janice Prestwood for help in completing the registration form.

Dated: December 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29741 Filed 12–15–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Dates and Times: January 14, 2009, 11 a.m.–3 p.m.

Place: Teleconference meeting.

Status: The meeting will be open to the public; audio conference access limited only by availability of telephone ports.

Purpose: The Committee represents the required preliminary planning of the mandated ACICBL activities for the 2009 calendar year. The meeting will afford committee members with the opportunity to identify and discuss potential topics on interdisciplinary and community based trainings for the focus of the Ninth Annual ACICBL Report to the Secretary and Congress. The discussion will also include the identification of potential speakers with expertise on recommended topics for the Annual Report as well as strategies for moving forward. In addition, the Committee will finalize the dates, format, and agenda for the two remaining mandated meetings of the 2009 calendar year.

Agenda: The agenda includes a discussion of potential topics and speakers for the Ninth Annual ACICBL Report, and planning for the two remaining meetings of the 2009 calendar year. Agenda items are subject to change as dictated by the priorities of the Committee.

Supplementary Information: The ACICBL will meet on Wednesday, January 14, 2009, 11 a.m. to 3 p.m. (EST) via telephone conference. To participate in this telephone conference call, please dial 1–888–272–7337 and provide the following information:

Leader's Name: Mr. Lou Coccodrilli.

Passcode: 9501090.

For Further Information Contact: Anyone requesting information regarding the Committee meeting should contact Lou Coccodrilli, Federal Official for the ACICBL, and Chief of the Area Health Education Center Branch, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, Rockville, Maryland 20857; *lcoccodrilli@hrsa.gov* or (301) 443–6590. CAPT Norma Hatot, Senior Nurse Consultant may also be contacted for inquiries via e-mail at *nhatot@hrsa.gov* or telephone at (301) 443–2861.

Dated: December 9, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–29665 Filed 12–15–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Service Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Request for Nominations

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill four upcoming vacancies on the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Authority: 42 U.S.C. 294f, Section 756 of the PHS Act, as amended. The Advisory Committee is governed by provisions of Public Law (Pub. L.) 92–463, as amended (5 U.S.C. Appendix 2) which sets forth standards for the formation and use of advisory committees.

DATES: The Agency must receive nominations on or before January 16, 2009.

ADDRESSES: All nominations are to be submitted by mail to Louis D. Coccodrilli, Designated Federal Official, ACICBL, Division of Diversity and Interdisciplinary Education (DDIE), Bureau of Health Professions (BHPr), HRSA, Parklawn Building, Room 9–36, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: CAPT Norma J. Hatot, Senior Program Officer, DDIE, BHPr, via e-mail at

nhatot@hrsa.gov or telephone at (301) 443–2681.

SUPPLEMENTARY INFORMATION: Under the authorities that established the ACICBL and the Federal Advisory Committee Act Public Law 92–463, as amended, HRSA is requesting nominations for four voting members.

The ACICBL provides advice and recommendations to the Secretary and to the Congress concerning policy, program development and other matters of significance related to interdisciplinary, community-based training grant programs authorized under sections 751–755, Title VII, Part D of the Public Health Service Act. The ACICBL prepares an annual report describing the activities conducted during the fiscal year, identifying findings and developing recommendations to enhance Title VII Interdisciplinary, Community-Based Training Grant Programs. The Annual Report is submitted to the Secretary of the U.S. Department of Health and Human Services and ranking members of the Committee on Health, Education, Labor and Pensions of the Senate, and the Committee on Energy and Commerce of the House of Representatives.

The Department of Health and Human Services is requesting a total of four nominations for voting members of the ACICBL from schools that have administered or are currently administering awards from the following programs: Area Health Education Centers; Geriatric Academic Career Award; Geriatric Training for Physicians, Dentists, and Behavioral, Mental Health Professionals; and Health Education Training Centers. Among these nominations, students, residents, and/or fellows from these programs are encouraged to apply.

The legislation governing this Committee requires that at least 75 percent of the members are health professionals, a fair balance between the health professions, a broad geographic distribution and a balance of members from urban and rural areas, and the adequate representation of women and minorities. Members will be appointed based on their competence, interest, and knowledge of the mission of the profession involved. As such, the pool of appropriately qualified nominees should reflect these requirements to the degree possible.

Interested individuals may nominate multiple qualified professionals for membership to the ACICBL to allow the Secretary a diverse listing of highly qualified potential candidates. Nominees willing to serve as members of the ACICBL should not have an appearance of a conflict of interest that would preclude their participation. Potential candidates will be asked to provide detailed information concerning consultancies, research grants, or contracts to permit an evaluation of possible sources of conflicts of interest. In addition, a curriculum vitae and a statement of interest will be required of the nominee to support experience working with Title VII Interdisciplinary, Community-Based Training Grant Programs, expertise in the field, and personal desire in participating on a National Advisory Committee. Members of the Advisory Committee shall be appointed for a term of three years.

All nominations must be received no later than January 16, 2009.

Dated: December 9, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–29661 Filed 12–15–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2008–1149]

Houston/Galveston Navigation Safety Advisory Committee Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The U.S. Coast Guard seeks applications for membership on the Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). This committee advises and makes recommendations to the Coast Guard on matters relating to the safe navigation of vessels to and from the Ports of Galveston, Houston, and Texas City, and throughout Galveston Bay, Texas.

DATES: Completed application forms should reach us on or before February 14, 2009.

ADDRESSES: You may request an application form by writing to Commander (spw), Designated Federal Officer (DFO) of HOGANSAC, USCG Sector Houston-Galveston, 9640 Clinton Drive, Houston, TX 77029; by calling LT Sean Hughes at (713) 678–9001; by submitting a faxed request to 713–671–5156; or by visiting HOGANSAC's Web site *http://www.hogansac.org.* Send your completed application to the DFO at the street address above.

FOR FURTHER INFORMATION CONTACT: CDR Hal R. Pitts, Executive Secretary of HOGANSAC at (713) 671–5164 or LT Sean Hughes, Assistant to the Executive Secretary of HOGANSAC at (713) 678–9001.

SUPPLEMENTARY INFORMATION: HOGANSAC is a Federal Advisory Committee subject to the provisions of 5 U.S.C. App. 2. This committee provides local expertise to the Secretary of Homeland Security and the Coast Guard on such matters as communications, surveillance, traffic control, anchorages, aids to navigation, and other related topics dealing with navigation safety in the Houston/Galveston area. The committee meets at least three times a year at various locations in the Houston/Galveston area. It may also meet for extraordinary purposes.

We will consider applications for nineteen (19) positions that expire or become vacant in September 2009. To be eligible, you should have experience and particular expertise and knowledge regarding the transportation, equipment, and techniques that are used to ship cargo and to navigate vessels in the inshore and the offshore waters of the Gulf of Mexico. Committee members represent a wide range of constituencies. There are twelve membership categories: (1) Two members who are employed by the Port of Houston Authority or have been selected by that entity to represent them; (2) two members who are employed by the Port of Galveston or the Texas City Port Complex or have been selected by those entities to represent them; (3) two members from organizations that represent shipowners, stevedores, shipyards, or shipping organizations domiciled in the State of Texas; (4) two members representing organizations that operate tugs or barges that utilize the port facilities at Galveston, Houston, and Texas City; (5) two members representing shipping companies that transport cargo from the ports of Galveston and Houston on liners, break bulk, or tramp steamer vessels; (6) two members representing those who pilot or command vessels that utilize the ports of Galveston, Houston and Texas City; (7) two at-large members who may represent a particular interest group but who use the port facilities at Galveston, Houston or Texas City; (8) one member representing labor organizations involved in the loading and unloading of cargo at the ports of Galveston or Houston; (9) one member representing licensed merchant mariners other than pilots, who perform shipboard duties on vessels which utilize the port facilities of Galveston, Houston or Texas City; (10) one member representing

environmental interests; (11) one member representing the general public and (12) one member representing recreational boaters. Each member serves for a term of two (2) years and may serve two (2) consecutive terms. Members serve voluntarily, without compensation from the Federal Government for salary, travel, or per diem.

In support of the policy of the Coast Guard on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

If you are selected as a non-representative member, or as a member who represents the general public, you will be appointed and serve as a special Government employee (SGE) as defined in section 202(a) of title 18, United States Code. As a candidate for appointment as a SGE, applicants are required to complete a Confidential Financial Disclosure Report (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Only the Designated Agency Ethics Official or the DAEO's designate may release a Confidential Financial Disclosure Report.

If you are interested in applying to become a member of the Committee, send a completed application to Commander (spw) Designated Federal Officer (DFO) of HOGANSAC, USCG Sector Houston-Galveston, 9640 Clinton Drive, Houston, TX 77029. Send the application in time for it to be received by the DFO on or before February 14, 2009.

Dated: December 3, 2008.

Joel R. Whitehead,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. E8–29727 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2008–1190]

Towing Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the Towing Safety Advisory Committee (TSAC). TSAC advises the Coast Guard on matters relating to shallow-draft inland and coastal waterway navigation and towing safety.

DATES: Application forms should reach the Coast Guard on or before February 16, 2009.

ADDRESSES: Application forms are available for download on the Advisory Committee's Web site at *http://homeport.uscg.mil/tsac;* look for ''ACM'' (Application for Committee Membership) under ''General Information.'' You may also request that an application form be e-mailed or sent to you by writing to Commandant (CG–5221/TSAC); U.S. Coast Guard, Room 1210; 2100 Second Street, SW.; Washington, DC 20593–0001; by calling 202–372–1407; or by e-mail to *Gerald.P.Miante@uscg.mil.* Be sure to sign and include the short page that allows us to keep political affiliation on file. In addition to your ''HOME ADDRESS,'' please include your e-mail address in that block. Also, in addition to your phone number, please indicate your fax number in the ''TELEPHONE'' block. Also, a copy of the application form, as well as this notice, is available on the Internet at *http://www.Regulations.gov* in docket USCG–2008–1190. Send your original completed and signed application in written form to Mr. Miante at the above street address.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Miante Assistant Designated Federal Officer of TSAC; telephone 202–372–1407, fax 202–372–1926, or e-mail *Gerald.P.Miante@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Towing Safety Advisory Committee (TSAC) is a Federal advisory committee under 5 U.S.C. App. (Pub. L. 92–463). It was established under authority of 33 U.S.C. 1231a. It advises the Secretary of Homeland Security on matters relating to shallow-draft inland and coastal waterway navigation and towing safety. This advice also assists the Coast Guard in formulating the position of the United States in advance of meetings of the International Maritime Organization.

TSAC meets at least once a year in Washington, DC, or another location selected by the Coast Guard. It may also meet for extraordinary purposes. Its subcommittees and working groups may meet to consider specific issues as required. The 16-person membership includes 7 representatives of the Barge and Towing Industry (reflecting a regional geographical balance); 1 member from the Offshore Mineral and Oil Supply Vessel Industry; and 2 members from each of the following areas: Maritime Labor; Shippers (of whom at least one shall be engaged in the shipment of oil or hazardous materials by barge); Port Districts, Authorities, or Terminal Operators; and the General Public.

The Coast Guard is currently considering applications for five positions that will become vacant on September 30, 2009: two positions from the Barge and Towing Industry; one position from the Offshore Mineral and Oil Supply Vessel Industry; one position from Shippers (who need not be engaged in the shipment of oil or hazardous materials by barge); and one position from the General Public. To be eligible, applicants should have particular expertise, knowledge, and experience relative to the position in towing operations, marine transportation, or business operations associated with shallow-draft inland and coastal waterway navigation and towing safety. Each member serves for a three-year term. A few members may serve consecutive terms. All members serve at their own expense and receive no salary or other compensation from the Federal Government, with the exception of possible reimbursement for travel expenses depending on budgetary constraints.

In support of the policy of DHS and the Coast Guard on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

Members of TSAC selected from the General Public will be appointed and serve as non-representative members, or Special Government Employees (SGE), as defined in section 202(a) of title 18, United States Code (18 U.S.C.). As a candidate for appointment as an SGE, applicants are required to complete a Confidential Financial Disclosure Report (CFDR) on Office of Government Ethics Form 450 (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Only the Designated Agency Ethics Official (DAEO) or the DAEO's designate may release a CFDR.

When filling in the ''Name of Committee you are interested in'' block, please indicate ''TSAC'' followed by the position category (*e.g.* , 'Barge and Towing,' 'Offshore,' 'Shippers,' or 'Public') for which you are applying.

If you are interested in applying to become a member of the Committee, send a completed application to Mr. Miante as noted in **ADDRESSES** above. Send the application in time for it to be received on or before February 16, 2009.

A copy of the application form is available in the docket for this notice. To visit our online docket, go to *http://www.regulations.gov,* enter the docket number for this notice (USCG–

2008–1190) in the Search box, and click ''Go.''

Dated: December 11, 2008.

J.G. Lantz,

Director, Commercial Regulations and Standards.

[FR Doc. E8–29735 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; Revision of a currently approved collection, OMB Number 1660–0083, FEMA Form 116–1, FEMA Form 085–1, FEMA Form 090–1.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Loan Package for Community Disaster Loans and Special Community Disaster Loan Programs. This collection allows the government to make loans to communities that have suffered economic problems due to disasters.

SUPPLEMENTARY INFORMATION: The Community Disaster Loan Program (CDL) is authorized by Section 417 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93–288, as amended, provides policies and procedures for local governments and State and Federal officials concerning the Community Disaster Loan Program; FEMA regulations 44 CFR, Part 206.364, Subpart K, implements the statutes. The Assistant Administrator may make a CDL to any local government which has suffered a substantial loss of tax or other revenues as a result of a major disaster or emergency and which demonstrates a need for Federal financial assistance in order to perform its governmental functions.

Collection of Information

Title: Application for Community Disaster Loan (CDL) Program and the Special Community Disaster Loan (SCDL) Program.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660–0083.

Form Numbers: FEMA Form 116–1 Promissory Note, FEMA Form 085–1 Local Government Resolution Collateral Security, and FEMA Form 090–1 Certification of Eligibility for Community Disaster Loans.

Abstract: The Loan Package for the Community Disaster Loan and Special Community Disaster Loan Programs provides States, Local and Tribal governments that have suffered substantial loss of tax or other revenues as a result of a major disaster or emergency, the opportunity to obtain financial assistance in order to perform their governmental functions. Local governments can submit a loan package for the traditional and Special Community Disaster Loan Programs. These loans must be justified on the basis of need and actual expenses.

Affected Public: State, Local, or Tribal Government.

Estimated Total Annual Burden Hours: 875 hours.

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	No. of respondents	No. of responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Local Government.	Certification of Eligibility for Community Disaster Loans/ FEMA Form 090–1.	50	1	2.5	125	$46.22	$5,778
Local Government.	Promissory Note/ FEMA Form 116–1.	50	1	4.0	200	46.22	9,244
Local Government.	Local Government Resolution—Collateral Security/FEMA Form 085–1.	50	1	10.0	500	46.22	23,110
Local Government.	Letter of Application ...	50	1	1.0	50	46.22	2,311
Total		50			875		40,443

Estimated Cost: The estimated annualized cost to respondents based on wage rate categories is $40,443.00. The estimated annual cost to the Federal Government is $1,009,800.00.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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. Comments must be submitted on or February 17, 2009.

ADDRESSES: Interested persons should submit written comments to Office of Management, Records Management Division, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, Mail Drop Room 301.

FOR FURTHER INFORMATION CONTACT: Contact John Wilmot, Community Disaster Loan Program Manager, Public Assistance Division, Disaster Assistance

Directorate, (202) 646–2544 for additional information. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections@dhs.gov.*

Samuel C. Smith,

Acting Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E8–29767 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; Revision of a currently approved collection, OMB Number 1660–0008, FEMA Form 81–31, FEMA Form 81–65.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.*, the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

Collection of Information

Title: Post Construction Elevation Certificate/Floodproofing Certificate.

OMB Number: 1660–0008.

Form Numbers: FEMA Form 81–31, Elevation Certificate, FEMA Form 81–65, Floodproofing Certificate.

Abstract: The Elevation Certificate and Floodproofing Certificate are used in conjunction with the application for flood insurance (OMB No. 1660–0006, National Flood Insurance Program Policy Forms). The certificates are required for proper rating of post Flood Insurance Rate Map (FIRM) structures, which are buildings constructed after the publication of the FIRM, for flood insurance in Special Flood Hazard Areas. In addition, the Elevation Certificate is needed for pre-FIRM structures being rated under post-FIRM flood insurance rules. The certificates provide community officials and others standardized documents to readily record needed building elevation information. NFIP policyholders/applicants provide the appropriate certificate to insurance agents. The certificate is then used in conjunction with the insurance application so that the building can be properly rated for flood insurance.

Affected Public: Individuals and households, Business or other for-profit, State, local or Tribal Government, Farms, Not-for-profit institutions.

Number of Respondents: 2,200.

Estimated Time per Respondent: 3.75.

Estimated Total Annual Burden Hours: 8,245 hours.

Frequency of Response: On Occasion.

Comments: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–6974. Comments must be submitted on or before January 15, 2009.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Acting Director, Records Management Division, 500 C Street, SW., Washington, DC 20472, Mail Drop Room 301, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@dhs.gov.*

Samuel C. Smith,

Acting Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E8–29768 Filed 12–15–08; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1792–DR]

Louisiana; Amendment No. 7 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–1792–DR), dated September 13, 2008, and related determinations.

DATES: *Effective Date:* December 8, 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 event declared a major disaster by the President in his declaration of September 13, 2008.

Livingston and St. Martin Parishes 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. E8–29760 Filed 12–15–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1799–DR]

New Hampshire; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Hampshire (FEMA–1799–DR), dated October 3, 2008, and related determinations.

DATES: *Effective Date:* December 5, 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 New Hampshire is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 3, 2008.

Merrimack 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. E8–29762 Filed 12–15–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–71]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Application for HUD/FHA Insured Mortgage ''HOPE for Homeowners''

AGENCY: Office Housing, Office of Single Family Program Development.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* December 30, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within fourteen (14) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: HUD Desk Officer, Office of Management and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Paperwork Reduction Act Officer, QDAM Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Lillian_Deitzer@hud.gov*, telephone (202) 402–8048. This is not a toll-free number. Copies of documentation submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a proposed information collection requirement as described below. This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for HUD/FHA Insured Mortgage ''HOPE for Homeowners''.

Description of Information Collection: Information is needed to determine the eligibility of the borrower and proposed mortgage transaction for FHA's insurance endorsement under the HOPE for Homeowners Program. Lenders seeking FHA's insurance prepare these forms.

OMB Control Number: 2502–Pending.

Agency Form Numbers: Model HOPE for Homeowners Consumer Disclosure and Certification form, Model Understanding Key Provisions of Appreciations sharing, Model Appreciation Sharing Worksheet and Certification, Shared Equity Note and Mortgage, Shared Appreciation Note and Mortgage.

Members of Affected Public: Business or other for-profit.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: The estimated total number of burden hours needed to prepare the information collection is 915,040; the number of respondents is 8,000; the frequency of response is 158.

Status: This is a request for a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 9, 2008.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E8–29678 Filed 12–15–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Exxon Valdez Oil Spill Trustee Council; Notice of Meeting

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice of meeting.

SUMMARY: The Department of the Interior, Office of the Secretary is announcing a public meeting of the Exxon Valdez Oil Spill Public Advisory Committee.

DATES: February 4, 2009, at 2 p.m.

ADDRESSES: Egan Convention Center, 555 West 5th Avenue, upstairs Board Room, Anchorage, Alaska.

FOR FURTHER INFORMATION CONTACT: Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 ''C'' Street, Suite 119, Anchorage, Alaska 99501, (907) 271–5011.

SUPPLEMENTARY INFORMATION: The Public Advisory Committee was created by Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991, and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska,* Civil Action No. A91–081 CV. The meeting agenda will include an orientation for new Public Advisory Committee members, review of the draft

fiscal year 2010 invitation for proposals, and the election of officers.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

[FR Doc. E8–29743 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–RG–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Exxon Valdez Oil Spill Trustee Council; Notice of Meeting

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice of meeting.

SUMMARY: The Department of the Interior, Office of the Secretary is announcing a public meeting of the Exxon Valdez Oil Spill Public Advisory Committee.

DATES: January 9, 2009, at 9:30 a.m.

ADDRESSES: Exxon Valdez Oil Spill Trustee Council Office, 441 West 5th Avenue, Suite 500, Anchorage, Alaska.

FOR FURTHER INFORMATION CONTACT: Douglas Mutter, Department of the Interior, Office of Environmental Policy and Compliance, 1689 ''C'' Street, Suite 119, Anchorage, Alaska 99501, (907) 271–5011.

SUPPLEMENTARY INFORMATION: The Public Advisory Committee was created by Paragraph V.A.4 of the Memorandum of Agreement and Consent Decree entered into by the United States of America and the State of Alaska on August 27, 1991, and approved by the United States District Court for the District of Alaska in settlement of *United States of America* v. *State of Alaska,* Civil Action No. A91–081 CV. The meeting agenda will include a review of the draft fiscal year 2010 invitation for proposals, the latest herring recovery plan, and the revised list of injured resources and services.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

[FR Doc. E8–29744 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–RG–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2008–N0312; 50120–1113–0000–D2]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Reviews of 7 Listed Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of review; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, initiate 5-year reviews of the endangered Appalachian monkeyface (*Quadrula sparsa*), the northeast population of the roseate tern (*Sterna dougalii dougalli*), and the shale barren rock-cress (*Arabis serotina*), and the threatened Cheat Mountain salamander (*Plethodon nettingi*), the Madison cave isopod (*Antrolana lira*), the sensitive joint-vetch (*Aeschynomene virginica*), and the Virginia sneezeweed (*Helenium virginicum*), under the Endangered Species Act of 1973, as amended (Act). We request any new information on these species that may have a bearing on their classification as endangered or threatened. Based on the results of these 5-year reviews, we will make a finding on whether these species are properly classified under the Act.

DATES: To allow us adequate time to conduct these reviews, we are requesting submission of new information by February 17, 2009. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For instructions on where to submit information and review the information that we receive on these species, see ''Public Solicitation of New Information.''

FOR FURTHER INFORMATION CONTACT: Ms. Mary Parkin, U.S. Fish and Wildlife Service, Northeast Region, 300 Westgate Center Drive, Hadley, MA 01035, 413–253–8617 or 617–876–6173, or via e-mail at *mary_parkin@fws.gov*. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8337 for TTY assistance. For species-specific information, contact the appropriate person under ''Public Solicitation of New Information.''

SUPPLEMENTARY INFORMATION:

Why Do We Conduct a 5-Year Review?

Under the Act we maintain the List of Endangered and Threatened Wildlife and Plant Species (List) at 50 CFR 17.11 and 17.12. We amend the List by publishing final rules in the **Federal Register**. Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. Section 4(c)(2)(B) requires that we determine: (1) Whether a species no longer meets the definition of threatened or endangered and should be removed from the List (delisted); (2) Whether a species more properly meets the definition of threatened and should be reclassified from endangered to threatened; or (3) Whether a species more properly meets the definition of endangered and should be reclassified from threatened to endangered. Using the best scientific and commercial data available, a species will be considered for delisting if the data substantiate that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) The species is considered to be recovered; and/or (3) The original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification requires a separate rulemaking process. Therefore, we are requesting submission of any such information that has become available since either the original listing or the most recent status review for these species. Based on the results of these 5-year reviews, we will make the requisite findings under section 4(c)(2)(B) of the Act.

Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under review. This notice announces initiation of our active review of the species in Table 1.

TABLE 1—SUMMARY OF LISTING INFORMATION, 4 WILDLIFE SPECIES AND 3 PLANT SPECIES IN THE NORTHEAST REGION

Common name	Scientific name	Status	Where listed	Final listing rule
ANIMALS				
Appalachian monkeyface	Quadrula sparsa	Endangered	VA	41 FR 24062; 06/14/1976
Appalachian monkeyface	Quadrula sparsa	Experimental Population, Non-Essential.	TN	72 FR 52433; 09/13/2007
Cheat Mountain salamander.	Plethodon nettingi	Threatened	Entire Range	54 FR 34464; 08/18/1989
Madison cave isopod	Antrolana lira	Threatened	Entire Range	47 FR 43699; 10/04/1982

TABLE 1—SUMMARY OF LISTING INFORMATION, 4 WILDLIFE SPECIES AND 3 PLANT SPECIES IN THE NORTHEAST REGION—Continued

Common name	Scientific name	Status	Where listed	Final listing rule
Roseate tern	Sterna dougallii dougallii	Endangered	Northeast population (CT, ME, MA, NJ, NY, NC, RI, VA).	52 FR 42064; 11/02/1987
PLANTS				
Sensitive joint-vetch	Aeschynomene virginica	Threatened	Entire Range	57 FR 21569; 05/20/1992
Shale barren rock-cress	Arabis serotina	Endangered	Entire Range	54 FR 29655; 07/13/1989
Virginia sneezeweed	Helenium viginicum	Threatened	Entire Range	63 FR 59239; 11/03/1998

What Information Do We Consider in Our Review?

In our 5-year review, we consider all new information available at the time of the review. These reviews will consider the best scientific and commercial data that have become available since the original listing determination or most recent status review of each species, such as: (A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics; (B) Habitat conditions, including but not limited to amount, distribution, and suitability; (C) Conservation measures that have been implemented to benefit the species; (D) Threat status and trends (see five factors under heading ''How do we determine whether a species is endangered or threatened?''); and (E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List of Endangered and Threatened Wildlife and Plants, and improved analytical methods.

Public Solicitation of New Information

We request any new information concerning the status of the wildlife species Appalachian monkeyface, Cheat Mountain salamander, Madison cave isopod, and roseate tern, and of the plant species sensitive joint-vetch, shale barren rock-cress, and Virginia sneezeweed. See ''What Information Do We Consider in Our Review?'' for specific criteria. Information should be supported with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources. We specifically request information regarding data from any systematic surveys, as well as any studies or analysis of data that may show population size or trends; information pertaining to the biology or ecology of the species; information regarding the effects of current land management on population distribution and abundance; information on the current condition of habitat; and recent information regarding conservation measures that have been implemented to benefit the species. Additionally, we specifically request information regarding the current distribution of populations and evaluation of threats faced by the species in relation to the five listing factors (as defined in section 4(a)(1) of the Act) and the species' listed status as judged against the definition of threatened or endangered. Finally, we solicit recommendations pertaining to the development of, or potential updates to, recovery plans and additional actions or studies that would benefit these species in the future.

Our practice is to make information, including names and home addresses of respondents, available for public review. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

You may submit information on the following species by U.S. mail, e-mail, or hand-delivery, to the corresponding addresses below. You may also view information we receive in response to this notice, as well as other public documentations in our files, at the following locations by appointment, during normal business hours.

Appalachian monkeyface: U.S. Fish and Wildlife Service, Southwest Virginia Field Office, 330 Cummings Street, Abingdon, VA 24210, Attention: Shane Hanlon. Direct inquiries to Mr. Hanlon at 276–623–1233, extension 25, or *shane_hanlon@fws.gov*.

Cheat mountain salamander: U.S. Fish and Wildlife Service, West Virginia Field Office, 694 Beverly Pike, Elkins, WV 26241, Attention: Barbara Douglas. Direct inquiries to Ms. Douglas at 304–636–6586, extension 19, or *barbara_douglas@fws.gov*.

Madison cave isopod: U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061, Attention: Sumalee Hoskin. Direct inquiries to Ms. Hoskin at 804–693–6694, extension 136, or *sumalee_hoskin@fws.gov*.

Roseate tern: U.S. Fish and Wildlife Service, New England Field Office, 70 Commercial Street, Suite 300, Concord, NH 03301, Attention: Michael Amaral. Direct inquiries to Mr. Amaral at 603–223–2541, extension 23, or *michael_amaral@fws.gov.*

Sensitive joint-vetch: U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061, Attention: Tylan Dean. Direct inquiries to Mr. Dean at 804–693–6694, extension 104, or *tylan_dean@fws.gov*.

Shale barren rock-cress: U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061, Attention: Kimberly Smith. Direct inquiries to Ms. Smith at 804–693–6694, extension 126, or *kimberly_smith@fws.gov*.

Virginia sneezeweed: U.S. Fish and Wildlife Service, Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061, Attention: Tylan Dean. Direct inquiries to Mr. Dean at 804–693–6694, extension 104, or *tylan_dean@fws.gov*.

All electronic information must be submitted in text format or rich text format. Include the following identifier in the subject line of the e-mail: Information on 5-year review for [name of species], and include your name and return address in the body of your message.

How Are These Species Currently Listed?

Table 1 provides current listing information. Also, the full List of endangered and threatened species is available on our Internet site at *http://endangered.fws.gov/wildlife.html#Species.*

Definitions Related to This Notice?

To help you submit information about the species we are reviewing, we provide the following definitions:

Species includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any species of vertebrate, which interbreeds when mature;

Endangered species means any species that is in danger of extinction throughout all or a significant portion of its range; and

Threatened species means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

How Do We Determine Whether a Species Is Endangered or Threatened?

Section 4(a)(1) of the Act establishes that we determine whether a species is endangered or threatened based on one or more of the five following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. Section 4(a)(1) of the Act requires that our determination be made on the basis of the best scientific and commercial data available.

What Could Happen as a Result of Our Review?

For each species under review, if we find new information that indicates a change in classification may be warranted, we may propose a new rule that could do one of the following: (a) Reclassify the species from threatened to endangered (uplist); (b) Reclassify the species from endangered to threatened (downlist); or (c) Remove the species from the List (delist). If we determine that a change in classification is not warranted, then the species will remain on the List under its current status.

Authority: This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531).

Dated: November 24, 2008.

Wendi Weber,

Acting Regional Director, Northeast Region, Fish and Wildlife Service.

[FR Doc. E8–29720 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2008–N0338; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We invite the public to comment on the following applications to conduct certain activities with endangered species.

DATES: Comments on these permit applications must be received on or before January 15, 2009.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA, 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist, see **ADDRESSES**, (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (''we'') solicits review and comment from local, State, and Federal agencies, and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–054011

Applicant: John F. Green, Riverside, California

The applicant requests a permit to take (capture and release) the San Bernardino kangaroo rat (*Dipodomys merriami parvus*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing their survival.

Permit No. TE–198929

Applicant: James T. Smith, Carlsbad, California

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–198925

Applicant: Genevieve K. Walden, San Francisco, California

The applicant requests a permit to remove/remove to possession the Phacelia argillacea (Clay phacelia), Phacelia formosula (North Park phacelia), *Phacelia insularis* subsp *insularis* (island phacelia), *Eriodictyon altissimum* (Indian Knob mountain balm), and Eriodictyon capitatum (Lompoc yerba santa) from federal lands in conjunction with genetic research sampling for the purpose of enhancing their survival.

Permit No. TE–198922

Applicant: Latisha M. Burnaugh, Sacramento, California

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–198917

Applicant: Dirk T. Pedersen, McKinleyville, California

The applicant requests a permit to take (survey, capture, and release) the tidewater goby (*Eucyclogobius newberryi*), in conjunction with surveys and population monitoring throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–198915

Applicant: Trevor M. Lucas, McKinleyville, California

The applicant requests a permit to take (survey, capture, and release) the tidewater goby (*Eucyclogobius newberryi*), in conjunction with surveys and population monitoring throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–198910

Applicant: Lauren D. Dusek, Arcata, California

The applicant requests a permit to take (survey, capture, and release) the tidewater goby (*Eucyclogobius newberryi*), in conjunction with surveys and population monitoring throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–132855

Applicant: Carly M. Spahr, Port Hueneme, California

The applicant requests an amendment to take (harass by survey, and locate/monitor nests) the California least tern (*Sterna Antillarum browni*) in conjunction with surveys and population monitoring studies within Ventura County, California, for the purpose of enhancing its survival.

Permit No. TE–200340

Applicant: Andrew R. Hatch, South Lake Tahoe, California

The applicant requests a permit to take (survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–200339

Applicant: Sarah M. Foster, Sacramento, California

The applicant requests a permit to take (survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–016381

Applicant: United States Geological Survey, Dixon, California

The applicant requests an amendment to take (capture, collect, and sacrafice) the desert pupfish (*Cyprinodon macularius*) in conjunction with scientific research in Imperial County, California for the purpose of enhancing its survival.

Permit No. TE–179036

Applicant: Cullen A Wilkerson, Kensington, California

The applicant requests an amendment permit to take (survey, capture, handle, and release) the San Francisco garter snake (*Thamnophis sirtalis tetrataenia*) and the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys within Solano, Napa Yolo, Butte, Contra Costa, San Mateo, Alameda, San Joaquin, and Santa Clara Counties, California for the purpose of enhancing its survival.

Permit No. TE–829554

Applicant: Barbara E. Kus, San Diego, California

The applicant requests a permit amendment to take (collect feathers) the least Bell's vireo (*Vireo bellii pusillus*) in conjunction with genetic studies throughout the range of the species in California, Nevada, Arizona, and New Mexico, and take (locate and monitor nests, capture, band, color-band, and release) the least Bell's vireo (*Vireo bellii pusillus*) in conjunction with population monitoring studies throughout the range of the species in Nevada and Arizona for the purpose of enhancing its survival.

Permit No. TE–032195

Applicant: Sean R. Avent, San Francisco, California

The applicant requests an amendment permit to take (survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys throughout the range of the species in California, for the purpose of enhancing its survival.

We solicit public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Dated: December 9, 2008.

Michael Fris,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. E8–29666 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2008–N0258; 50133–1265–JAHP]

John Hay National Wildlife Refuge, Merrimack County, NH

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and an associated National Environmental Policy Act (NEPA) document for John Hay National Wildlife Refuge (NWR). We provide this notice in compliance with our planning policy to advise other agencies, Tribes, and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider. We are also requesting public comments.

DATES: To ensure consideration, we must receive your written comments by January 15, 2009. We will hold public meetings to begin the CCP planning process; see *Public Meetings* under **SUPPLEMENTARY INFORMATION**. We will announce opportunities for public input in local news media throughout the CCP planning process, and will announce upcoming public meetings in local news media and the refuge Web site.

ADDRESSES: Send your comments or requests for more information by any one of the following methods:

Electronic mail: northeastplanning@fws.gov. Include ''John Hay NWR CCP/EA'' in the subject line of the message.

U.S. Postal Service: Eastern Massachusetts NWR Complex, 73 Weir Hill Road, Sudbury, MA 01776.

In-Person Drop-off, Viewing, or Pickup: Call 978–443–4661 to make an appointment during regular business hours at the Sudbury address.

Fax: 978–443–2898.

FOR FURTHER INFORMATION CONTACT: Andrew French or Barry Parrish, Refuge/Project Leader, at 413–558–8002, or Carl Melberg, Planning Team Leader, at 978–443–4661.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for John Hay NWR in Merrimack County, New Hampshire. We provide this notice in compliance with our planning policy to

(1) advise other Federal and State agencies and the public of our intention to conduct detailed planning on this refuge, and (2) obtain suggestions and information on the scope of topics to consider in the environmental document and during development of the CCP.

Background

The CCP Process

The National Wildlife Refuge System Improvement Act of 1997 (Improvement Act) (16 U.S.C. 668dd–668ee), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act and NEPA.

We establish each unit of the NWRS for specific purposes. We use these purposes as the basis to develop and prioritize management goals and objectives for the refuge within the NWRS mission, and to determine how the public can use the refuge. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible conservation approach to this important wildlife habitat, while providing for wildlife-dependent recreation opportunities that are compatible with the refuge's establishing purposes and the mission of the NWRS. Our CCP process provides opportunities for Tribal, State, and local governments; agencies; organizations; and the public to participate. At this time, we encourage the public to provide input in the form of issues, concerns, ideas, and suggestions for the future management of John Hay NWR.

We will conduct the environmental review of this environmental assessment in accordance with the requirements of NEPA, as amended (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

John Hay National Wildlife Refuge

John Hay NWR was the former summer estate of historic figure John Hay. It was donated to the Service in 1972 by Alice Hay to be used as a migratory bird and wildlife reservation. Currently, the refuge consists of approximately 80 acres on the shores of Lake Sunapee in Newbury, New Hampshire, and consists of upland northern forests, and undeveloped shoreline. These areas serve the habitat needs of waterfowl, wading birds, and raptors.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified preliminary issues, concerns, and opportunities that we may address in the CCP. We have briefly summarized these issues below. During public scoping, we may identify additional issues.

Public use throughout the refuge will be reevaluated in relation to wildlife-dependent recreation and other mission compatible uses. These include an ADA-compliant interpretive nature trail, overlooks, and a trailhead at the Fells parking area. We will also explore different visitor use options for the refuge.

Access to the refuge from the adjacent Fells property needs to be coordinated in terms of the use of their parking area or the creation of a second parking area, and the establishment of a trailhead or other interpretive information on their property.

We need to address how the Service can create a more visible presence at the refuge and the adjacent Fells property. Potential avenues are through signs, kiosks, and seasonal staff.

Public Meetings

We will involve the public through open houses, informational and technical meetings, and written comments. We will release mailings, news releases, and announcements to provide information about opportunities for public involvement in the planning process. You can obtain the schedule from the planning team leader or project leader (see **ADDRESSES**). You may also submit comments anytime during the planning process by mail, electronic mail, or fax (see **ADDRESSES**). There will be additional opportunities to provide public input once we have prepared a draft CCP.

We anticipate that public meetings will be held in Newbury, New Hampshire. For specific information including dates, times, and locations, contact the project leader (see **ADDRESSES**) or visit our Web site at *http://www.fws.gov/northeast/johnhay.*

Public Availability of Comments

Our practice is to make comments, including names, home addresses, home phone numbers, and electronic mail addresses of respondents available for public review. Individual respondents may request that we withhold their names and/or home addresses, etc., but if you wish us to consider withholding this information, you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Dated: October 1, 2008.

Wendi Weber,

Acting Regional Director, Northeast Region, U.S. Fish and Wildlife Service, Hadley, Massachusetts.

[FR Doc. E8–28914 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV050000–L51010000.ER0000.F8740000; NVN–084626; 09–08807; TAS: 14X5017]

Proposed Wind Energy Project, Searchlight, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to prepare an environmental impact statement (EIS).

SUMMARY: In compliance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*, the Bureau of Land Management (BLM), Las Vegas Field Office will prepare an EIS for a wind energy project located on public lands in Clark County, Nevada.

DATES: This notice initiates the public scoping process. Comments on issues may be submitted in writing until February 17, 2009. Any scoping meetings will be announced 15 days in advance through local news media and

the BLM Web site at: *http://www.nv.blm.gov/vegas/default.html.*

ADDRESSES: Submit comments related to the project by any of the following methods:

- *E-mail: mchandle@nv.blm.gov*
- *Fax:* (702) 515–5064 (attention Mark Chandler)
- *Mail:* BLM Las Vegas Field Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130–2301

Documents pertinent to this project may be examined at the Las Vegas Field Office. Additional opportunities for public participation will be provided on publication of the draft EIS.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to the mailing list, call Mark Chandler, (702) 515–5064; or e-mail *mchandle@nv.blm.gov.*

SUPPLEMENTARY INFORMATION: Searchlight Wind Energy, LLC, has submitted an application for the construction, operation, maintenence, and termination of a wind energy generation site. The proposed project would consist of 156 wind turbine generators and related rights-of-way appurtenances, including a substation administered by the Western Area Power Administration east of Searchlight, Nevada. The proposed wind energy project would produce approximately 359 megawatts of electricity. The proposed project site will be located on approximately 24,383 acres of public lands surrounding the town of Searchlight, Nevada.

Issues that are anticipated to be addressed in this EIS include visual impacts, avian impacts, socioeconomic impacts, electrical transmission capacity, and cumulative impacts.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Federal, State, and local agencies, as well as individuals or organizations that may be interested in or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

Authority: 43 CFR 2800.

Dated: December 4, 2008.

Kimber Liebhauser,

Assistant Field Manager, Lands Division, Las Vegas Field Office.

[FR Doc. E8–29686 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLID100000–L10200000–PH0000]

Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The RAC will next meet in Idaho Falls, Idaho on January 20–21, 2009 for a two-day meeting. The first day will be new member orientation in the afternoon starting at 2 p.m. at the Idaho Falls BLM Office, 1405 Hollipark Drive, Idaho Falls, Idaho. The second day will be at the same location starting at 8 a.m. with electing a new chairman, vice chairman and secretary. Other meeting topics include noxious weeds, power line corridors, Snake River Activity Operations Plan, Upper Snake RMP and Recreation RAC items. Other topics will be scheduled as appropriate. All meetings are open to the public.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the BLM Idaho Falls District (IFD), which covers eastern Idaho.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: Joanna Wilson, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. Telephone: (208) 524–7550. E-mail: *Joanna_Wilson@blm.gov.*

Dated: December 8, 2008.

Joanna Wilson,

RAC Coordinator, Public Affairs Specialist.

[FR Doc. E8–29709 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW172444]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, L.L.C. for competitive oil and gas lease WYW172444 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW172444 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited

above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29705 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW153111]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, LLC for competitive oil and gas lease WYW153111 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW153111 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29714 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW153112]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, L.L.C. for competitive oil and gas lease WYW153112 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW153112 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29715 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW153114]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, LLC for competitive oil and gas lease WYW153114 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW153114 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29716 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW155731]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, LLC for competitive oil and gas lease WYW155731 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW155731 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29717 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW153113]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Chesapeake Exploration, LLC for competitive oil and gas lease WYW153113 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW153113 effective June 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–29718 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 30, 2008. Pursuant to section 60.13 of 36 CFR Part 60, written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by December 31, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/National, Historic Landmarks Program.

ALABAMA

Jefferson County

Ramsay-McCormack Building, 1823–1825 Avenue E, Birmingham, 08001273

ARIZONA

Maricopa County

Hoghe Bunk House, 5240 W. Lamar Rd., Glendale, 08001274

Santa Cruz County

Little Outfit Schoolhouse, The, 571 Canelo Pass Rd., Patagonia, 08001275

CALIFORNIA

Los Angeles County

Brockman Building and New York Cloak and Suit House (annex), 520 W. 7th St. and 708 S. Grand Ave., Los Angeles, 08001276

San Benito County

San Juan Bautista Third Street Historic District, 3rd St. between 406 3rd St. and Franklin St., San Juan Bautista, 08001277

San Joaquin County

Philomathean Clubhouse, 1000 N. Hunter St., Stockton, 08001278

Santa Clara County

Young, Earl and Virginia, House, 1888 White Oaks Rd., Campbell, 08001279

GEORGIA

Bibb County

League, Joseph and Mary Jane, House, 1849 Waverland Dr., Macon, 08001280

Fulton County

New Hope African Methodist Episcopal Church and Cemetery, 3012 Arden Rd., NW., Atlanta, 08001281

Habersham County

Lawton Place, 136 7th Ave., Mount Airy, 08001282

IOWA

Clarke County

Chicago, Burlington and Quincy Depot, (Advent & Development of Railroads in

Iowa MPS) 215 N. Main St., Osceola, 08001283

MASSACHUSETTS

Suffolk County

Compton Building, 159, 161–175 Devonshire St., 18–20 Arch St., Boston, 08001284

MISSOURI

Buchanan County

Lawler Motor Company Building, (St. Joseph, Buchanan County, Missouri MPS AD) 1224 Frederick Ave., St. Joseph, 08001285

St. Louis Independent City

St. Cecilia Historic District, (South St. Louis Historic Working and Middle Class Streetcar Suburbs MPS) Bounded by S. Grand Blvd., Delor St., Virginia Ave., and Bates St., St. Louis, 08001286

MONTANA

Silver Bow County

Wold Barn, SW corner of jct. of Hecla and 3rd Sts., Melrose, 08001287

NORTH CAROLINA

Ashe County

Lansing School, E. side of NC 194 at jct. with NC 1517, Lansing, 08001288

Guilford County

First Baptist Church, 701 E. Washington Dr., High Point, 08001289

Halifax County

Enfield Graded School, 700 Branch St., Enfield, 08001290

Henderson County

Cold Spring Park Historic District, (Hendersonville MPS) Bounded roughly by N. Main St. on the N., Maple St. on the E., 9th Ave. E. on the S., and Locust St. on the W., Hendersonville, 08001291

Wake County

Mount Hope Cemetery, 1100 Fayetteville St., Raleigh, 08001292

NORTH DAKOTA

Billings County

Custer Military Trail Historic Archaeological District, Address Restricted, Medora, 08001293

Golden Valley County

Custer Military Trail Historic Archaeological District, Address Restricted, Medora, 08001293

OHIO

Hamilton County

Hyde Park Methodist Episcopal Church, 1345 Grace Ave., Cincinnati, 08001294

Nurre-Royston House, 4330 Errun La., Cincinnati, 08001295

Lawrence County

Downtown Ironton Historic District, Portions of 2nd, 3rd, 4th, 5th, Center Sts., Park Ave., Vernon St. and Bobby Bare Blvd., Ironton, 08001296

Montgomery County

Julienne Girls Catholic High School, 325 Homewood Ave., Dayton, 08001297

Stark County

Dobkins, John and Syd, House, 5120 Plain Center NE., Canton, 08001298

TEXAS

Dallas County

Dallas Downtown Historic District (Boundary Increase), Bounded by Jackson, North Hardwood Commerce, N.-S. line between S. Pearl Exwy., and S. Hardwood Canton, Dallas, 08001299

Tarrant County

Westbrook, Roy A. and Gladys, House, 2232 Winton Terrace W., Fort Worth, 08001300

WASHINGTON

King County

Hawthorne Square, (Seattle Apartment Buildings, 1900–1957) 4800 Fremont Ave. N., Seattle, 08001301

Redmond City Park, 7802 168th Ave., NE., Redmond, 08001302

WISCONSIN

Wood County

Parkin Ice Cream Company, 108 W. 9th St., Marshfield, 08001303

WYOMING

Big Horn County

Hyart Theater, The, 251 E. Main St., Lovell, 08001304

Laramie County

Moore Haven Heights Historic District, Between Bent Ave. on the W., E. side of Central Ave. on the E., W. 8th Ave. on the N., W. Pershing Blvd on the S., Cheyenne, 08001305

Sweetwater County

Green River Downtown Historic District, 72–142 Flaming Gorge Way, 58–94 N. 1st St., 125–200 E. Railroad Ave., 62–94 N. 1st E. St., Pedestrian Overpass, Green River, 08001306

Request for boundary decrease has been made for the following resources:

ARIZONA

Maricopa County

Sun-Up Ranch, W. Frontage Rd. of Black Canyon Hwy., 1.75 mi. N. of Desert Hills interchange, New River, 08001307

Request for removal has been made for the following resources:

IOWA

Floyd County

Suspension Bridge, Over the Big Cedar River at the end of Clark St., Charles City, 89001778

Tama County

Toledo Bridge Ross St. Over Deer Cr. Toledo, 98000480

TEXAS

Galveston County

Balinese Room, 2107 Seawall Blvd. Galveston, 9700258

Breakers, The, TX 87 W. of Gilchrist, Caplen, 98001225

Moser House, 509 19th St., Galveston, 84001711

[FR Doc. E8–29663 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b, c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to appraise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from October 27 to October 31, 2008.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St., NW., Washington, DC 20240; in person (by appointment), 1201 Eye St., NW., 8th floor, Washington, DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov*.

Dated: December 4, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ARIZONA

Cochise County

Chiricahua National Monument Historic Designed Landscape, 12856 E. Rhyolite Canyon Rd., Willcox vicinity, 08001020, Listed, 10/31/08, (Historic Park Landscapes in National and State Parks MPS)

COLORADO

Weld County

Clubhouse—Student Union, Between 18th & 19th Sts., & 8th & 10th Aves., Greeley, 08001021, Listed, 10/29/08, (New Deal Resources on Colorado's Eastern Plains MPS)

LOUISIANA

Assumption Parish

LaBarre House, 4371 LA 1, Napoleonville vicinity, 08001019, Listed, 10/31/08

MARYLAND

Carroll County

Roop's Mill, 1001, 1019 Taneytown Pike, Westminster, 08000796, Listed, 10/31/08

Cecil County

Perry Point Village, A, B, C, D Aves., 2nd, 3rd, 4th, 5th Sts., Perry Point VA Center, Perry Point, 65009962, * Determined eligible, 10/31/08

Montgomery County

Krieger, Seymour, House, 9739 Brigadoon Dr., Bethesda, 08001022, Listed, 10/29/08

MISSISSIPPI

Harrison County

Gulfport-Harrison Public Library, 21st Ave., Gulfport, 65009961, * Determined eligible, 10/31/08

MISSOURI

Greene County

Ambassador Apartments, 1235 E. Elm St., Springfield, 08001023, Listed, 10/29/08, (Springfield MPS)

St. Louis Independent City

Farm and Home Savings and Loan Association, 1001 Locust St., St. Louis (Independent City), 08001025, Listed, 10/29/08

* Denotes FEDERAL Determination of Eligibility.

[FR Doc. E8–29660 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Request for Determination of Valid Existing Rights Within the Daniel Boone National Forest, Kentucky

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

ACTION: Notice and request for comment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are providing opportunity for the public to comment on a request for a determination of valid existing rights (VER) to use an existing Forest Service road as a coal mine access and haul road across Federal lands within the boundaries of the Daniel Boone National Forest in Leslie County, Kentucky. The remainder of the mine would be located on privately owned land.

DATES: We will accept electronic or written comments until 4 p.m. Eastern time on January 15, 2009. Requests for an extension of the comment period must be received by the same time.

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

- *Mail/Hand-Delivery/Courier:* Joseph L. Blackburn, Director, Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503.
- *E-mail: jblackburn@osmre.gov.*

For detailed instructions on submitting comments, see ''V. How Do I Submit Comments on the Request?'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Joseph L. Blackburn, Director, Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503.

Telephone: (859) 260–8402. Fax: (859) 260–8410. E-mail: *jblackburn@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. What Is the Nature of the VER Determination Request?
II. What Legal Requirements Apply to This Request?
III. What Information Is Available Relevant to the Basis for the Request?
IV. How Will We Process the Request?
V. How Do I Submit Comments on the Request?

I. What Is the Nature of the VER Determination Request?

On October 21, 2008, Mr. John Begley II submitted a request for a determination of VER on behalf of Mr. William T. Gilbert of Jag Energy LLC. Jag Energy LLC has applied for a permit (Application #866–0264) to conduct surface coal mining operations on privately owned land in Bear Branch, Leslie County, Kentucky. The property to be mined is adjacent to the Daniel Boone National Forest.

William T. Gilbert is seeking a determination that Jag Energy LLC has VER under paragraph (c)(1) of the definition of VER in 30 CFR 761.5 to use an existing road across Federal lands within the Daniel Boone National Forest as an access and haul road for the proposed mine. No other surface coal mining operations would be conducted on Federal lands within the Daniel Boone National Forest as part of this mine.

II. What Legal Requirements Apply to This Request?

Section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. 1272(e)(2), prohibits surface coal mining operations on Federal lands within the boundaries of any national forest, with two exceptions. The first exception pertains to surface operations and impacts incidental to an underground coal mine. The second relates to surface operations on lands within national forests west of the 100th meridian. Neither of those exceptions applies to the request now under consideration.

The introductory paragraph of section 522(e) also provides two general exceptions to the prohibitions on surface coal mining operations in that section. Those exceptions apply to operations in existence on the date of enactment of the Act (August 3, 1977) and to land for which a person has VER. SMCRA does not define VER. We subsequently adopted regulations defining VER and clarifying that, for lands that come under the protection of 30 CFR 761.11 and section 522(e) after the date of enactment of SMCRA, the applicable date is the date that the lands came under protection, not August 3, 1977.

On December 17, 1999 (64 FR 70766–70838), we adopted a revised definition of VER, established a process for submission and review of requests for VER determinations, and otherwise modified the regulations implementing section 522(e). At 30 CFR 761.16(a), we published a table clarifying which agency (OSM or the State regulatory authority) is responsible for making VER determinations and which definition (State or Federal) will apply. That table specifies that OSM is responsible for VER determinations for Federal lands within national forests and that the Federal VER definition in 30 CFR 761.5 applies to those determinations.

Paragraph (c) of the Federal definition of VER contains the standards applicable to VER for roads that lie within the definition of surface coal mining operations. Jag Energy LLC is seeking a VER determination under paragraph (c)(1), which provides that a person who claims VER to use or construct a road across the surface of lands protected by 30 CFR 761.11 or section 522(e) of SMCRA must demonstrate that the ''road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface coal mining operations.''

In addition, based upon the information provided in the VER request, we also are considering whether VER might exist under the standard in paragraph (c)(3), which requires a demonstration that a ''valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).''

III. What Information Is Available Relevant to the Basis for the Request?

The following information has been submitted by Jag Energy LLC or obtained from the United States Forest Service (USFS) or the Kentucky

Department for Natural Resources (DNR):

1. A 1.76 mile long × 12 foot wide road designated USFS road FSR 1669 exists on the land to which the VER determination request pertains.

2. The land upon which the road is located was in Federal ownership as part of the Daniel Boone National Forest on August 3, 1977, the date of enactment of SMCRA.

3. A letter from USFS District Ranger, John Kinney, indicating that William Gilbert has applied for a special use permit for the use of Forest Service Road 1669 to access his property in Bear Branch, Ky.

4. An affidavit from John Hollen, a resident of Bear Branch in Leslie County, Ky indicating that the proposed haul road contained in Jag Energy LLC application #866–0264 crossing the USFS property was used prior to 1977 as a coal haul road.

5. A coal lease between William T. Gilbert *et al.* Lessors, and Kenneth C. Smith, Lessee, for the Number four coal seam on lands described in Deed Book 34, page 464 and an Affidavit of Descent of John and Sally B. Gilbert in the records of the Leslie County, Ky. Court Clerk's office.

6. A copy of the deed and Affidavit of Descent referenced in the coal lease.

IV. How Will We Process the Request?

We received the request on October 21, 2008, and determined that it was administratively complete on October 30, 2008. That review did not include an assessment of the technical or legal adequacy of the materials submitted with the request.

The process by which we will further review the request is set out in 30 CFR 761.16(d) and (e). As required by 30 CFR 761.16(d)(1), we are publishing this notice to seek public comment on the merits of the request. A similar notice will also be published in a newspaper of general circulation in Leslie County, Kentucky.

After the close of the comment period, we will review the materials submitted with the request, all comments received in response to this and other notices, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, we will notify the requester, in writing, explaining the inadequacy of the record and requesting submittal, within a specified time, of any material needed to remedy the deficiency.

Once the record is complete and adequate, we will determine whether the requester has demonstrated VER for the proposed access and haul road. Our decision document will contain findings of fact and conclusions, along with an explanation of the reasons for our conclusions. We will publish a notice of the decision in the **Federal Register** and a newspaper of general circulation in Leslie County, Kentucky.

However, as provided in 30 CFR 761.16(d)(1)(iv), we will not make a decision on the merits of the request, if, by the close of the comment period under this notice or the notice required by 30 CFR 761.16(d)(3), a person with a legal interest in the land to which the request pertains initiates appropriate legal action in the proper venue to resolve any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of the request. This provision applies only if our decision is based upon the standard in paragraph (c)(1) of the definition of VER in 30 CFR 761.5. It will not apply if we base our decision on the standard in paragraph (c)(3) of the definition.

V. How Do I Submit Comments on the Request?

We will make the VER determination request and associated materials available to you for review as prescribed in 30 CFR 842.16, except to the extent that the confidentiality provisions of 30 CFR 773.6(d) apply. Subject to those restrictions, you may review a copy of the request for the VER determination and all comments received in response to this request at the Lexington Field Office (see **ADDRESSES**). Documents contained in the administrative record are available for public review at the Field Office during normal business hours, Monday through Friday, excluding holidays.

Electronic or Written Comments

If you wish to comment on the merits of the request for a VER determination, please send electronic or written comments to us at the addresses above (see **ADDRESSES**) by the close of the comment period (see **DATES**). Under 30 CFR 761.16(d)(1)(vii), you may request a 30-day extension of the comment period. Requests for extension of the public comment period must be submitted to the same addresses by the date indicated.

If you submit comments by e-mail, please include your name and return address in your message. You may contact the Lexington Field Office at (859) 260–8402 if you wish to confirm receipt of your message.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 18, 2008.

Michael K. Robinson,

Acting Regional Director, Appalachian Region.

[FR Doc. E8–29758 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. Republic Services, Inc. et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that a proposed Final Judgment and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Republic Services, Inc. & Allied Waste Industries, Inc.,* Civil Action No. 1:08-cv-02076. On December 3, 2008, the United States filed a Complaint alleging that the proposed acquisition by Republic Services, Inc. of Allied Waste Industries, Inc. would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the provision of non-franchised small container commercial waste collection services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana; and in the provision of municipal solid waste disposal services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. The proposed Final Judgment, filed the same day as the Complaint, requires Republic to divest certain non-franchised small container

commercial waste collection assets in the small container collection areas of concern and certain municipal solid waste disposal assets in the municipal solid waste disposal services areas of concern. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, the industry, and the remedies available to private litigants who may have been injured by the alleged violation.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530 (telephone: 202–307–0924).

Patricia A. Brink,

Deputy Director of Operations.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530; State of California, Office of Attorney General, 455 Golden Gate Avenue, San Francisco, CA 94102; Commonwealth of Kentucky, Consumer Protection Division, 1024 Capital Center Drive, Frankfort, KY 40601; State of Michigan, Consumer Protection Division, Antitrust Section, 525 W. Ottawa Street, 6th Floor, Lansing, Michigan 48913; State of North Carolina, Department of Justice, 9001 Mail Service Center, Raleigh, NC 27699–9001; State of Ohio, Attorney General's Office, 150 East Gay Street, 23rd Floor, Columbus, OH 43215; Commonwealth of Pennsylvania, Office of the Attorney General, Strawberry Square, 16th Floor, Harrisburg, PA 17120; and State of Texas, Antitrust Division, Office of the Attorney General, PO Box 12548, Austin, TX 78711–2548; Plaintiffs, v. Republic Services, Inc., 110 S.E. 6th Street, 28th Floor, Fort Lauderdale, FL 33301; and Allied Waste Industries, Inc., 18500 North Allied Way, Phoenix, AZ 85054, Defendants.

Civil Action No.: 1.08-Cv-02076.
Description: Antitrust.
Judge: Roberts, Richard W.
Date Stamp: 12/3/2008.

Complaint

Plaintiff United States of America (''United States''), acting under the direction of the Attorney General of the United States, and plaintiffs State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas (the ''States''), acting under the direction of their respective Attorneys General, bring this civil antitrust action to enjoin the acquisition by defendant Republic Services, Inc. (''Republic'') of the voting securities of defendant Allied Waste Industries, Inc. (''Allied'') and to obtain equitable and other relief as is appropriate. Plaintiffs complain and allege as follows:

I. Nature of the Action

1. Pursuant to a stock purchase agreement dated June 22, 2008, Republic plans to acquire all of the issued and outstanding voting securities of Allied, in a transaction valued at $4.5 billion. Defendants Republic and Allied currently compete to provide small container commercial waste collection and municipal solid waste (''MSW'') disposal in areas across the United States. The proposed transaction would substantially lessen competition for small container commercial waste collection service as a result of Republic's acquisition of Allied small container commercial waste collection assets in the following areas: (a) Atlanta, Georgia; (b) Cape Girardeau, Missouri; (c) Charlotte, North Carolina; (d) Fort Worth, Texas; (e) Greenville-Spartanburg, South Carolina; (f) Houston, Texas; (g) Lexington, Kentucky; (h) Lubbock, Texas; and (i) Northwest Indiana. The proposed transaction also would substantially lessen competition for MSW disposal service as a result of Republic's acquisition of Allied's MSW disposal assets in the following areas: (a) Atlanta, Georgia; (b) Cape Girardeau, Missouri; (c) Charlotte, North Carolina; (d) Cleveland, Ohio; (e) Denver, Colorado; (f) Flint, Michigan; (g) Fort Worth, Texas; (h) Greenville-Spartanburg, South Carolina; (i) Houston, Texas; (j) Los Angeles, California; (k) Northwest Indiana; (l) Philadelphia, Pennsylvania; and (m) San Francisco, California,

2. Defendants Republic and Allied are two of only a few significant providers of small container commercial waste collection or MSW disposal services in each of the identified areas. Unless the acquisition is enjoined, consumers of small container commercial waste collection or MSW disposal services in these areas likely will pay higher prices and receive fewer services as a consequence of the elimination of the vigorous competition between Republic and Allied. Accordingly, Republic's acquisition of Allied would violate Section 7 of the Clayton Act, 15 U.S.C. 18.

II. Jurisdiction and Venue

3. This action is filed by the United States under Section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain the violation by defendants of Section 7 of the Clayton Act, 15 U.S.C. 18. Each of the States brings this action under Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain the violation by defendants of Section 7 of the Clayton Act, 15 U.S.C. 18. The States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as parens patriae on behalf of the citizens, general welfare and economy of each of their states.

4. Defendant Allied transacts business in the District of Columbia, and Republic and Allied have consented to venue and personal jurisdiction, in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22 and 28 U.S.C. 1391(c).

5. Defendants Republic and Allied collect MSW from residential, commercial, and industrial customers, and they own and operate transfer stations and landfills that process and dispose of MSW. In their small container commercial waste collection and MSW disposal businesses, Republic and Allied make sales and purchases in interstate commerce, ship waste in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce, as well as commerce in each of the states. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. 22 and 28 U.S.C. 1331 and 1337.

III. Defendants and the Transaction

6. Republic is a Delaware corporation with its principal office in Fort Lauderdale, Florida. Republic is the nation's third largest waste hauling and disposal company. It provides small container commercial waste collection and MSW disposal services throughout the United States. In 2007, Republic reported total revenues of approximately $3.2 billion.

7. Allied is a Delaware corporation with its principal office in Phoenix,

Arizona. Allied is the nation's second largest waste hauling and disposal company. It also provides small container commercial waste collection and MSW disposal services throughout the United States. In 2007, Allied reported total revenues of approximately $6.1 billion.

8. On January 22, 2008, defendants Republic and Allied entered into a stock purchase agreement pursuant to which Republic will acquire all of the issued and outstanding voting securities of Allied in a transaction valued at $4.5 billion.

IV. Trade and Commerce

A. The Relevant Service Markets

Small Container Commercial Waste Collection

9. Waste collection firms, or haulers, collect MSW from residential, commercial and industrial establishments and transport the waste to a disposal site, such as a transfer station, landfill or incinerator, for processing and disposal. Private waste haulers typically contract directly with customers for the collection of waste generated by commercial accounts. MSW generated by residential customers, on the other hand, often is collected either by local governments or by private haulers pursuant to contracts bid by, or franchises granted by, municipal authorities.

10. ''Small container commercial waste collection'' means the business of collecting MSW from commercial and industrial accounts, usually in ''dumpsters'' (*i.e.*, a small container with one to ten cubic yards of storage capacity), and transporting or ''hauling'' such waste to a disposal site by use of a front-end or rear-end load truck. Typical small container commercial waste collection customers include office and apartment buildings and retail establishments (*e.g.*, stores and restaurants). As used herein, ''small container commercial waste collection'' does not include small container commercial waste collection of franchised routes, the collection of roll-off containers, or residential collection service.

11. Small container commercial waste collection differs in many important respects from the collection of residential or other types of waste. An individual commercial customer typically generates substantially more MSW than a residential customer. To handle this high volume of MSW efficiently, haulers often provide commercial customers with small containers, also called dumpsters, for storing the waste. Haulers organize their commercial accounts into routes, and collect and transport the MSW generated by these accounts in front-end load (''FEL'') trucks uniquely well suited for commercial waste collection. Less frequently, haulers may use more maneuverable, but less efficient, rear-end load (''REL'') trucks, especially in those areas in which a collection route includes narrow alleyways or streets. FEL trucks are unable to navigate narrow passageways easily and cannot efficiently collect the waste located in them.

12. On a typical small container commercial waste collection route, an operator drives a FEL vehicle to the customer's container, engages a mechanism that grasps and lifts the container over the front of the truck, and empties the container into the vehicle's storage section where the waste is compacted and stored. The operator continues along the route, collecting MSW from each of the commercial accounts, until the vehicle is full. The operator then drives the FEL truck to a disposal facility, such as a transfer station, landfill or incinerator, and empties the contents of the vehicle. Depending on the number of locations and amount of waste collected on the route, the operator may make one or more trips to the disposal facility in the servicing of the route.

13. In contrast to a small container commercial waste collection route, a residential waste collection route is significantly more labor intensive. The customer's MSW is stored in much smaller containers (*e.g.*, garbage bags or trash cans) and instead of FEL trucks, waste collection firms routinely use REL or side-load trucks manned by larger crews (usually, two-person or three-person teams). On residential routes, crews generally hand-load the customer's MSW, typically by tossing garbage bags and emptying trash cans into the vehicle's storage section. Because of the differences in the collection processes, residential customers and commercial customers usually are organized into separate routes.

14. Likewise, other types of collection activities, such as the use of roll-off containers (typically used for construction debris) and the collection of liquid or hazardous waste, are rarely combined with small container commercial waste collection. This separation of routes is due to differences in the hauling equipment required, the volume of waste collected, health and safety concerns, and the ultimate disposal option used.

15. The differences in the types and volume of MSW collected and in the equipment used in collection services distinguish small container commercial waste collection from all other types of waste collection activities. Absent competition from other small container commercial waste collection firms, a small container commercial waste collection provider could profitably increase its charges without losing significant sales or revenues to firms engaged in the provision of other types of waste collection services. Thus, small container commercial waste collection is a line of commerce, or relevant service, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

Disposal of Municipal Solid Waste

16. ''MSW'' means municipal solid waste, a term of art used to describe solid putrescible waste generated by households and commercial establishments such as retail stores, offices, restaurants, warehouses, and non-manufacturing activities in industrial facilities. MSW does not include special handling waste (*e.g.*, waste from manufacturing processes, regulated medical waste, sewage, and sludge), hazardous waste, or waste generated by construction or demolition sites. MSW has physical characteristics that readily distinguish it from other liquid or solid waste.

17. In order to be disposed of lawfully, MSW must be disposed in a landfill or an incinerator, and such facilities must be located on approved types of land and operated under prescribed procedures. Federal, state and local safety, environmental, zoning and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW in each market. In less densely populated areas of the country, MSW often is disposed of directly into landfills that are permitted and regulated by the state. Landfill permit restrictions often impose limitations on the type and amount of waste that can be deposited. In many urban and suburban areas, because landfills are scarce due to high population density and the limited availability of suitable land. Accordingly, MSW generated in such areas often is burned in an incinerator or taken to a transfer station. A transfer station is an intermediate disposal site for the processing and temporary storage of MSW before transfer, in bulk, to more distant landfills or incinerators for final disposal. Anyone who fails to dispose of MSW in a lawful manner can be subject to severe civil and criminal penalties.

18. Because of the strict laws and regulations that govern the disposal of

MSW, there are no good substitutes for MSW disposal in landfills or incinerators, or at transfer stations located near the source of the waste. Firms that compete in the disposal of MSW can profitably increase their charges to haulers of MSW without losing significant sales to any other firms. Thus, disposal of MSW is a line of commerce, or relevant service, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

B. The Relevant Geographic Markets

Small Container Commercial Waste Collection

19. Small container commercial waste collection is generally provided in highly localized areas because, to operate efficiently and profitably, a hauler must have sufficient density (*i.e.*, a large number of commercial accounts that are reasonably close together) in its small container commercial waste collection operations. If a hauler has to drive significant distances between customers, it earns less money for the time the truck is operating. For the same reason, the accounts must be near the operator's base of operations. It is economically impractical for a small container commercial waste collection firm to service metropolitan areas from a distant base, which requires that the FEL truck travel long distances just to arrive at its route. Haulers, therefore, generally establish garages and related facilities within each major local area served.

20. In each of the following areas encompassing the listed counties, local small container commercial waste collection firms, absent competition from other small container commercial waste collection firms, could profitably increase charges to local customers without losing significant sales to more distant competitors: Atlanta, Georgia (Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb and Paulding Counties); Cape Girardeau, Missouri (Cape Girardeau County); Charlotte, North Carolina (Mecklenburg County); Fort Worth, Texas (Tarrant County); Greenville-Spartanburg, South Carolina (Greenville and Spartanburg Counties); Houston, Texas (Harris County); Lexington, Kentucky (Fayette, Jessamine, Woodford, Scott and Franklin Counties); Lubbock, Texas (Lubbock County); and Northwest Indiana (Lake, Porter and LaPorte Counties). Accordingly, each of these areas is a section of the country, or relevant geographic market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

Disposal of Municipal Solid Waste

21. MSW generally is transported by collection trucks to landfills and transfer stations, and the availability of disposal sites close to a hauler's routes is a major factor that determines a hauler's competitiveness and profitability. The cost of transporting MSW to a disposal site often is a substantial component of the cost of disposal. The cost advantage of local disposal sites limits the areas where MSW can be economically transported and disposed of by haulers and creates localized markets for MSW disposal services.

22. In each of the following areas encompassing the listed counties, the high costs of transporting MSW and the substantial travel time to other disposal facilities based on distance, natural barriers and congested roadways, limit the distance that haulers of MSW generated in those areas can travel economically to dispose of their waste: Atlanta, Georgia (Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb and Paulding Counties); Cape Girardeau, Missouri (Cape Girardeau County); Charlotte, North Carolina (Mecklenburg County); Cleveland, Ohio (Cuyahoga County); Denver, Colorado (Denver and Arapahoe Counties); Flint, Michigan (Saginaw and Genesee Counties); Fort Worth, Texas (Tarrant County); Greenville-Spartanburg, South Carolina (Greenville and Spartanburg Counties); Houston, Texas (Harris County); Los Angeles, California (Los Angeles County); Northwest Indiana (Lake, Porter and LaPorte Counties); Philadelphia, Pennsylvania (Philadelphia County); and San Francisco, California (Contra Costa, Solano and Alameda Counties). The firms that compete in disposal of MSW generated in each of these areas generally own landfills, transfer stations or incinerators located within the area or no farther than roughly 25 to 35 miles outside the area's border.

In the event that all the owners of those local disposal facilities imposed a small but significant increase in the price of the disposal of MSW, haulers of MSW generated in each area could not profitably turn to more distant disposal facilities. Firms that compete for the disposal of MSW generated in each area, absent competition from other local MSW disposal operators, could profitably increase their charges for disposal of MSW generated in the area without losing significant sales to more distant disposal sites. Accordingly, disposal of MSW generated in each of the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California is a section of the country, or relevant geographic market, for purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 18 U.S.C. 15.

C. Competitive Effects of the Acquisition

23. Defendants Republic and Allied directly compete in small container commercial waste collection service in each of the relevant geographic markets for small container commercial waste collection, defined in paragraph 20. In these markets, Republic and Allied each account for a substantial share of total revenues from small container commercial waste collection services.

24. Defendants Republic and Allied directly compete in the disposal of MSW in each of the relevant geographic markets for MSW disposal, defined in paragraph 22. In these markets, Republic and Allied each account for a substantial share of MSW disposal revenue and capacity.

25. The acquisition of Allied voting securities by Republic would remove a significant competitor in small container commercial waste collection and the disposal of MSW in already highly concentrated and difficult-to-enter markets. In each of these markets, the resulting substantial increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for collection of small container commercial waste or the disposal of MSW.

Atlanta, Georgia Area

26. In the Atlanta, Georgia area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Atlanta, Georgia area is approximately $60 million. After the acquisition, defendants would have approximately 50 percent of the total number of small container commercial collection routes in the market. Using a standard measure of market concentration called the ''HHI'' (defined and explained in Appendix A), the post-merger HHI for small container commercial waste

collection would be approximately 4064, an increase of 1225 points over the pre-merger HHI of 2839.

27. The proposed acquisition also would reduce from four to three the number of significant competitors for the disposal of MSW in the Atlanta, Georgia area. Annual revenue from MSW disposal in this market is approximately $89 million. After the acquisition, defendants would have approximately 46 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 3864, an increase of 953 points over the pre-merger HHI of 2911.

Cape Girardeau, Missouri Area

28. In the Cape Girardeau, Missouri area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Cape Girardeau, Missouri area is approximately $5 million. After the acquisition, defendants would have approximately 64 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would be approximately 4552, an increase of 2034 points over the pre-merger HHI of 2518.

29. The proposed acquisition also would reduce from three to two the number of significant competitors for the disposal of MSW in the Cape Girardeau, Missouri area. Annual revenue from MSW disposal in this market is approximately $3 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 5800, an increase of 2442 points over the pre-merger HHI of 3358.

Charlotte, North Carolina Area

30. In the Charlotte, North Carolina area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Charlotte, North Carolina area is approximately $40 million. After the acquisition, defendants would have approximately 70 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would approximate 5456, an increase of 2340 points over the pre-merger HHI of 3116.

31. The proposed acquisition also would reduce from three to two the number of significant competitors for the disposal of MSW in the Charlotte, North Carolina area. Annual revenue from MSW disposal in this market is approximately $69 million. After the acquisition, defendants would have approximately 80 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 8652, an increase of 3794 points over the pre-merger HHI of 4918.

Cleveland, Ohio Area

32. In the Cleveland, Ohio area, the proposed acquisition would reduce from four to three the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $68 million. After the acquisition, defendants would have approximately 56 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 3837, an increase of 1570 points over the pre-merger HHI of 2267.

Denver, Colorado Area

33. In the Denver, Colorado area, the proposed acquisition would reduce from three to two the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $56 million. After the acquisition, defendants would have approximately 37 percent of the MSW disposal market, and the two largest competitors would have roughly 87 percent. The post-merger HHI for MSW disposal would be approximately 4104, an increase of 551 points over the pre-merger HHI of 3353.

Flint, Michigan Area

34. In the Flint, Michigan area, the proposed acquisition would reduce from four to three the number of competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $29 million. After the acquisition, defendants would have over 51 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 4311, an increase in excess of 827 points over the pre-merger HHI of 3483.

Fort Worth, Texas Area

35. In the Fort Worth, Texas area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Fort Worth, Texas area is approximately $55 million. After the acquisition, defendants would have approximately 42 percent of the total number of small container commercial collection routes in the market, and the two largest competitors would have approximately 70 percent of the market. The post-merger HHI for small container commercial waste collection would be approximately 2711, an increase of 783 points over the pre-merger HHI of 1928.

36. The proposed acquisition also would reduce from four to three the number of significant competitors for the disposal of MSW in the Fort Worth, Texas area. Annual revenue from MSW disposal in this market is approximately $84 million. After the acquisition, defendants would have over 55 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 4428, an increase of 1332 points over the pre-merger HHI of 3096.

Greenville-Spartanburg, South Carolina Area

37. In the Greenville-Spartanburg area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Greenville-Spartanburg area is approximately $41 million. After the acquisition, defendants would have approximately 69 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would be approximately 5714, an increase of 2173 points over the pre-merger HHI of 3541.

38. The proposed acquisition also would reduce from three to two the number of significant competitors for the disposal of MSW in the Greenville-Spartanburg area. Annual revenue from MSW disposal in this market is approximately $40 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 5000, an increase of 1226 points over the pre-merger HHI of 3774.

Houston, Texas Area

39. In the Houston, Texas area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Houston, Texas area is approximately $109 million. After the acquisition, defendants would have approximately 56 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for

small container commercial waste collection would be approximately 4060, an increase of 1613 points over the pre-merger HHI of 2447.

40. The proposed acquisition also would reduce from three to two the number of significant competitors for the disposal of MSW in the Houston, Texas area. Annual revenue from MSW disposal in this market is approximately $75 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 5733, an increase of 2408 points over the pre-merger HHI of 3325.

Lexington, Kentucky Area

41. In the Lexington, Kentucky area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lexington, Kentucky area is approximately $9 million. After the acquisition, defendants would have approximately 75 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would be approximately 6250, an increase of 2500 points over the pre-merger HHI of 3750.

Los Angeles, California Area

42. In the Los Angeles, California area, the proposed acquisition would reduce from four to three the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $372 million. After the acquisition, defendants would have approximately 39 percent of the MSW disposal market, and the two largest competitors would have 61 percent. The post-merger HHI for MSW disposal would be approximately 3070, an increase of 865 points over the pre-merger HHI of 2204.

Lubbock, Texas Area

43. In the Lubbock, Texas area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lubbock, Texas area is approximately $18 million. After the acquisition, defendants would have approximately 63 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would be approximately 4674, an increase of 1944 points over the pre-merger HHI of 2730.

Northwest Indiana Area

44. In the Northwest Indiana area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Northwest Indiana area is approximately $2.4 million. After the acquisition, defendants would have approximately 44 percent of the total number of small container commercial collection routes in the market. The post-merger HHI for small container commercial waste collection would be approximately 3586, an increase of 981 points over the pre-merger HHI of 2605.

45. The proposed acquisition also would reduce from four to three the number of significant competitors for the disposal of MSW in the Northwest Indiana area. Annual revenue from MSW disposal in this market is approximately $28 million. After the acquisition, defendants would have approximately 64 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 4864, an increase of 1718 points over the pre-merger HHI of 4111.

Philadelphia, Pennsylvania Area

46. In the Philadelphia, Pennsylvania area, the proposed acquisition would reduce from three to two the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $126 million. After the acquisition, defendants would have approximately 52 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 4547, an increase of 1396 points over the pre-merger HHI of 3151.

San Francisco, California Area

47. In the San Francisco, California area, the proposed acquisition would reduce from three to two the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $101 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market. The post-merger HHI for MSW disposal would be approximately 4256, an increase of 1283 points over the pre-merger HHI of 2973.

D. Entry Into Small Container Commercial Waste Collection

48. Significant new entry into small container commercial waste collection is difficult and time-consuming in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana. A new entrant into small container commercial waste collection cannot provide a significant competitive constraint on the prices charged by market incumbents until it achieves minimum efficient scale and operating efficiencies comparable to existing firms. In order to obtain a comparable operating efficiency, a new firm must achieve route densities similar to those of firms already competing in the market. However, the incumbent's ability to engage in price discrimination and enter into long-term contracts with collection customers is effective in preventing new entrants from winning a large enough base of customers to achieve efficient routes in sufficient time to constrain the post-acquisition firm from significantly raising prices. Differences in the service provided by an incumbent hauler to each customer permit the incumbent easily to meet competition from new entrants by pricing its services lower to any individual customer that wants to switch to the new entrant. Incumbent firms frequently also use three to five year contracts, which may automatically renew or contain large liquidated damage provisions for contract termination. Such contracts make it more difficult for a customer to switch to a new hauler in order to obtain lower prices for its collection service. By making it more difficult for new haulers to obtain customers, these practices increase the cost and time required by an entrant to form an efficient route, reducing the likelihood that the entrant ultimately will be successful.

E. Entry Into MSW Disposal

49. Significant new entry into the disposal of MSW in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California would be difficult and time-consuming. Obtaining a permit to construct a new disposal facility or to expand an existing one is a costly and time-consuming process that typically takes many years to conclude. Suitable land is scarce. Even when land is available, local public opposition often increases the time and uncertainty of successfully permitting a facility. It is

also difficult to overcome environmental concerns and satisfy other governmental requirements.

50. Where it is not practical to construct and permit a landfill, it is necessary to use an incinerator to dispose of waste, or a transfer station to facilitate the use of more distant disposal options. Many of the problems associated with the permitting and construction of a landfill likewise make it difficult to permit and construct a transfer station or incinerator.

51. In the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California, entry by constructing and permitting a new MSW disposal facility would be costly and time-consuming, and unlikely to prevent market incumbents from significantly raising prices for the disposal of MSW following the acquisition.

V. Violation Alleged

52. Republic's proposed acquisition of all Allied voting securities and waste hauling or disposal assets in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Los Angeles, California; Lubbock, Texas; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California likely will lessen competition substantially and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

53. The transaction likely will have the following effects, among others:

a. Competition in small container commercial waste collection service in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana will be lessened substantially;

b. Prices charged by small container commercial waste collection firms in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana will increase;

c. Competition in the disposal of MSW in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California will be lessened substantially; and

d. Prices for disposal of MSW in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California will increase.

VI. Requested Relief

Plaintiffs request:

1. That Republic's proposed acquisition of all Allied's issued and outstanding voting securities be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act;

2. That defendants be permanently enjoined from carrying out the acquisition of voting securities described in the stock purchase agreement dated June 22, 2008, or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to merge the voting securities or assets of the defendants;

3. That plaintiffs receive such other and further relief as the case requires and the Court deems proper; and

4. That plaintiffs recover the costs of this action.

Dated: December 3, 2008
Respectfully submitted,
For Plaintiff United States of America
/s/ _____
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/s/ _____
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Appendix A

Herfindahl-Hirschman Index Calculations

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated and those in which the HHI is in excess of 1,800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. *See Horizontal Merger Guidelines* § 1.51.

United States District Court for the District of Columbia

United States of America, State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas, Plaintiffs, v. *Republic Services, Inc., and Allied Waste Industries, Inc., Defendants.*

Civil Action No.:
Description: Antitrust
Judge:
Date Stamp:

Proposed Final Judgment

Whereas, plaintiffs, the United States of America, the State of California, the Commonwealth of Kentucky, the State of Michigan, the State of North Carolina, the State of Ohio, the Commonwealth of Pennsylvania, and the State of Texas, filed their Complaint on December 3, 2008; the plaintiffs and defendants, Republic Services, Inc. and Allied Waste Industries, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law; and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of law or fact;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of the Divestiture Assets to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that the divestitures required below can and will be made, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby ordered, adjudged, and decreed:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom defendants divest the Divestiture Assets.

B. ''Allied'' means defendant Allied Waste Industries, Inc., a Delaware corporation with its headquarters in Phoenix, Arizona, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

C. ''Republic'' means defendant Republic Services, Inc., a Delaware corporation headquartered in Ft. Lauderdale, Florida, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

D. ''Disposal'' means the business of disposing of waste into approved disposal sites, including the use of transfer stations to facilitate shipment of waste to other disposal sites.

E. ''Divestiture Assets'' means the Relevant Disposal Assets and the Relevant Hauling Assets.

F. ''Hauling'' means small container commercial waste collection from customers and the shipment of the collected waste to disposal sites. Hauling, as used herein, does not include collection of roll-off containers.

G. ''Route'' means a group of customers receiving regularly scheduled small container commercial waste collection service and all tangible and intangible assets relating to the route, as of October 31, 2008 (except for *de*

minimis changes, such as customers lost and gained in the ordinary course of business), including capital equipment, trucks and other vehicles (those assigned to routes and a pro-rata share of spare vehicles); containers (at the customer location and a pro-rata share of spares); supplies (pro-rata share); and if requested by the Acquirer, the real property and improvements to real property (*e.g.*, garages and buildings that support the route) as specified in Section II, paragraph I below; customer lists; customer and other contracts; leasehold interests; permits/licenses and accounts receivable, excluding franchise customers.

H. ''Relevant Disposal Assets'' means, unless otherwise noted, with respect to each transfer station and landfill listed and described herein, all of defendants' rights, titles, and interests in any tangible asset related to each transfer station and landfill listed, including all fee simple or ownership rights to offices, garages, related facilities, capital equipment, trucks and other vehicles, scales, power supply equipment, and supplies; and all of defendants' rights, titles, and interests in any related intangible assets, including all leasehold interests and renewal rights thereto, permits, customer lists, contracts, and accounts, or options to purchase any adjoining property. Relevant Disposal Assets, as used herein, includes each of the following:

1. Landfills and Landfill Disposal Agreements

a. Charlotte, North Carolina

Allied's Anson County Landfill, located at 375 Allied Road, Polkton, North Carolina 28135;

b. Cleveland, Ohio

Allied's Superior Oakland Marsh Landfill, located at 170 Noble Road East, Shiloh, Ohio 44878;

c. Denver, Colorado

Republic's Front Range Landfill, located at 1830 Weld Company Road 5, Erie, Colorado 80516;

d. Flint, Michigan

Republic's Brent Run Landfill, located at 8247 Vienna Road, Montrose, Michigan 48457;

e. Fort Worth, Texas

At the Acquirer's option, (i) Allied's Turkey Creek Landfill, located at 9100 South I–35 West Exit 21, Alvarado, Texas 76009, or (ii) all of Allied's rights, titles, and interests in the Fort Worth Southeast Landfill, located at 6900 Dick Price Road, Kennedale, Texas 76060, provided that the City of Fort Worth, owner of the Fort Worth Southeast Landfill, approves in advance the sale or assignment of Allied's rights, titles, and interests in the landfill to the Acquirer. If an Acquirer opts to purchase all of Allied's rights, titles, and interests in the Fort Worth Southeast Landfill, defendants will use their best efforts to secure the City of Fort Worth's approval.

f. Greenville-Spartanburg, South Carolina

Allied's Anderson Regional Landfill, located at 203 Landfill Road, Anderson, South Carolina 29627;

g. Houston, Texas

(1) Republic's Seabreeze Environmental Landfill, located at 10310 FM–523, Angleton, Texas 77515; and

(2) Rights to landfill disposal, at rates to be negotiated, at Allied's Blue Ridge Landfill, located at 2200 FM–521 Road, Fresno, Texas 77545, pursuant to which defendants will reserve capacity for an Acquirer for MSW disposal under the following minimum terms and conditions:

a. A term of ten (10) years from the date of sale of the Relevant Hauling Assets for the Houston, Texas area;

b. The Acquirer may dispose of 600 tons per day of MSW (''Minimum Disposal Amount'') and no more than 1,000 tons per day of direct-haul MSW (''Maximum Disposal Amount'') at the Blue Ridge Landfill (''Maximum Disposal Amount''), during each six (6) calendar month period during the term of the agreement, to be pro rated for any partial periods at the beginning and end of the agreement. The agreement may also provide that if the Acquirer disposes of less than the prevailing Minimum Disposal Amount during any such six (6) month period, then the Minimum Disposal Amount and the Maximum Disposal Amount may be reduced for the remainder of the disposal agreement term by a tonnage amount equal to the shortfall amount.

c. For the Acquirer of the landfill disposal agreement, defendants must commit to operate the Blue Ridge Landfill gates, scale houses, and disposal areas under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in the metropolitan Houston area, except as to price and credit terms; and

d. At any time during the life of the agreement, the Acquirer has the right to terminate the agreement upon ninety (90) days' written notice to defendants.

h. Los Angeles, California

Republic's Chiquita Canyon Sanitary Landfill, 29201 Henry Mayo Drive, Valencia, California 91355;

i. Northwest Indiana

At the option of the Acquirer of the Valparaiso Transfer Station, landfill disposal rights, at rates to be negotiated, at Allied's Newton County Development Corporation Landfill (''Newton County Landfill''), located at 2266 East 500 South Road, Brook, Indiana 47922, pursuant to which defendants will offer to reserve 350 tons per day of capacity for an Acquirer for MSW disposal at Newton County Landfill, under the following minimum terms and conditions:

(1) A term of two (2) years from the date of sale of the Valparaiso Transfer Station;

(2) The Acquirer may dispose of up to 350 tons per day of MSW at Newton County Landfill;

(3) For the Acquirer of the landfill disposal agreement, defendants must commit to operate the Newton County Landfill gates, scale houses, and disposal areas under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in the Northwest Indiana area, except as to price and credit terms; and

(4) At any time during the life of the agreement, the Acquirer has the right to terminate the agreement upon thirty (30) days' written notice to defendants.

j. Philadelphia, Pennsylvania

At the option of the Acquirer of the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station, rights to landfill disposal, at rates to be negotiated, at Republic's Modern Landfill, located at 4400 Mount Pisgah Road, York, Pennsylvania 17402, pursuant to which defendants will reserve capacity for an Acquirer for MSW disposal at Modern Landfill, under the following minimum terms and conditions:

(1) A term of eighteen (18) months from the date of sale of the Girard Point Transfer Station and the Philadelphia Recycling and Transfer Station;

(2) The Acquirer may dispose of up to 1300 tons per day of MSW at the Modern Landfill;

(3) For the Acquirer of the landfill disposal agreement, defendants must commit to operate the Modern Landfill gates, scale houses, and disposal areas under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in the

Philadelphia, Pennsylvania area, except as to price and credit terms; and

(4) At any time during the life of the agreement, the Acquirer has the right to terminate the agreement upon thirty (30) days' written notice to defendants.

k. San Francisco, California

Republic's Potrero Hills Sanitary Landfill, located at 3675 Potrero Hills Lane, Suisun, California 94585, except that Republic need not convey (i) the right to control the location of disposal for waste volumes that Republic has disposed of at Potrero Hills Sanitary Landfill via transfer through the Golden Bear Transfer Station or contracts covering the disposal of such waste, or (ii) contracts between the Republic subsidiary that owns Potrero Hills Sanitary Landfill and Alameda County Industries to the extent those contracts govern disposal of waste at Vasco Road Landfill.

2. Transfer Stations

a. Atlanta, Georgia

(i) Republic's Central Gwinnett Transfer Station, located at 535 Seaboard Industrial Drive, Lawrenceville, Georgia 30045; and

(ii) Allied's BFI Smyrna Transfer Station, located at 4696 South Cobb Drive, Smyrna, Georgia 30080;

b. Cape Girardeau, Missouri

Allied's Jackson Solid Waste Transfer Station, located at 2004 Lee Avenue, Hwy 25 N, Jackson, Missouri 63755;

c. Charlotte, North Carolina

Republic's Queen City Transfer Station, located at 3130 Jeff Adams Drive, Charlotte, North Carolina 28206;

d. Cleveland, Ohio

Republic's Harvard Road Transfer Station, located at 3227 Harvard Road, Newburgh Heights, Ohio 44105;

e. Greenville-Spartanburg, South Carolina

Allied's Greer Transfer Station, located at 590 Gilliam Road, Greer, South Carolina 29651;

f. Houston, Texas

Republic's Hardy Road Transfer Station, located at 18784 Hardy Road, Houston, Texas 77073;

g. Northwest Indiana

Allied's Valparaiso Transfer Station, located at 3101 Bertholet Boulevard, Valparaiso, Indiana 46383; and

h. Philadelphia, Pennsylvania

(i) Republic's Girard Point Transfer Station, located at 3600 South 26th Street, Philadelphia, Pennsylvania 19145; and

(ii) Allied's Philadelphia Recycling and Transfer Station, located at 2209 South 58th Street, Philadelphia, Pennsylvania 19143.

I. ''Relevant Hauling Assets,'' unless otherwise noted, means the small container commercial waste collection routes and other assets listed below:

1. Atlanta, Georgia

(a) Allied's small container commercial waste collection routes 123, 130, 131, 132, 133, 136, 137, 138, 141, 142, 144, 146, and 147; and (b) at the Acquirer's option, the hauling facility located at 1581 Fulenwider Road, Gainesville, Georgia;

2. Cape Girardeau, Missouri

(a) Allied's small container commercial waste collection routes 790 and 791; and (b) at the Acquirer's option, the hauling facility located at 281 Rambler Road, Jackson, Missouri;

3. Charlotte, North Carolina

(a) Republic's small container commercial waste collection routes A001, A002, A003, A004, A005, A007, A008, A009, A010, and A012; and (b) at the Acquirer's option, the hauling facility located at 5516 Rozzelles Ferry Road, Charlotte, North Carolina;

4. Fort Worth, Texas

(a) Republic's small container commercial waste collection routes VA, VB, VC, VD, and VE; and (b) notwithstanding any other provision of this Final Judgment, in the event an Acquirer purchases Allied's rights, titles and interests in the Fort Worth Southeast Landfill, the Acquirer shall have the option to lease a sufficient portion of the Republic yard located at 1212 Harrison Avenue, Arlington, Texas for a period of six (6) months with an option to renew for one additional six (6) month period, under a lease to permit the Acquirer to support fully the operation of the divested small container commercial waste collection routes and the potential growth of the divested hauling business to include additional routes;

5. Greenville-Spartanburg, South Carolina

(a) Allied's small container commercial waste collection routes 701, 704, 705, 708, 714, 718, 719, and 720; and (b) at the Acquirer's option, the hauling facility located at 101 Rogers Bridge Road, Duncan, South Carolina;

6. Houston, Texas

(a) Republic's small container commercial waste collection routes A002, A004, A005, A006, A008, A009, A010, A011, A012, A017, A024, A027, A028, A029, A031, A034, A035, A038, A040, A042, A043, A044, A045, A046, A049, A052, A053, A054, A055, A058, A059, and A060; and (b) at the Acquirer's option, the hauling facility located at 2010 Wilson Road, Houston, Texas;

7. Lexington, Kentucky

(a) Republic's small container commercial waste collection routes 31, 32, 34, 36, and 37; and (b) at the Acquirer's option, the hauling facility located at 4000 Park Central Court, Nicholasville, Kentucky;

8. Lubbock, Texas

(a) Allied's small container commercial waste collection routes 1711, 1713, 1714, 1911, 1912, 1913, and 1914; and (b) at the Acquirer's option, the hauling facility located at 1812 CR–60, Lubbock, Texas; and

9. Northwest Indiana

(a) Allied's small container commercial waste collection routes 150, 751, 754, 756, and 757; and (b) at the Acquirer's option, the hauling facility located at 3101 Bertholet Boulevard, Valparaiso, Indiana.

J. ''Relevant State'' means the state or commonwealth in which the Divestiture Assets are located, provided, however, that state or commonwealth is a party to this Final Judgment.

K. ''Small container commercial waste collection'' means the business of collecting municipal solid waste from commercial and industrial accounts, usually in ''dumpsters'' (*i.e.*, a small container with one to ten cubic yards of storage capacity), and transporting or ''hauling'' such waste to a disposal site by use of a front-end or rear-end load truck. Typical small container commercial waste collection customers include office and apartment buildings and retail establishments (*e.g.*, stores and restaurants). As used herein, ''small container commercial waste collection'' does not include small container commercial waste collection of franchised routes.

L. ''MSW'' means municipal solid waste, a term of art used to describe solid putrescible waste generated by households and commercial establishments. Municipal solid waste does not include special handling waste (*e.g.*, waste from manufacturing processes, regulated medical waste, sewage and sludge), hazardous waste or waste generated by construction or demolition sites.

III. Applicability

A. This Final Judgment applies to Republic and Allied, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the defendants' Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 90 calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer(s) acceptable to the United States in its sole discretion, after consultation with the Relevant State. With respect to the Atlanta, Georgia; Cleveland, Ohio; Philadelphia, Pennsylvania; and Ft. Worth, Texas areas, the Divestiture Assets in each area must be offered for sale to prospective Acquirers separately from Divestiture Assets in other areas. All of the Divestiture Assets serving any single relevant area shall be sold to the same Acquirer, unless defendants receive the prior written consent of the United States. The United States, in its sole discretion, after consultation with the Relevant State, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer(s) and the United States information relating to all personnel involved in the operation and management of the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer(s) to employ or contract with any defendant employee whose primary responsibility is the operation or management of the Divestiture Assets.

D. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer(s) that each asset will be operational on the date of sale.

F. In the event that the Turkey Creek Landfill is not, for any reason, fully operational and capable of disposing of at least 675,000 tons of MSW annually at the time of its divestiture, defendants shall be required to divest alternative disposal assets in the Fort Worth, Texas area that are sufficient to achieve the purposes of this Final Judgment to the satisfaction of the United States, in its sole discretion, after consultation with the State of Texas.

G. Defendants shall not take any action that will impede in any way the permitting, operation or divestiture of the Divestiture Assets.

H. Defendants shall warrant to each Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. Unless the United States, after consultation with the Relevant State, otherwise consents in writing, the divestitures pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include all the Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the Relevant State, that the divestiture will achieve the purposes of this Final Judgment and that the Divestiture Assets can and will be used by an Acquirer(s) as part of a viable, ongoing disposal or hauling business in each relevant area. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

(1) Shall be made to an Acquirer(s) that, in the United States's sole judgment, after consultation with the Relevant State, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the disposal or hauling business; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the Relevant State, that none of the terms of any agreement between an Acquirer(s) and defendants gives defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee

A. If defendants have not divested the Divestiture Assets within the time period specified in Section IV, Paragraph A, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestitures to an Acquirer(s) acceptable to the United States, after consultation with the Relevant State, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V, Paragraph D of this Final Judgment, the trustee may hire at the defendants' cost and expense any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestitures.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any objection by defendants on the ground of the trustee's malfeasance must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States, the Relevant State, and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (1) the trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States and the Relevant State of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States and the Relevant State of such notice, the United States, in its sole discretion, after consultation with the Relevant State, may request from defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States, in its sole discretion, after consultation with the Relevant State, shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V, Paragraph C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V, Paragraph C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Notice of Future Acquisitions

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), defendants, without providing advance notification to United States and the Relevant State, shall not directly or indirectly acquire, any (1) interest in any business engaged in a relevant service in a relevant area, (2) assets (other than in the ordinary course of business) used in a relevant service in a relevant area, (3) capital stock, or (4) voting securities of any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in MSW disposal or small container commercial waste collection in any relevant area, where that person's annual revenues in the relevant area from MSW disposal and/or small container commercial waste collection service were in excess of $500,000 annually. For clarity, this provision also applies to an acquisition of disposal facilities that serve a relevant area but are located outside the relevant area, whether or not they are physically located in the relevant area.

Such notification shall be provided to the United States in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information

requested in Items 5 through 8 of the instructions must be provided only about the relevant service. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

AREAS FOR WHICH NOTICE PROVISION APPLIES

Relevant area	Counties	Relevant service
Atlanta, GA	Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb and Paulding Counties.	hauling and transfer station disposal.
Cape Girardeau, MO	Cape Girardeau County	hauling and transfer station disposal.
Charlotte, NC	Mecklenburg County	hauling and transfer station and landfill disposal.
Cleveland, OH	Cuyahoga County	transfer station and landfill disposal.
Denver, CO	Denver and Arapahoe Counties	landfill disposal.
Flint, MI	Saginaw and Genesee Counties	landfill disposal.
Fort Worth, TX	Tarrant County	hauling and landfill disposal.
Greenville-Spartanburg, SC	Greenville and Spartanburg Counties	hauling and transfer station and landfill disposal.
Houston, TX	Harris County	hauling and transfer station and landfill disposal.
Lexington, KY	Fayette, Jessamine, Woodford, Scott and Franklin Counties	hauling.
Los Angeles, CA	Los Angeles County	landfill disposal.
Lubbock, TX	Lubbock County	hauling.
Northwest Indiana	Lake, Porter and LaPorte Counties	hauling and transfer station disposal.
Philadelphia, PA	Philadelphia County	transfer station disposal.
San Francisco, CA	Contra Costa, Solano and Alameda Counties	landfill disposal.

VIII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

IX. Hold Separate

Until the divestitures required by this Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

X. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Section IV or V, defendants shall deliver to the United States and the Relevant State an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, after consultation with the Relevant State, to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the plaintiffs an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestitures have been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division (''DOJ''), including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, or the Attorney General's Office of any other plaintiff, except in the course of legal proceedings to which the United States or any other plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition

During the term of this Final Judgment, defendants may not reacquire any part of the Divestiture Assets, nor may any defendant participate in any other transaction that would result in a combination, merger, or other joining together of any part of the Divestiture Assets with assets of the divesting company.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

United States District Court for the District of Columbia

United States of America, State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas, Plaintiffs, v. Republic Services, Inc., and Allied Waste Industries, Inc., Defendants.

Civil Action No.: 1:08–cv–02076.
Description: Antitrust.
Judge: Roberts, Richard W.
Date Stamp: 12/3/2008.

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Pursuant to a stock purchase agreement dated June 22, 2008, defendant Republic Services, Inc. (''Republic'') plans to acquire all of the issued and outstanding voting securities of defendant Allied Waste Industries, Inc. (''Allied''). If consummated, the agreement would give Republic ownership of all the waste hauling and disposal assets held by Allied throughout the United States. The United States and the State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas (the ''States'') filed a civil antitrust Complaint on December 3, 2008, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for small container commercial waste collection and municipal solid waste (''MSW'') disposal services in several markets in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of MSW.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Republic is required within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable business operations, specified small container commercial waste collection and MSW disposal assets. Under the terms of the Hold Separate Stipulation and Order, Republic and Allied are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from their other assets and businesses.

The United States, the States, and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

1. The Defendants and the Proposed Transaction

Republic, with revenues in 2007 of approximately $3.2 billion, is the nation's third largest waste hauling and disposal company. Allied, with 2007

revenues of approximately $6.1 billion, is the nation's second largest waste hauling and disposal company. The proposed transaction, as initially agreed to by defendants on June 22, 2008, would lessen competition substantially in the provision of non-franchised small container commercial waste collection services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana. In addition, the transaction as initially proposed would lessen competition substantially in the provision of MSW disposal services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States and the States on December 3, 2008.

B. The Competitive Effects of the Transaction

MSW is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and transport the waste to private and public MSW disposal facilities (*e.g.*, transfer stations, incinerators, and landfills), which, for a fee, process and legally dispose of the waste. Small container commercial waste collection is one component of MSW collection, which also includes residential and other waste collection. Private waste haulers typically contract with customers for the collection of waste generated by commercial accounts. MSW generated by residential customers, on the other hand, often is collected by local governments or by private haulers pursuant to contracts bid by, or franchises granted by, municipal authorities. Republic and Allied compete in the collection of small container commercial waste and the disposal of MSW.

1. The Effects of the Transaction on Competition in Small Container Commercial Waste Collection

a. Small Container Commercial Waste Collection

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.*, one- to ten-cubic-yard containers for MSW storage, and front-end load vehicles commonly used for collection and transportation of MSW) is uniquely well suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential, hazardous waste, and roll-off services) are not good substitutes for small container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport MSW generated by commercial accounts and, hence, rarely are used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly localized geographic markets. It is expensive to transport MSW long distances between collection customers or to disposal sites. To minimize transportation costs and maximize the scale, density, and efficiency of their MSW collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Distance may significantly limit a remote firm's ability to provide small container commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local small container commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local small container commercial waste customers without losing significant sales to firms outside the area.

Applying this analysis, the Complaint alleges that local small container waste collection firms, absent competition from other small container waste collection firms, could profitably increase charges to local customers without losing significant sales to more distant competitors in each of the following areas: Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana. Accordingly, the Complaint alleges that each of these areas constitutes a section of the country, or a relevant geographic market, for the purpose of assessing the competitive effects of a combination of Republic and Allied in the provision of small container commercial waste collection services.

There are significant entry barriers into small container commercial waste collection. A new entrant into small container commercial waste collection services must achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms in order to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. An efficient route usually handles 80 or more customers or containers each day. Because most customers have their MSW collected once or twice a week, a new entrant must have several hundred small container commercial waste customers in close proximity to construct an efficient route. However, the incumbent's ability to engage in price discrimination and enter into long-term contracts with small container commercial waste collection customers can leave too few customers available for the entrant in a sufficiently confined geographic area to create an efficient route. The incumbent firm can selectively and temporarily charge an unbeatably low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to

switch to a new small container commercial waste hauler and obtain lower prices for its collection service. Because of these factors, a new entrant may find it difficult to compete by offering its small container commercial waste services at pre-entry price levels comparable to the incumbent and may find an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately be successful.

The need for route density, the use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which likely will be forced to compete at lower than pre-entry price levels. Such barriers in the market for small container commercial waste collection have allowed incumbent firms to raise prices successfully.

b. Anticompetitive Effects in Small Container Commercial Waste Collection Markets

(1) Atlanta, Georgia Area

Republic is acquiring the hauling assets of Allied in Atlanta, Georgia. These assets serve small container commercial waste collection customers in Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb, and Paulding Counties, Georgia. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Atlanta, Georgia area is approximately $60 million. After the acquisition, defendants would have approximately 50 percent of the total number of small container commercial waste collection routes in the market.

(2) Cape Girardeau, Missouri Area

Republic is acquiring the hauling assets of Allied in Cape Girardeau, Missouri. These assets serve small container commercial waste collection customers in Cape Girardeau County, Missouri. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Cape Girardeau, Missouri area is approximately $5 million. After the acquisition, defendants would have approximately 64 percent of the total number of small container commercial waste collection routes in the market.

(3) Charlotte, North Carolina Area

Republic is acquiring the hauling assets of Allied in Charlotte, North Carolina. These assets serve small container commercial waste collection customers in Mecklenburg County, North Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Charlotte, North Carolina area is approximately $40 million. After the acquisition, defendants would have approximately 70 percent of the total number of small container commercial waste collection routes in the market.

(4) Fort Worth, Texas Area

Republic is acquiring the hauling assets of Allied in Fort Worth, Texas. These assets serve small container commercial waste collection customers in Tarrant County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Fort Worth, Texas area is approximately $55 million. After the acquisition, defendants would have approximately 42 percent of the total number of small container commercial waste collection routes in the market, and the two largest competitors would have approximately 70 percent of the market.

(5) Greenville-Spartanburg, South Carolina Area

Republic is acquiring the hauling assets of Allied in Greenville-Spartanburg, South Carolina. These assets serve small container commercial waste collection customers in Greenville and Spartanburg Counties, South Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Greenville-Spartanburg, South Carolina area is approximately $41 million. After the acquisition, defendants would have approximately 69 percent of the total number of small container commercial waste collection routes in the market.

(6) Houston, Texas Area

Republic is acquiring the hauling assets of Allied in Houston, Texas. These assets serve small container commercial waste collection customers in Harris County, Texas. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Houston, Texas area is approximately $109 million. After the acquisition, defendants would have approximately 56 percent of the total number of small container commercial waste collection routes in the market.

(7) Lexington, Kentucky Area

Republic is acquiring the hauling assets of Allied in Lexington, Kentucky. These assets serve small container commercial waste collection customers in Fayette, Jessamine, Woodford, Scott and Franklin Counties, Kentucky. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lexington, Kentucky area is approximately $9 million. After the acquisition, defendants would have approximately 75 percent of the total number of small container commercial waste collection routes in the market.

(8) Lubbock, Texas Area

Republic is acquiring the hauling assets of Allied in Lubbock, Texas. These assets serve small container commercial waste collection customers in Lubbock County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lubbock, Texas area is approximately $18 million. After the acquisition, defendants would have approximately 63 percent of the total number of small container commercial waste collection routes in the market.

(9) Northwest Indiana Area

Republic is acquiring the hauling assets of Allied in the Northwest Indiana area. These assets serve small container commercial waste collection customers in Lake, Porter and LaPorte Counties, Indiana. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Northwest Indiana area is

approximately $2.4 million. After the acquisition, defendants would have approximately 44 percent of the total number of small container commercial collection routes in the market.

The Complaint alleges that a combination of Republic and Allied in each of these areas would remove a significant competitor in small container commercial waste collection services. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for the collection of small container commercial waste.

2. The Effects of the Transaction on Competition in the Disposal of Municipal Solid Waste

a. Municipal Solid Waste Disposal

A number of federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. In order to be disposed of lawfully, MSW must be disposed of in a landfill or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in an unlawful manner risks severe civil and criminal penalties. In some areas, landfills are scarce because of significant population density and the limited availability of suitable land. Accordingly, most MSW generated in these areas is burned in an incinerator or brought to transfer stations where it is compacted and transported on tractor trailer trucks to a more distant permanent MSW disposal site. A transfer station is an intermediate disposal site for processing and temporary storage of MSW before transfer in bulk to more distant landfills or incinerators for final disposal.

Because of the strict laws and regulations that govern MSW disposal, there are no good substitutes for MSW disposal in landfills, or incinerators, or at transfer stations located near the source of the waste. Firms that compete in MSW disposal can profitably increase their charges to haulers of MSW without losing significant sales to any other firms. Thus, for purposes of antitrust analysis, MSW disposal constitutes a line of commerce, or relevant service, for purposes of analyzing the transaction.

MSW disposal generally occurs in localized markets. Because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in an area is disposed of in landfills within roughly 25 to 35 miles of the relevant geographic market. In certain relevant geographic markets, virtually all of the MSW is disposed of in nearby transfer stations due to the high costs of transporting MSW and the substantial travel time to other MSW disposal facilities based on distance, natural barriers, and congested roadways. In the event that all owners of local disposal facilities imposed a small but significant increase in the price of disposal of MSW, haulers of MSW generated in that area could not profitably turn to more distant disposal sites. Firms that compete in MSW disposal in these markets, absent competition from other local MSW disposal operators, can profitably increase their charges for MSW disposal without losing significant sales to more distant MSW disposal sites.

In other relevant geographic markets, because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in the area is disposed of in landfills often within roughly 25 to 35 miles of the relevant geographic market. Firms that compete to dispose of MSW generated in these markets can profitably increase their charges for MSW disposal without losing significant sales to more distant MSW disposal sites.

Applying this analysis, the Complaint alleges that in each of the following areas, the high costs of transporting MSW and the substantial travel time to other disposal facilities based on distance, natural barriers and congested roadways, limit the distance that haulers can travel economically to dispose of their waste: Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. Those areas constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Republic and Allied in the provision of MSW disposal services.

There are significant barriers to entry in MSW disposal. Obtaining a permit to construct a new disposal facility or expand an existing one is a costly and time-consuming process that typically takes many years to conclude. Local public opposition often increases the time and uncertainty of successfully permitting a facility. It is also difficult to overcome environmental concerns and satisfy other government requirements. In the relevant geographic areas for MSW disposal, entry by a new MSW disposal facility would be costly and time-consuming, and unlikely to prevent market incumbents from significantly raising prices for MSW disposal following the acquisition.

3. Anticompetitive Effects in the Disposal of Municipal Solid Waste

(1) Atlanta, Georgia Area

Republic is acquiring the MSW disposal assets of Allied serving the Atlanta, Georgia area. These assets serve MSW disposal customers in Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb, and Paulding Counties, Georgia. The proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal in the Atlanta, Georgia area. Annual revenue from MSW disposal in this market is approximately $89 million. After the acquisition, defendants would have approximately 46 percent of the MSW disposal market.

(2) Cape Girardeau, Missouri Area

Republic is acquiring the MSW disposal assets of Allied serving the Cape Girardeau, Missouri area. These assets serve MSW disposal customers in Cape Girardeau County, Missouri. The proposed acquisition would reduce from three to two the number of significant competitors for the MSW disposal in the Cape Girardeau, Missouri area. Annual revenue from MSW disposal in this market is approximately $3 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market.

(3) Charlotte, North Carolina Area

Republic is acquiring the MSW disposal assets of Allied serving the Charlotte, North Carolina area. These assets serve MSW disposal customers in Mecklenburg County, North Carolina. The proposed acquisition would reduce from three to two the number of significant competitors for the MSW disposal in the Charlotte, North Carolina area. Annual revenue from MSW disposal in this market is approximately $69 million. After the acquisition, defendants would have approximately 80 percent of the MSW disposal market.

(4) Cleveland, Ohio Area

Republic is acquiring the MSW disposal assets of Allied serving the Cleveland, Ohio area. These assets serve MSW disposal customers in Cuyahoga County, Ohio. In this area, the proposed acquisition would reduce from four to

three the number of significant competitors for the MSW disposal. Annual revenue from MSW disposal in this market is approximately $68 million. After the acquisition, defendants would have approximately 56 percent of the MSW disposal market.

(5) Denver, Colorado Area

Republic is acquiring the MSW disposal assets of Allied serving the Denver, Colorado area. These assets serve MSW disposal customers in Denver and Arapahoe Counties, Colorado. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $56 million. After the acquisition, defendants would have approximately 37 percent of the MSW disposal market, and the two largest competitors would have roughly 87 percent.

(6) Flint, Michigan Area

Republic is acquiring the MSW disposal assets of Allied serving the Flint, Michigan area. These assets serve MSW disposal customers in Saginaw and Genesee Counties, Michigan. In this area, the proposed acquisition would reduce from four to three the number of competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $29 million. After the acquisition, defendants would have over 51 percent of the MSW disposal market.

(7) Fort Worth, Texas Area

Republic is acquiring the MSW disposal assets of Allied serving the Fort Worth, Texas area. These assets serve MSW disposal customers in Tarrant County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $84 million. After the acquisition, defendants would have over 55 percent of the MSW disposal market.

(8) Greenville-Spartanburg, South Carolina Area

Republic is acquiring the MSW disposal assets of Allied serving the Greenville-Spartanburg, South Carolina area. These assets serve MSW disposal customers in Greenville and Spartanburg Counties, South Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $40 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market.

(9) Houston, Texas Area

Republic is acquiring the MSW disposal assets of Allied serving the Houston, Texas area. These assets serve MSW disposal customers in Harris County, Texas. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal in the Houston, Texas area. Annual revenue from MSW disposal in this market is approximately $75 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market.

(10) Los Angeles, California Area

Republic is acquiring the MSW disposal assets of Allied serving the Los Angeles, California area. These assets serve MSW disposal customers in Los Angeles County, California. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $372 million. After the acquisition, defendants would have approximately 39 percent of the MSW disposal market, and the two largest competitors would have 61 percent.

(11) Northwest Indiana Area

Republic is acquiring the MSW disposal assets of Allied serving the Northwest Indiana area. These assets serve MSW disposal customers in Lake, Porter and LaPorte Counties, Indiana. In this area, the proposed acquisition would also reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $28 million. After the acquisition, defendants would have approximately 64 percent of the MSW disposal market.

(12) Philadelphia, Pennsylvania Area

Republic is acquiring the MSW disposal assets of Allied serving the Philadelphia, Pennsylvania area. These assets serve MSW disposal customers in Philadelphia County, Pennsylvania. In this area, the proposed acquisition would reduce from three to two the number of competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $126 million. After the acquisition, defendants would have approximately 52 percent of the available MSW disposal capacity.

(13) San Francisco, California Area

Republic is acquiring the MSW disposal assets of Allied serving the San Francisco, California area. These assets serve MSW disposal customers in Contra Costa, Solano and Alameda Counties, California. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $101 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market.

The Complaint alleges that a combination of Republic and Allied in each of these areas would remove a significant competitor in the market for MSW disposal. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for MSW disposal.

III. Explanation of the Proposed Final Judgment

The divestiture requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services and MSW disposal services in the markets identified in the Complaint by removing sufficient collection and disposal assets from the merged firm's control and placing them in the hands of a firm that is independent of the merged firm and capable of preserving the competition that otherwise would have been extinguished by the merger. Specifically, the proposed Final Judgment requires defendants, within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business or businesses, (a) small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana, and (b) MSW disposal assets (*e.g.*, landfills, transfer stations, airspace disposal rights, leasehold rights, garages and offices, trucks and vehicles, scales, permits and intangible assets such as customer lists and contracts) in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver,

Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. The assets must be divested to purchasers approved by the United States and in such a way as to satisfy the United States that they can and will be operated by the purchaser or purchasers as part of a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, United States, and the States as appropriate, setting forth his or her efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee, United States, and the States as appropriate, will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

A. Divestiture Provisions

The proposed Final Judgment provides that, for any area in which defendants are required to divest assets, all of the assets serving that area shall be sold to a single purchaser, unless defendants receive the prior written consent of the United States to do otherwise. As described below, the divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in each of the nine markets in which the Complaint alleges harm to competition for small container commercial waste collection services and in each of the 13 markets in which the Complaint alleges harm to competition for MSW disposal. These divestitures will preserve the competition that otherwise would have been lost as a result of the acquisition.

1. Atlanta, Georgia Area

Defendants must divest 13 of Allied's approximately 35 small container commercial waste collection routes and related assets in the Atlanta, Georgia area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes serving the northern and eastern portions of the Atlanta area, where Allied and Republic routes overlap most directly and the firms compete most intensely. The divestiture of these routes to an independent, economically viable acquirer will thus preserve such competition and also position the acquirer to expand its service throughout the Atlanta area.

Defendants must also divest to the same acquirer Republic's Central Gwinnett Transfer Station in Lawrenceville, Georgia and Allied's BFI Smyrna Transfer Station in Smyrna, Georgia to remedy MSW disposal concerns in the Atlanta, Georgia area. In this area, transfer stations are the primary disposal option for haulers of MSW because MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Republic's Central Gwinnett Transfer Station is located in the northeastern portion of the Atlanta area and provides an efficient MSW disposal option for the acquirer of the 13 small container commercial waste collection routes to be divested in this market. Allied's BFI Smyrna Transfer Station, which is in the western portion of the Atlanta area, is also efficiently located. Together, the two transfer stations will provide efficient access to disposal for collection routes throughout the Atlanta area. The United States' investigation found that there are sufficient independent MSW landfills economically reached via these transfer stations to allow the acquirer to provide effective disposal competition in the Atlanta area, both for its own waste streams as well as those of other independent haulers throughout the Atlanta area.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Atlanta area divestiture assets for sale separately from the other assets required to be divested, so as to expand the pool of potential bidders for the Atlanta area divestiture assets. Local or regional waste firms that might wish to combine the Atlanta area divestiture assets with their own assets serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

Pursuant to the terms of the Modified Final Judgment entered in *United States* v. *Allied Waste Industries, Inc. & Browning-Ferris Industries, Inc.,* (D.D.C. 1999) (No. 1:99 CV 01962) [hereinafter *Allied/BFI*], Allied was required to divest its Newnan Transfer Station, located in Newnan, Georgia. Republic acquired the Newnan Transfer Station from Allied and owns it today. Paragraph VIII(A) of the *Allied/BFI* Modified Final Judgment prohibits Allied's reacquisition of assets that it divested without the prior written consent of the United States. Although Republic's acquisition of Allied will recombine this transfer station with Allied's other disposal assets in the Atlanta area, the United States has consented to this recombination because it concluded that the Newnan Transfer Station no longer participates meaningfully in the Atlanta market for MSW disposal, and no competitive issues exist in the rural areas southwest of Atlanta served by the Newnan Transfer Station. Specifically, the United States' investigation found that, although Allied used the Newnan Transfer Station to serve the Atlanta disposal market as of 1999—and that facility competed directly with transfer stations in the Atlanta area that Allied was acquiring in the *Allied/BFI* transaction—the focus of the Newnan Transfer Station has changed under Republic ownership, and other transfer stations in the Atlanta area now accept the waste streams that previously went to the Newnan Transfer Station. Waste flow reports show that the Newnan facility disposes of waste generated in rural areas southwest of Atlanta and competes much less directly with other disposal facilities in the Atlanta area. Accordingly, the United States concluded that the proposed acquisition of Allied by Republic, whereby Allied's MSW disposal assets would be recombined with the Newnan Transfer Station, would not substantially diminish competition for the provision of MSW disposal services in the Atlanta, Georgia area. Instead, the divestiture of Republic's Central Gwinnett Transfer Station and Allied's BFI Smyrna Transfer Station would be an effective remedy for the anticompetitive effects of the proposed acquisition on MSW disposal in this market.

2. Cape Girardeau, Missouri Area

Defendants must divest Allied's two routes and related assets that serve small container commercial waste collection customers in the Cape

Girardeau, Missouri area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

Defendants must also divest to the same acquirer Allied's only transfer station in the Cape Girardeau, Missouri area—the Jackson Solid Waste Transfer Station in Jackson, Missouri—to remedy MSW disposal concerns in this market. In this area, transfer stations are the primary disposal option for haulers of MSW because MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Allied's Jackson Solid Waste Transfer Station has historically provided MSW disposal services for the two Allied small container commercial waste collection routes that will be divested in this market, and there is sufficient independent MSW landfill capacity economically reached via the transfer station to enable the acquirer of the divested assets to provide effective collection and disposal competition in the Cape Girardeau area.

3. Charlotte, North Carolina Area

Defendants must divest Republic's ten routes and related assets that serve small container commercial waste collection customers in the Charlotte, North Carolina area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this area, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

Defendants must also divest to the same acquirer Republic's Queen City Transfer Station in Charlotte, North Carolina and Allied's Anson County Landfill in Polkton, North Carolina to remedy MSW disposal concerns in the Charlotte, North Carolina area. Republic's Queen City Transfer Station in Charlotte, North Carolina is the facility Republic uses to serve its ten routes in the Charlotte area, and is an efficient MSW disposal option. Allied's Anson County Landfill is efficiently located relative to the Queen City Transfer Station and possesses ample capacity to preserve disposal competition in the Charlotte area once divested to an independent, economically viable operator. The proposed Final Judgment does not require the divestiture of the landfill used by Republic to serve this area—Republic's Uwharrie Environmental Landfill in Mount Gilead, North Carolina—because a significant portion of the capacity of that landfill, which is farther from the Queen City Transfer Station than Allied's Anson County facility, is devoted by Republic to serving waste streams from areas to the north of the Charlotte area, where the United States' investigation found that there was no competitive concern.

4. Cleveland, Ohio Area

Defendants must divest to a single Acquirer Republic's Harvard Road Transfer Station in Newburgh Heights, Ohio and Allied's Superior Oakland Marsh Landfill in Shiloh, Ohio to remedy MSW disposal concerns in the Cleveland, Ohio area. Republic's Harvard Road Transfer Station is a large transfer station that is centrally located in the Cleveland, Ohio market. The Superior Oakland Marsh Landfill is efficiently located to accept MSW from the divested Harvard Road Transfer Station and other transfer stations serving the Cleveland, Ohio area, and it possesses ample capacity to preserve disposal competition in the Cleveland area once it is divested to an independent, economically viable operator. The proposed Final Judgment does not require divestiture of the landfill used by Republic to serve waste delivered via the Harvard Road Transfer Station—Republic's Countywide Recycling and Disposal Landfill in East Sparta, Ohio—because that facility has unresolved environmental issues related to its operation that would make it an unattractive candidate for divestiture.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Cleveland area divestiture assets for sale separately from the other assets required to be divested, so as to expand the pool of potential bidders for the Cleveland area divestiture assets. Local or regional waste firms that might wish to combine the Cleveland area divestiture assets with their own assets serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

5. Denver, Colorado Area

Defendants must divest Republic's only MSW disposal facility serving the Denver, Colorado area—the Front Range Landfill in Erie, Colorado—to remedy MSW disposal concerns in this market.

6. Flint, Michigan Area

Defendants must divest Republic's only actively operating MSW disposal facility serving the Flint, Michigan area—the Brent Run Landfill in Montrose, Michigan—to remedy MSW disposal concerns in this market. The proposed Final Judgment does not require defendants to divest an inactive landfill owned by Republic that could serve this market—the Tay Mouth Landfill in Birch Run, Michigan—because Republic's Brent Run Landfill possesses ample capacity to preserve competition once divested to an independent, economically viable operator.

7. Fort Worth, Texas Area

Defendants must divest Republic's five routes and related assets that serve small container commercial waste collection customers in the Fort Worth, Texas area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

Defendants must also divest to the same acquirer one of two landfills in the Fort Worth area: (1) Allied's Turkey Creek Landfill in Alvaredo, Texas, or (2) all of Allied's rights, titles, and interests in the Fort Worth Southeast Landfill in Kennedale, Texas, a disposal site that Allied leases from the City of Fort Worth. The selection of which landfill is to be divested is to be made by the acquirer. The divestiture of either of the two Allied landfills to an independent, economically viable competitor will eliminate the competitive harm caused by the acquisition. Both landfills are located close to Fort Worth, Texas, and are efficiently situated to serve this market as MSW disposal options.

If the acquirer selects Allied's Turkey Creek Landfill, which has been inactive since 2007, the proposed Final Judgment required defendants to warrant to the purchaser that, at the date of sale, the landfill will be operational and ensure that it is capable of disposing of 675,000 tons of MSW annually, which is the approximate volume disposed of during 2005, when the landfill was fully operational. If the landfill is not so capable, defendants shall be required to divest alternative disposal assets in the Fort Worth area acceptable to the United States as sufficient to remedy the competitive harm caused by the acquisition.

If the acquirer selects the Fort Worth Southeast Landfill, which Allied leases pursuant to a long-term contract with the City of Fort Worth, the acquirer would have to obtain the prior approval

of Fort Worth to the sale, and the proposed Final Judgment requires defendants to use their best efforts to obtain such approval.

The proposed Final Judgment does not require divestiture of the garage facilities used by Republic to serve the routes to be divested. Both Republic and Allied own garages that serve the Fort Worth area, but both of these facilities are much larger than necessary to serve the routes to be divested and are used predominantly to serve collection routes (such as residential franchise routes) as to which there is no competitive harm. The defendants intend to continue using both facilities after the acquisition is consummated. If the acquirer selects the Turkey Run Landfill for divestiture, it would be able to make use of space at that facility to service trucks used to operate the collection routes to be divested. If the acquirer selects the Forth Worth Southeast Landfill, the proposed Final Judgment requires the defendants to provide the acquirer with an option to lease for up to one year a sufficient portion of Republic's garage located in Arlington, Texas, to support fully the operation of the five routes to be divested as well as the potential growth of the divested collection business.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Fort Worth area divestiture assets for sale separately from the other assets required to be divested, so as to facilitate bids by local or regional waste firms that might wish to combine the Fort Worth area divestiture assets—which do not encompass all of the collection or disposal assets of either Republic or Allied in this area—with their own assets serving this market in order to create a more efficient, vertically integrated competitor serving the Fort Worth, Texas market. Such firms may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

8. Greenville-Spartanburg, South Carolina Area

Defendants must divest Allied's eight routes and related assets that serve small container commercial waste collection customers in the Greenville-Spartanburg, South Carolina area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

Defendants must also divest to the same acquirer all of Allieds MSW disposal assets serving the Greenville-Spartanburg, South Carolina area—Allied's Greer Transfer Station in Greer, South Carolina, and its Anderson Regional Landfill in Anderson, South Carolina—to remedy MSW disposal concerns in this market.

9. Houston, Texas Area

Defendants must divest 32 of Republic's 54 small container commercial waste collection routes and related assets in the Houston, Texas area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes serving the entire Houston area. The divestiture of these routes to an independent, economically viable acquirer will thus preserve competition and position the acquirer to expand its service.

Defendants must also divest Republic's Hardy Road Transfer Station in Houston, Texas and Seabreeze Landfill in Angleton, Texas to remedy MSW disposal concerns in the Houston, Texas area. Together, these two MSW disposal facilities will preserve competition for MSW disposal in the Houston area. The proposed Final Judgment does not require the divestiture of Republic's interest in two transfer stations owned by the City of Houston and operated by Republic under a long-term disposal contract and lease. The United States' investigation found that competition for that disposal contract would not be adversely affected by the proposed transaction.

In order to provide the acquirer of the divested routes serving the southern portion of the Houston area with an efficient direct-haul disposal option, the proposed Final Judgment requires that the defendants offer the acquirer airspace disposal rights at Republic's Blue Ridge Landfill for the term of the proposed Final Judgment. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

10. Lexington, Kentucky Area

Defendants must divest Republic's five routes and related assets that serve small container commercial waste collection customers in the Lexington, Kentucky area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

11. Lubbock, Texas Area

Defendants must divest Allied's seven routes and related assets that serve small container commercial waste collection customers in the Lubbock, Texas area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

12. Northwest Indiana Area

Defendants must divest five of Allied's nine small container commercial waste collection routes and related assets in the Northwest Indiana area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes serving the portions of the Northwestern Indiana area where Allied and Republic routes overlap most directly and the firms compete most intensely. The divestiture of these routes to an independent, economically viable acquirer will thus preserve such competition and also position the acquirer to expand its service throughout the Northwestern Indiana area.

Defendants must also divest to the same acquirer Allied's Valparaiso Transfer Station in Valparaiso, Indiana to remedy MSW disposal concerns in the Northwest Indiana area. Allied's Valparaiso Transfer Station is centrally located in this area and will allow the acquirer to provide efficient access to disposal for collection routes throughout the Northwestern Indiana area, including those to be divested.

The United States' investigation found that there are sufficient independent MSW landfills economically reached via the Valparaiso Transfer Station to allow the acquirer to provide effective disposal competition in the Northwestern Indiana area. To facilitate the acquirer's transition of waste streams served by this transfer stations to other landfills, the proposed Final Judgment requires that the purchaser of the transfer station be offered the option of entering a disposal agreement providing access to up to 350 tons per day of capacity for up to two years at Allied's Newton County Development Corporation Landfill in Brook, Indiana for the final disposal of

waste received at the transfer station. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

13. Los Angeles, California Area

Defendants must divest Republic's only landfill serving the Los Angeles, California area ''the Chiquita Canyon Sanitary Landfill in Valencia, California'' to remedy MSW disposal concerns in this market.

14. Philadelphia, Pennsylvania Area

Defendants must divest Republic's Girard Point Transfer Station and Allied's Philadelphia Recycling and Transfer Station, both in Philadelphia, Pennsylvania, to remedy MSW disposal concerns in the Philadelphia, Pennsylvania area. In this area, transfer stations are the primary disposal option for haulers of MSW in this market, because roadways in much of the area are highly congested and MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Both transfer stations to be divested are easily accessible to MSW haulers in this market, and both are located in densely populated areas of the market where Republic and Allied currently compete to provide MSW disposal services: Republic's Girard Point Transfer Station is south of central Philadelphia and Allied's Philadelphia Recycling and Transfer Station is located to the west of central Philadelphia.

The United States' investigation found that there are sufficient independent MSW landfills economically reached via these transfer stations to allow the acquirer to provide effective disposal competition in the Philadelphia area. To facilitate the acquirer's transition of waste streams served by these transfer stations to other landfills—including compliance with municipal regulations requiring that any landfill accepting MSW generated in the City of Philadelphia, either directly or through a transfer station, be approved in advance—the proposed Final Judgment requires that the purchaser of the transfer stations be offered the option of entering a disposal agreement providing access to up to 1,300 tons per day of capacity for up to 18 months at Republic's Modern Landfill in York, Pennsylvania for the final disposal of MSW received at the transfer stations. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Philadelphia area divestiture assets for sale separately from the other assets required to be divested, so as to expand the pool of potential bidders for the Philadelphia area divestiture assets. Local or regional waste firms that might wish to combine the Philadelphia area divestiture assets with their own assets serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

15. San Francisco, California Area

Defendants must divest Republic's Potrero Hills Sanitary Landfill in Suisun, California to remedy MSW disposal concerns in the San Francisco, California area. Republic's Potrero Hills Sanitary Landfill has been a significant disposal competitor for MSW generated in this market. This divestiture will preserve the competition between the Potrero Hills facility and Allied's disposal facilities in this market.

Pursuant to the terms of the Modified Final Judgment entered in *Allied/BFI,* Allied was required to divest the Vasco Road Landfill, located in Livermore, California and serving the San Francisco, California area. Republic acquired the Vasco Road Landfill from Allied and owns it today. Paragraph VIII(A) of the *Allied/BFI* Modified Final Judgment prohibits Allied's reacquisition of assets that it divested without the prior written consent of the United States. Although Republic's acquisition of Allied will recombine the Vasco Road Landfill with Allied's other disposal assets in the San Francisco area, the United States has consented to this recombination. The United States has consented because it concluded that the competitive significance of the Vasco Road Landfill has diminished considerably since 1999. Specifically, Republic's Vasco Road Landfill is not a significant competitor to Allied's Keller Canyon Landfill, located in Pittsburg, California, for the disposal of MSW generated outside Alameda County because of its location and the relatively high taxes levied on each ton of MSW disposed at Vasco Road. For disposal of MSW generated in Alameda County, Vasco Road faces competition from a large landfill located in Alameda County and owned by another firm. Today, the Vasco Road Landfill predominantly competes for the disposal of special waste (such as contaminated soil), which is not subject to the higher tax rate applied to MSW. Accordingly, the United States concluded that the proposed acquisition of Allied by Republic, whereby Allied's MSW disposal assets would be recombined with the Vasco Road Landfill, would not substantially diminish competition for the provision of MSW disposal services in the San Francisco, California area, and that the divestiture of the Potrero Hills Sanitary Landfill would be an effective remedy for the anticompetitive effects of the proposed acquisition in this MSW disposal market.

B. Notice of Future Acquisitions

Paragraph VII of the proposed Final Judgment requires that defendants provide advance notification of certain proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. That provision requires 30 days' advance written notice to the United States and the relevant state before defendants may acquire, directly or indirectly, any interest in any business engaged in waste collection or disposal in a market as to which the Complaint alleged a violation where the acquired business's annual revenues from the relevant service in the market exceed $500,000 for the 12 months preceding the proposed acquisition. This provision will enable the United States and the States to investigate prior to consummation the competitive effects of proposed transactions in markets of concern.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the States, and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance

with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to:

Maribeth Petrizzi,
Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Republic's acquisition of all of Allied's issued and outstanding voting securities. The United States is satisfied, however, that the divestiture of assets and other relief described in the proposed Final Judgment will preserve competition for small container commercial waste collection services and MSW disposal in the relevant markets identified by the United States.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS, 858* F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ''reaches of the public interest'').

decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 3, 2008

Respectfully submitted,

/s/

Lowell R. Stern,

DC Bar No. 440487, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 307–0924

[FR Doc. E8–29603 Filed 12–15–08; 8:45 am]

BILLING CODE 4410–11–P

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) '61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–097)]

NASA Advisory Council; Science Committee; Earth Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Earth Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, January 7, 2009, 8:30 a.m. to 4:30 p.m. and Thursday, January 8, 2009, 8:30 a.m. to 1 p.m. Eastern Daylight Time.

ADDRESSES: NASA Headquarters, Room 3H46, 300 E Street, SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Earth Science Division Update

—NASA's Modeling Program

—Decadal Survey Mission Implementation and Comparative Cost Analysis of Earth and Space Science Missions

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide the following information no less than 7 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: December 10, 2008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–29757 Filed 12–15–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10 a.m., Thursday, December 18, 2008.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED: 1. Final Rule—Parts 712 and 741 of NCUA Rules and Regulations, Credit Union Service Organizations.

2. Final Rule—Part 706 of NCUA Rules and Regulations, Unfair or Deceptive Acts or Practices.

3. Insurance Fund Report.

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Secretary of the Board.

[FR Doc. E8–29778 Filed 12–12–08; 11:15 am]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Extend an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than three years.

DATES: Written comments on this notice must be received by February 17, 2009 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

For Additional Information or Comments: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Grantee Reporting Requirements for Science and Technology Centers (STC): Integrative Partnerships.

OMB Number: 3145–0194.

Expiration Date of Approval: February 28, 2009.

Type of Request: Intent to seek approval to extend an information collection.

Abstract:

Proposed Project:

The Science and Technology Centers (STC): Integrative Partnerships Program supports innovation in the integrative conduct of research, education and knowledge transfer. Science and Technology Centers build intellectual and physical infrastructure within and between disciplines, weaving together knowledge creation, knowledge integration, and knowledge transfer. STCs conduct world-class research through partnerships of academic institutions, national laboratories, industrial organizations, and/or other public/private entities. New knowledge thus created is meaningfully linked to society.

STCs enable and foster excellent education, integrate research and education, and create bonds between learning and inquiry so that discovery and creativity more fully support the learning process. STCs capitalize on diversity through participation in center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

Centers selected will be required to submit annual reports on progress and plans, which will be used as a basis for performance review and determining the level of continued funding. To support this review and the management of a Center, STCs will be required to develop a set of management and performance indicators for submission annually to NSF via an NSF evaluation technical assistance contractor. These indicators are both quantitative and descriptive and may include, for example, the characteristics of center personnel and students; sources of financial support and in-kind support; expenditures by operational component; characteristics of industrial and/or other sector participation; research activities; education activities; knowledge transfer activities; patents, licenses; publications; degrees granted to students involved in Center activities; descriptions of significant advances and other outcomes of the STC effort. Part of this reporting will take the form of a database which will be owned by the institution and eventually made available to an evaluation contractor. This database will capture specific information to demonstrate progress towards achieving the goals of the program. Such reporting requirements will be included in the cooperative agreement which is binding between the academic institution and the NSF.

Each Center's annual report will address the following categories of activities: (1) Research, (2) education, (3) knowledge transfer, (4) partnerships, (5) diversity, (6) management and (7) budget issues.

For each of the categories the report will describe overall objectives for the year, problems the Center has encountered in making progress towards goals, anticipated problems in the following year, and specific outputs and outcomes.

Use of the Information: NSF will use the information to continue funding of the Centers, and to evaluate the progress of the program.

Estimate of Burden: 100 hours per center for seventeen centers for a total of 1700 hours.

Respondents: Non-profit institutions; Federal government.

Estimated Number of Responses per Report: One from each of the seventeen centers.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on 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.

Dated: December 11, 2008.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E8–29700 Filed 12–15–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that

such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from November 20, 2008 to December 3, 2008. The last biweekly notice was published on December 2, 2008 (73 FR 73351).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents related to these actions will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted, with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer ™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of amendments request: October 1, 2008.

Description of amendments request: The proposed amendment would insert a requirement into the operating licenses of the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, involving the reporting of specified reactor vessel (RV) inservice inspection (ISI) information and analyses as specified in **Federal Register** Notice (72 FR 56275), dated October 3, 2007, ''Alternative Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events.'' This amendment is a required part of a code relief request, submitted by the licensee on October 1, 2008, to extend the RV ISI 10-year inspection interval for RV weld examinations.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change, which adds a requirement within Calvert Cliffs licenses to provide required information and analyses as

a supporting condition for extending the allowed reactor vessel ISI interval, only involves the commitment to provide data obtained from the reactor vessel ISI. This proposed change involves only the submittal of generated data that will be used to verify the reactor vessel has more than sufficient margin to prevent any pressurized thermal shock event from occurring. This proposed change does not involve any change to the design basis of the plant or of any structure, system, or component. Therefore, the proposed change does not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change, which adds a requirement within Calvert Cliffs licenses to provide required information and analyses as a supporting condition for extending the reactor vessel ISI interval, only involves the commitment to provide data and analyses obtained from the reactor vessel ISI. As such this proposed change does not result in physical alteration to the plant configuration or make any change to plant operation. As a result no new accident scenarios, failure mechanisms, or single failures are introduced. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

The proposed change, which adds a requirement within Calvert Cliffs licenses, to provide required information and analyses as a supporting condition for extending the allowed reactor vessel ISI interval, only involves the commitment to provide data and analyses obtained from the reactor vessel ISI. The submitted data may be used to verify the condition of the reactor vessel meets all required standards to ensure sufficient safety margin is maintained against the occurrence of a pressurized thermal shock event during the expanded time interval between reactor vessel ISIs. The proposed change is administrative in nature and is not related to any margin [of] safety. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendments request involves no significant hazards consideration.

Attorney for licensee: Carey Fleming, Sr. Counsel—Nuclear Generation, Constellation Generation Group, LLC, 750 East Pratt Street, 17th floor, Baltimore, MD 21202.

NRC Branch Chief: Mark G. Kowal.

Entergy Operations Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: September 18, 2008.

Description of amendment request: The proposed amendment would modify Technical Specification (TS) requirements for inoperable snubbers by relocating the current TS 3.7.8, ''Snubbers,'' to the Technical Requirements Manual (TRM) and adding Limiting Condition for Operation (LCO) 3.0.8. The proposed amendment would also make conforming changes to TS LCO 3.0.1. In conjunction with the proposed changes, the TS Bases for LCO 3.0.8 will be added, consistent with Bases Control Program, as described in Section 6.16 of the TS.

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on November 24, 2004 (69 FR 68412), on possible license amendments adopting TSTF–372 using the NRC's CLIIP for amending licensee's TSs, which included a model safety evaluation (SE) and model no significant hazards consideration (NSHC) determination.

The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on May 4, 2005. (70 FR 23252), which included the resolution of public comments on the model SE. The May 4, 2005, notice of availability referenced the November 4, 2004, notice. The licensee has affirmed the applicability of the following NSHC determination in its application.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change[s] [Do] Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change[s] [allow] a delay time for entering a supported system TS when the inoperability is due solely to an inoperable snubber if risk is assessed and managed. The postulated seismic event requiring snubbers is a low-probability occurrence and the overall TS system safety function would still be available for the vast majority of anticipated challenges. Therefore, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident while relying on allowance provided by proposed LCO 3.0.8 are no different than the consequences of an accident while relying on the TS required actions in effect without the allowance provided by proposed LCO 3.0.8. Therefore, the consequences of an accident previously evaluated are not significantly affected by [these] change[s]. The addition of a requirement to assess and manage the risk introduced by [these] change[s] will further minimize possible concerns. Therefore, [these] change[s] [do] not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change[s] [Do] Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change[s] [do] not involve a physical alteration of the plant (no new or different type of equipment will be installed). Allowing delay times for entering supported system TS when inoperability is due solely to inoperable snubbers, if risk is assessed and managed, will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The addition of a requirement to assess and manage the risk introduced by [these] change[s] will further minimize possible concerns. Thus, [these] change[s] [do] not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change[s] [Do] Not Involve a Significant Reduction in the Margin of Safety

The proposed change[s] [allow] a delay time for entering a supported system TS when the inoperability is due solely to an inoperable snubber, if risk is assessed and managed. The postulated seismic event requiring snubbers is a low-probability occurrence and the overall TS system safety function would still be available for the vast majority of anticipated challenges. The risk impact of the proposed TS changes was assessed following the three tiered approach recommended in NRC Regulatory Guide 1.177. A bounding risk assessment was performed to justify the proposed TS changes. This application of LCO 3.0.8 is predicated upon the licensee's performance of a risk assessment and the management of plant risk. The net change to the margin of safety is insignificant. Therefore, [these] change[s] [do] not involve a significant reduction in a margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Terence A. Burke, Associate General Counsel—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213.

NRC Branch Chief: Michael T. Markley.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–412, Beaver Valley Power Station, Unit No. 2 (BVPS–2), Beaver County, Pennsylvania

Date of amendment request: November 7, 2008.

Description of amendment request: The proposed amendment would modify the method used to calculate the available net positive suction head (NPSH) for the BVPS–2 recirculation spray (RS) pumps as described in the BVPS–2 Updated Final Safety Analysis Report (UFSAR). BVPS–2 UFSAR would take credit for containment overpressure by allowing for the difference between containment total pressure and the vapor pressure of the water in the containment sump in the available NPSH calculation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The change to the method used to calculate available NPSH for the RS pumps will not affect the probability of an accident because the RS pumps are not used during normal plant operations and cannot initiate an accident.

Successful operation of at least one train of RS pumps is required in order to demonstrate that containment and fuel cladding design basis limits are not exceeded. The design basis accident currently assumes a breach of the reactor coolant pressure boundary. There is no impact to the fuel cladding since the proposed change does not affect performance of the emergency core cooling systems. Successful operation of the RS pumps depends on adequate NPSH being available to support RS pump performance. The change in the methodology will result in an increase of the NPSH available to the RS pumps as calculated in the safety analysis. This will increase the calculated NPSH margin because the required NPSH to the RS pumps will not change due to the methodology change. Because the available NPSH remains adequate, with margin to NPSH requirements, acceptable RS pump performance will be assured and the design basis limits for containment pressure and fuel cladding will not be exceeded and the consequences of an accident will not be increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change to the method used to calculate available NPSH for the RS pumps will not create the possibility of a new accident because the operation of the plant or the RS pumps is not changed. The RS pumps are not used during normal plant operations and cannot initiate an accident. A different kind of accident will not be created because the proposed calculation method will produce an NPSH value that will ensure proper operation of the pumps and will not result in any new failure modes of the RS pumps.

Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The change to the method used to calculate available NPSH for the RS pumps will not involve a significant reduction in a margin of safety because the change does not reduce the NPSH margin to the RS pump required NPSH. The only controlling numerical value pertaining to available NPSH of the RS pumps that is established in the UFSAR is a lower limit specified in the UFSAR, referred to as the required NPSH for the RS pumps. The required NPSH limit will not be altered as a result of the proposed calculation method, and the required NPSH will continue to be maintained under the applicable accident scenario.

Therefore, the proposed amendment will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David W. Jenkins, Attorney, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Branch Chief: Mark G. Kowal.

Indiana Michigan Power Company (I&M), Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment request: September 25, 2008.

Description of amendment request: The proposed amendment would modify Technical Specifications, Figures 4.3–1 and 4.3–2, which show allowable locations for nuclear fuel in the spent fuel pool storage racks. The figures currently show two different allowable storage patterns for four of the storage rack modules. I&M proposes to modify these two figures such that fuel may be located in any of these four individual modules in accordance with either figure to allow continued placement of new and intermediate burn-up fuel in the spent fuel pool as the storage racks approach capacity.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided its analysis of the issue of no significant hazards consideration. The NRC staff has performed its own analysis, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Response: No.

The accidents and events of concern involving fuel located in the spent fuel pool storage racks are a criticality accident, a fuel handling accident, and inadequate decay heat removal. The proposed change will not increase the probability of a criticality accident because analyses demonstrate that sub-criticality will be maintained for the fuel storage considerations allowed by the change. The proposed change will not increase the probability of a fuel handling accident because it does not affect the manner in which fuel is moved or handled. The proposed change will decrease the number of fuel moves needed for upcoming refueling outages. The proposed change will not increase the probability of inadequate decay heat removal because thermal-hydraulic analyses demonstrate adequate heat removal will remain valid for the storage configurations allowed by the change. Therefore, the probability of occurrence of a previously evaluated accident will not be significantly increased.

The proposed change does not adversely affect the ability to perform the intended safety functions of any structure, system, or component (SSC) credited for mitigating a criticality accident, a fuel handling accident, or inadequate decay heat removal. Therefore, the consequences of a previously evaluated accident will not be significantly increased.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not alter the design function or operation of any SSC. The proposed change does not affect the capability of the SSCs involved with the storage of fuel in the spent fuel pool to

perform their function. As a result, no new failure mechanisms, malfunctions, or accident initiators are created. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margins of safety involved with the storage of fuel in the spent fuel pool are the margins associated with criticality, mitigation of a fuel handling accident, and assurance of adequate decay heat removal. The proposed amendment involves no change in the capability of any SSC that maintains these margins. Therefore, there is no significant reduction in a margin of safety as a result of the proposed amendment.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on its own analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

Indiana Michigan Power Company (I&M), Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment request: October 21, 2008.

Description of amendment request: The proposed amendment would modify Technical Specification 5.6.3, ''Radioactive Effluent Release Report,'' by changing the required annual submittal date for the report from ''within 90 days of January 1'' (i.e., prior to April 1), to prior to May 1. The change is consistent with the requirements for the Radioactive Effluent Release Report submittal date identified in Technical Specification Task Force Traveler Number 152 (TSTF–152), ''Revise Reporting Requirements to be Consistent with 10 CFR 20,'' approved by the U.S. Nuclear Regulatory Commission (NRC) in March 1997.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided its analysis of the issue of no significant hazards consideration. The NRC staff has performed its own analysis, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Response: No.

The proposed change is administrative in nature. The date of the submittal of the Radioactive Effluent Release Report is not an initiator of any analyzed event. Similarly, the date of submission does not affect the consequences of any accident previously evaluated. The proposed change does not physically alter the plant or affect plant operation.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change is administrative in nature. It revises the date by which the Radioactive Effluent Release Report is required to be submitted to the NRDC. Revision of the submittal date of the report does not affect any accident initiator or cause any new accident precursors to be created. The proposed change does not affect the types or amounts of radioactive effluents released or cumulative occupational radiological exposures.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change is administrative in nature and does not involve a significant reduction in a margin of safety. There are no margins of safety associated with the submittal date for the Radioactive Effluent Release Report.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on its own analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

Indiana Michigan Power Company (I&M), Docket No. 50–316, Donald C. Cook Nuclear Plant, Unit 2, Berrien County, Michigan

Date of amendment request: October 9, 2008.

Description of amendment request: The proposed amendment would support a proposed change to the inservice inspection program that is based on topical report WCAP–16168–NP–A, Revision 2, ''Risk-Informed Extension of the Reactor Vessel Inservice Inspection Interval.'' The U.S. Nuclear Regulatory Commission (NRC) safety evaluation approving the topical report requires licensees to amend their licenses to require that the information and analyses requested in Section (e) of the final 10 CFR 50.61a (or the proposed 10 CFR 50.61a, given in 72 FR 56275 prior to issuance of the final 10 CFR 50.61a) be submitted for NRC staff review and approval within 1 year of completing the required reactor vessel weld inspection. I&M proposes to add a new license condition to provide this information.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change will revise the license to require the submission of information and analyses to the Nuclear Regulatory Commission (NRC) following completion of each American Society of Mechanical Engineers (ASME) Code, Section XI, Category B–A and B–D Reactor Vessel weld inspection. Submittal of the information and analyses can have no effect on the consequences of an accident or the probability of an accident because the submission of information is not related to the operation of the plant or any equipment, the programs and procedures used to operate the plant, or the evaluation of accidents.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will only affect the requirement to submit information and analyses when specified inspections are performed. There are no changes to plant equipment, operating characteristics or conditions, programs or failures. There are no new accident initiators or precursors.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will revise the license to require the submission of information and analyses to the NRC following completion of each ASME Code, Section XI, Category B–A and B–D Reactor Vessel weld inspection which does not affect any Limiting Conditions for Operation used to establish the margin of safety. The requirement to submit information and analyses is an administrative tool to assure the NRC has the ability to independently review information developed by the licensee.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, Indiana Michigan Power Company, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

R.E. Ginna Nuclear Power Plant, LLC, Docket No. 50–244, R.E. Ginna Nuclear Power Plant, Wayne County, New York

Date of amendment request: October 7, 2008.

Description of amendment request: The proposed amendment would insert a requirement into the operating license of the Ginna Nuclear Power Plant involving the reporting of specified reactor vessel (RV) inservice inspection (ISI) information and analyses as specified in **Federal Register** Notice (72 FR 56275), dated October 3, 2007, ''Alternative Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events.'' This amendment is a required part of a code relief request, submitted by the licensee on October 3, 2008, to extend the RV ISI 10-year inspection interval.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change, which adds a requirement within the Ginna license, to provide required information and analyses as a supporting condition for extending the allowed reactor vessel ISI interval, only involves the commitment to provide data obtained from the reactor vessel ISI. This proposed change involves only the submittal of generated data that will be used to verify the reactor vessel has more than sufficient margin to prevent any pressurized thermal shock event from occurring. This proposed change does not involve any change to the design basis of the plant or of any structure, system, or component. Therefore, the proposed change does not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change, which adds a requirement within the Ginna license to provide required information and analyses as a supporting condition for extending the reactor vessel ISI interval, only involves the commitment to provide data and analyses obtained from the reactor vessel ISI. As such this proposed change does not result in physical alteration to the plant configuration or make any change to plant operation. As a result no new accident scenarios, failure mechanisms, or single-failures are introduced. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Operation of the facility in accordance with the proposed amendment would not involve a significant reduction in a margin of safety.

The proposed change, which adds a requirement within the Ginna license, to provide required information and analyses as a supporting condition for extending the allowed reactor vessel ISI interval, only involves the commitment to provide data and analyses obtained from the reactor vessel ISI. The submitted data will be used to verify the condition of the reactor vessel meets all required standards to ensure a sufficient safety margin is maintained against the occurrence of a pressurized thermal shock event during the expanded time interval between reactor vessel ISIs. The proposed change is administrative in nature and is not related to any margin to safety. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Carey Fleming, Sr. Counsel—Nuclear Generation, Constellation Group, LLC, 750 East Pratt Street, 17 Floor, Baltimore, MD 21202.

NRC Branch Chief: Mark G. Kowal.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: October 8, 2008.

Description of amendment request: The proposed amendments would revise Technical Specifications (TS) by the adoption of Technical Specification Task Force (TSTF) Standard TS Change Traveler TSTF–374, Revision 0, to modify TS by relocating references to specific American Society for Testing and Materials (ASTM) standards for fuel oil testing to licensee-controlled documents and adding alternate criteria to the ''clear and bright'' acceptance test for new fuel oil. The proposed change was described in the Notice of Availability published in the **Federal Register** on April 21, 2006 (71 FR 20735).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC) by incorporating by reference the proposed NSHC determination (NSHCD) presented in the **Federal Register** notice on February 22, 2006 (71 FR 9179), which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. Requirements to perform testing in accordance with applicable ASTM standards are retained in the TS as are requirements to perform surveillances of both new and stored diesel fuel oil. Future changes to the licensee-controlled document will be evaluated pursuant to the requirements of 10 CFR 50.59, ''Changes, tests and experiments,'' to ensure that such changes do not result in more than a minimal increase in the probability or consequences of an accident previously evaluated. In addition, the ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to recognize more rigorous testing of water and sediment content. Relocating the specific ASTM standard references from the TS to a licensee-controlled document and allowing a water and sediment content test to be performed to establish the acceptability of new fuel oil will not affect nor degrade the ability of the emergency diesel generators (DGs) to perform their specified safety function. Fuel oil quality will continue to meet ASTM requirements.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, and configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not adversely affect the ability of structures, systems, and components (SSCs) to perform their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Further, the proposed changes do not increase the types and amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures.

Therefore, the changes do not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. In addition, the ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to allow a water and sediment content test to be performed to establish the acceptability of new fuel oil. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The requirements retained in the TS continue to require testing of the diesel fuel oil to ensure the proper functioning of the DGs.

Therefore, the changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes relocate the specific ASTM standard references from the Administrative Controls Section of TS to a licensee-controlled document. Instituting the proposed changes will continue to ensure the use of applicable ASTM standards to evaluate the quality of both new and stored fuel oil designated for use in the emergency DGs. Changes to the licensee-controlled document are performed in accordance with the provisions of 10 CFR 50.59. This approach provides an effective level of regulatory control and ensures that diesel fuel oil testing is conducted such that there is no significant reduction in a margin of safety.

The ''clear and bright'' test used to establish the acceptability of new fuel oil for use prior to addition to storage tanks has been expanded to allow a water and sediment content test to be performed to establish the acceptability of new fuel oil. The margin of safety provided by the DGs is unaffected by the proposed changes since there continue to be TS requirements to ensure fuel oil is of the appropriate quality for emergency DG use. The proposed changes provide the flexibility needed to improve fuel oil sampling and analysis methodologies while maintaining sufficient controls to preserve the current margins of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

NRC Branch Chief: Melanie Wong.

Virginia Electric and Power Company, Docket No. 50–280, Surry Power Station, Unit No. 1, Surry County, Virginia

Date of amendment request: October 14, 2008.

Description of amendment request: The proposed change includes a one-cycle revision to the Surry Power Station, Unit No. 1 (Surry 1) technical specifications (TSs). Specifically, TS 6.4.Q, ''Steam Generator (SG) Program,'' and TS 6.6.A.3, ''Steam Generator Tube Inspection Report,'' will be revised to incorporate an interim alternate repair criterion into the provisions for SG tube repair for use during the Surry 1 2009 spring refueling outage and the subsequent operating cycle.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Of the various accidents previously evaluated, the proposed changes only affect the steam generator tube rupture (SGTR) event evaluation and the postulated steam line break (SLB), and locked rotor evaluations. Loss-of-coolant accident (LOCA) conditions cause a compressive axial load to act on the tube. Therefore, since the LOCA tends to force the tube into the tubesheet rather than pull it out, it is not a factor in this amendment request.

Another faulted load consideration is a safe shutdown earthquake (SSE); however, the seismic analysis of Model F steam generators has shown that axial loading of the tubes is negligible during an SSE. At normal operating pressures, leakage from primary water stress corrosion cracking (PWSCC) below 17 inches from the TTS [top of the tubesheet] is limited by both the tube-to-tubesheet crevice and the limited crack opening, permitted by the tubesheet constraint. Consequently, negligible normal operating leakage is expected from cracks within the tubesheet region.

For the SGTR event, the required structural margins of the steam generator tubes is maintained by limiting the allowable ligament size for a circumferential crack to remain in service to 203 degrees below 17 inches from the TTS for the subsequent operating cycle. Tube rupture is precluded for cracks in the hydraulic expansion region due to the constraint provided by the tubesheet. The potential for tube pullout is mitigated by limiting the allowable crack size to 203 degrees for the subsequent operating cycle. These allowable crack sizes take into account eddy current uncertainty and crack growth rate. It has been shown that a circumferential crack with an azimuthal extent of 203 degrees for the 18 month SG tubing eddy current inspection interval meet the performance criteria of NEI 97–06, Rev. 2, ''Steam Generator Program Guidelines'' and Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes.'' Therefore, the margin against tube burst/pullout is maintained during normal and postulated accident conditions and the proposed change does not result in a significant increase in the probability or consequence of a SGTR.

The probability of a SLB is unaffected by the potential failure of a SG tube as the failure of a tube is not an initiator for a SLB event. SLB leakage is limited by leakage flow restrictions resulting from the leakage path above potential cracks through the tube-to-tubesheet crevice. The leak rate during postulated accident conditions (including locked rotor) has been shown to remain within the accident analysis assumptions for all axial or circumferentially oriented cracks occurring 17 inches below the top of the tubesheet. Since normal operating leakage is limited to 150 gpd [gallons per day], the attendant accident condition leak rate, assuming all leakage to be from indications below 17 inches from the top of the tubesheet, would be bounded by 470 gpd. This value is within the accident analysis assumptions for the limiting design basis accident for Surry, which is the postulated SLB event.

Based on the above, the performance criteria of NEI–97–06, Rev. 2 and Regulatory Guide (RG) 1.121 continue to be met and the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different accident from any accident previously evaluated?

Response: No.

The proposed change does not introduce any changes or mechanisms that create the possibility of a new or different kind of accident. Tube bundle integrity is expected to be maintained for all plant conditions upon implementation of the interim alternate repair criteria. The proposed change does not introduce any new equipment or any change to existing equipment. No new effects on existing equipment are created nor are any new malfunctions introduced.

Therefore, based on the above evaluation, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change maintains the required structural margins of the steam generator tubes for both normal and accident conditions. NEI 97–06, Rev. 2 and RG 1.121 are used as the basis in the development of the limited tubesheet inspection depth methodology for determining that steam generator tube integrity considerations are maintained within acceptable limits. RG

1.121 describes a method acceptable to the NRC staff for meeting GDC 14, 15, 31, and 32 by reducing the probability and consequences of an SGTR. RG 1.121 concludes that by determining the limiting safe conditions of tube wall degradation beyond which tubes with unacceptable cracking, as established by inservice inspection, should be removed from service or repaired, the probability and consequences of a SGTR are reduced. This RG uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the ASME Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking in a tube or the tube-to-tubesheet weld, References 2 and 4 [of the application] define a length of remaining tube ligament that provides the necessary resistance to tube pullout due to the pressure induced forces (with applicable safety factors applied). Additionally, it is shown that application of the limited tubesheet inspection depth criteria will not result in unacceptable primary-to-secondary leakage during all plant conditions.

Based on the above, it is concluded that the proposed changes do not result in any reduction of margin with respect to plant safety as defined in the Updated Final Safety Analysis Report or bases of the plant Technical Specifications.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Melanie C. Wong.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia

Date of amendment request: October 9, 2008.

Description of amendment request: The proposed change revises the technical specifications (TSs) for consistency with the assumptions of the current Alternate Source Term dose analysis of record, performed in accordance with Title 10 of the Code of Federal Regulations (10 CFR), Section 50.67, and the results of non-pressurized main control room/emergency switchgear room (MCR/ESGR) envelope boundary tracer gas testing. The proposed change removes the MCR Bottled Air System requirements from the TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed license amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The MCR Bottled Air System is not an initiator or precursor to any accident previously evaluated, and is not credited as a success path for dose mitigation in the event of a DBA [design-basis accident]. MCR/ESGR envelope isolation and emergency ventilation continue to be available consistent with accident analyses assumptions. Therefore, the proposed TS change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed license amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not alter the requirements for MCR/ESGR envelope isolation or the MCR/ESGR Emergency Ventilation System during accident conditions. No physical modifications to the plant are being made (i.e., no new or different type of equipment will be installed), and no significant changes in the methods governing normal plant operation are being implemented. Also, the proposed change does not alter assumptions made in the safety analysis and is consistent with those assumptions. Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed TS change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined, and the dose analysis acceptance criteria are not affected. The proposed change does not result in plant operation in a configuration outside the analyses or design basis and does not adversely affect systems that respond to safely shut down the plant and to maintain the plant in a safe shutdown condition. Therefore, the proposed TS change does not involve a significant reduction in a margin of safety.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Melanie C. Wong.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209,

(301) 415–4737 or by e-mail to *pdr@nrc.gov*.

Dominion Energy Kewaunee, Inc., Docket No. 50–305, Kewaunee Power Station, Kewaunee County, Wisconsin

Date of application for amendment: November 9, 2007, as supplemented by letter dated June 2, 2008.

Brief description of amendment: The amendment revised the Technical Specifications by relocating the requirement of Specification 3.8.a.7 to the licensee-controlled Technical Requirements Manual. Specification 3.8.a.7 specified that heavy loads greater than the weight of a fuel assembly will not be transported over or placed in either spent fuel pool when spent fuel is stored in that pool.

Date of issuance: November 20, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 200.

Facility Operating License No. DPR–43: Amendment revised the Facility Operating License and Technical Specifications.

*Date of initial notice in **Federal Register:** December 18, 2007 (72 FR 71706).*

The supplemental letter contained clarifying information, did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 20, 2008.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: May 5, 2008.

Brief description of amendment: The amendment would revise renewed facility operating license DPR–20 to remove license condition 2.F. The license condition describes reporting requirements for exceeding the facility steady-state reactor core power level described in license condition 2.C.(1). The proposed change is consistent with the NRC approved change notice published in the **Federal Register** on November 4, 2005 (70 FR 67202), announcing the availability of this improvement through the consolidated line item improvement process (CLIIP).

Date of issuance: November 20, 2008.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 233.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** September 9, 2008 (73 FR 52417).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 20, 2008.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–346, Davis-Besse Nuclear Power Station (DBNPS), Unit No. 1, Ottawa County, Ohio

Date of application for amendment: August 3, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML072200448), as supplemented by letters dated May 16, 2008 (2 letters) (ADAMS Accession Nos. ML081480464 and ML081430105), July 23, 2008 (ADAMS Accession No. ML082070079), August 7, 2008 (ADAMS Accession No. ML082270658), August 26, 2008 (ADAMS Accession No. ML082600594), and September 3, 2008 (ADAMS Accession No. ML082490154).

Brief description of amendment: This amendment converts the current technical specifications (CTSs) to the improved TSs (ITSs) and relocates certain requirements to other licensee-controlled documents. The ITSs are based on NUREG–1430, ''Standard Technical Specifications (STS) Babcock and Wilcox Plants,'' Revision 3.0; ''NRC Final Policy Statement on Technical Specification Improvements for Nuclear Power Reactors,'' dated July 22, 1993 (58 FR 39132); and 10 CFR 50.36, ''Technical Specifications.'' Technical Specification Task Force changes were also incorporated. The purpose of the conversion is to provide clearer and more readily understandable requirements in the TSs for DBNPS to ensure safe operation. In addition, the amendment includes a number of issues that were considered beyond the scope of NUREG–1430.

Date of issuance: November 20, 2008.

Effective date: As of the date of issuance and shall be implemented within 180 days.

Amendment No.: 279.

Facility Operating License No. NPF–3: Amendment revised the Technical Specifications and License.

*Date of initial notice in **Federal Register:*** May 22, 2008 (73 FR 29787–29791).

The supplements provided contained clarifying information and did not expand the scope of the application as originally noticed.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 20, 2008.

No significant hazards consideration comments received: No.

Florida Power and Light Company, Docket No. 50–335, St. Lucie Plant, Unit No. 1, St. Lucie County, Florida

Date of application for amendment: July 16, 2007, as supplemented by letters dated February 14, March 18, April 14, June 2, July 11, and August 13, 2008.

Brief description of amendment: Amendment revised the facility's operating bases to adopt the alternative source term as allowed in 10 CFR 50.67 and described in Regulatory Guide RG 1.183.

Date of issuance: November 26, 2008.

Effective date: Effective as of the date of issuance and shall be implemented within 9 months.

Amendment No.: 206.

Renewed Facility Operating License No. DPR–67: Amendment revised the Technical Specifications.

*Date of initial notice in **Federal Register:*** August 28, 2007 (72 FR 49578). The supplements dated February 14, March 18, April 14, June 2, July 11, and August 13, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 26, 2008.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–410, Nine Mile Point Nuclear Station, Unit No. 2 (NMP2), Oswego County, New York

Date of application for amendment: July 30, 2007, as supplemented on April 7 and September 8, 2008.

Brief description of amendment: The amendment revises Technical Specification (TS) 3.7.3, ''Control Room Envelope Air Conditioning (AC) System,'' by adding an Action statement to the Limiting Condition for Operation. Specifically, the new Action statement allows 72 hours to restore one control room AC subsystem to operable status and requires verification that the control room temperature remains below 90 degrees Fahrenheit every 4 hours during

the period of inoperability. This amendment adopts Nuclear Regulatory Commission-approved TS Task Force (TSTF)–477, Revision 3, ''Add Action Statement for Two Inoperable Control Room Air Conditioning Subsystems.''

Date of issuance: November 24, 2008.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment No.: 128.

Renewed Facility Operating License No. NPF–069: Amendment revises the License and TSs.

Date of initial notice in ***Federal Register:*** September 27, 2007 (72 FR 54477), as revised on September 24, 2008 (73 FR 55166). The supplemental letters dated April 7 and September 8, 2008, provided additional information that clarified the application and did not expand the scope of the application as originally noticed. The September 8, 2008, letter provided administrative changes to the proposed TSs and a supplemental No Significant Hazards Consideration determination as reflected in 73 FR 55166.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 24, 2008.

No significant hazards consideration comments received: No

Nuclear Management Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: April 22, 2008.

Brief description of amendment: The amendment revised (1) the control rod notch surveillance frequency in Section 3.1.3, ''Control Rod Operability,'' and (2) one example in Section 1.4, ''Frequency,'' to clarify the applicability of the 1.25 surveillance test interval extension. These changes were done pursuant to the previously approved Technical Specification Task Force (TSTF) change traveler TSTF–475, ''Control Rod Notch Testing Frequency and SRM [Source Range Monitor] Insert Control Rod Action,'' Revision 1.

Date of issuance: November 19, 2008.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 158.

Facility Operating License No. DPR–22: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 9, 2008 (73 FR 52419).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 19, 2008.

No significant hazards consideration comments received: No.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of amendment request: November 30, 2007, as supplemented by letters dated June 5 and November 14, 2008.

Brief description of amendment: The proposed TS changes will provide operational flexibility supported by DC electrical subsystem design upgrades that are in progress. These upgrades will provide increased capacity batteries, additional battery chargers, and the means to cross-connect DC subsystems while meeting all design battery loading requirements. With these modifications in place, it will be feasible to perform routine surveillances as well as battery replacements online.

Date of issuance: November 28, 2008.

Effective date: As of the date of issuance and shall be implemented 120 days from the date of issuance.

Amendment Nos.: Unit 2—218; Unit 3—211.

Facility Operating License Nos. NPF–10 and NPF–15: The amendments revised the Facility Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** May 6, 2008 (73 FR 25045). The supplement dated June 5 and November 14, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 28, 2008.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of application for amendments: February 29, 2008.

Brief description of amendments: The proposed changes would modify the Appendix A TS and the Appendix D Additional Conditions requirements related to control room emergency ventilation systems to establish more effective and appropriate actions to ensure the habitability of the control room envelope. The change is based on Technical Specification Task Force (TSTF) traveler, TSTF–448, Revision 3. The licensee proposed revising action and surveillance requirements in TS 3.7.10, ''Control Room Emergency Filtration System (CREFS)—Both Units Operating,'' TS 3.7.11, ''Control Room Emergency Filtration System (CREFS)—One Unit Operating,'' TS 3.7.12, ''Control Room Emergency Filtration System (CREFS)—Both Units Shutdown,'' and adding a new administrative controls program in TS Section 5.5, ''Programs and Manuals.'' An Additional Condition is also added regarding the schedule for performance of the surveillance requirements. The purpose of the changes is to ensure that CRE boundary operability is maintained and verified through effective surveillance and programmatic requirements, and that appropriate remedial actions are taken in the event of an inoperable CRE boundary.

Date of issuance: November 25, 2008.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment Nos.: Unit 1: 154, Unit 2: 135.

Facility Operating License Nos. NPF–68 and NPF–81: Amendments revised the licenses, the technical specifications and the additional conditions.

Date of initial notice in ***Federal Register:*** March 25, 2008 (73 FR 15787).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 25, 2008.

No significant hazards consideration comments received: No

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application for amendment: December 28, 2007.

Brief description of amendment: The proposed amendment revised Technical Specification (TS) Administrative Controls Section 5.5.8, ''Inservice Testing Program,'' to indicate that the Inservice Testing Program (IST) shall include testing frequencies applicable to the American Society of Mechanical Engineers Code for Operation and Maintenance of Nuclear Power Plants (ASME OM Code), and to indicate that there may be some nonstandard frequencies specified as 2 years or less in the IST, to which the provisions of Surveillance Requirement (SR) 3.0.2 is applicable.

The amendment also revised TS 5.5.8.a and TS 5.5.8.d to reference a more recent ASME OM Code. In addition, the amendment revised TS 5.5.8.b to allow any test frequency in the

IST Program that is 2 years or less to be extended up to 25 percent in accordance with the provisions in TS SR 3.0.2.

Date of issuance: November 24, 2008.

Effective date: As of its date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 187.

Facility Operating License No. NPF–30: The amendment revised the Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** March 25, 2008 (73 FR 15789).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 24, 2008.

No significant hazards consideration comments received: No.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application for amendment: November 29, 2007.

Brief description of amendment: The amendment revised Technical Specification (TS) 3.4.10, ''Pressurizer Safety Valves,'' TS 3.4.11, ''Pressurizer Power Operated Relief Valves (PORVs),'' and TS 3.4.12, ''Cold Overpressure Mitigation System (COMS)'' to adopt Nuclear Regulatory Commission (NRC)-approved TS Task Force (TSTF) travelers to the Standard Technical Specifications, TSTF–247-A and TSTF–352-A.

Date of issuance: November 25, 2008.

Effective date: As of its date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 188.

Facility Operating License No. NPF–30: The amendment revised the Operating License and Technical Specifications.

Date of initial notice in Federal Register: October 22, 2008 (73 FR 63025).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 25, 2008.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to

intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If there are problems in accessing the document, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns/issues relating to technical and/or health and safety matters discussed or referenced in the applications.

2. Environmental—primarily concerns/issues relating to matters discussed or referenced in the environmental analysis for the applications.

3. Miscellaneous—does not fall into one of the categories outlined above.

As specified in 10 CFR 2.309, if two or more petitioners/requestors seek to co-sponsor a contention, the petitioners/requestors shall jointly designate a representative who shall have the authority to act for the petitioners/requestors with respect to that contention. If a petitioner/requestor seeks to adopt the contention of another sponsoring petitioner/requestor, the petitioner/requestor who seeks to adopt the contention must either agree that the sponsoring petitioner/requestor shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner/requestor a representative who shall have the authority to act for the petitioners/requestors with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary

[1] To the extent that the applications contain attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel and discuss the need for a protective order.

that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Tennessee Valley Authority, Docket No. 50–390, Watts Bar Nuclear Plant, Unit No. 1, Rhea County, Tennessee

Date of amendment request: November 12, 2008.

Description of amendment request: The amendment revises Technical Specification (TS) 3.4.15, ''RCS [Reactor Coolant System] Leakage Detection Instrumentation.''

Date of issuance: November 25, 2008.

Effective date: As of the date of issuance, to be implemented within 5 days.

Amendment No.: 71.

Facility Operating License No. NPF–90: The amendment revises the TSs and the license.

Public comments requested as to proposed no significant hazards consideration (NSHC): Yes. Public notice of the proposed amendments was published in the *The Herald-News* newspaper, located in Dayton, Tennessee on November 19, 2008. The notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received.

The Commission's related evaluation of the amendment, finding of exigent circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated November 25, 2008.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Branch Chief: L. Raghavan.

Dated at Rockville, Maryland, this 5th day of December 2008.

For the Nuclear Regulatory Commission.

Joseph G Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–29450 Filed 12–15–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Withdrawal of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of Regulatory Guide 3.38.

FOR FURTHER INFORMATION CONTACT: Robert G. Carpenter, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6177 or e-mail to *Robert.Carpenter@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide 3.38, ''General Fire Protection Guide for Fuel Reprocessing Plants.'' This guide was released for comment in June 1976 and provided guidance on acceptable criteria for fire protection programs in the design and construction of fuel reprocessing facilities. The NRC is withdrawing this regulatory guide because it is outdated.

There are currently no licensees that operate fuel reprocessing plants. Additionally, the staff is considering amending the regulatory framework for licensing advanced fuel cycle facilities, such as a reprocessing facility, and Regulatory Guide 3.38 is currently not sufficient guidance for future fuel reprocessing facilities. The staff will consider issuing additional guidance in conjunction with a revised regulatory framework for licensing a reprocessing facility.

II. Further Information

The withdrawal of Regulatory Guide 3.38 does not alter any prior or existing licensing commitments based on its use. Regulatory guides may be withdrawn when their guidance is superseded by congressional action or no longer provides useful information.

Regulatory guides are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* Regulatory guides are also available for inspection at the NRC's Public Document Room (PDR), Room O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738. The PDR's mailing address is US NRC PDR, Washington, DC 20555–0001. You can reach the PDR staff by telephone at 301–415–4737 or 1 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 3rd day of December 2008.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–29724 Filed 12–15–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–28530; File No. 812–13563]

TIAA–CREF Life Funds, et al.

December 10, 2008.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of application (''Application'') for exemption pursuant to Section 6(c) of the Investment Company Act of 1940, as amended (the ''1940 Act''), from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder.

APPLICANTS: TIAA–CREF Life Funds (the ''Trust''), the TIAA–CREF Life Insurance Company (''TIAA–CREF Life''), and Teachers Advisors, Inc. (''Advisors'') (collectively, ''Applicants'').

SUMMARY OF APPLICATION: Applicants seek an order to permit shares of the Trust and shares of any other future investment company (''Other Investment Companies'') that is designed to fund insurance products and for which TIAA–CREF Life, or any of its affiliates, may serve as administrator, investment manager, principal underwriter or sponsor (the Trust and Other Investment Companies being hereinafter referred to, collectively, as ''Insurance Investment Companies''), or permit shares of any current or future series of any Insurance Investment Company (''Insurance Fund''), to be sold to and held by: (1) Separate accounts funding variable annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies of TIAA–CREF Life; (2) trustees on behalf of tax-qualified and certain other retirement and employee benefit plans outside of the separate account context (''Qualified Plans'' or ''Plans''); (3) Advisors and any affiliate of Advisors that serves as an investment adviser, manager, principal underwriter, sponsor, or administrator for the purpose of providing seed capital to an Insurance Fund (collectively, the ''Manager''); and (4) any insurance company general account that is permitted to hold shares of an Insurance Fund consistent with the requirements of Treasury Regulation 1.817–5 (''General Account'') under the circumstances described in the Application.

FILING DATE: The Application was filed on August 13, 2008, and amended and restated on December 10, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on January 5, 2009, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, c/o Stewart P. Greene, Esq., TIAA–CREF Life Funds, 730 Third Avenue, New York, New York 10017–3206.

FOR FURTHER INFORMATION CONTACT: Michael Kosoff, Staff Attorney, at (202) 551–6754 or Harry Eisenstein, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the Public Reference Branch of the Commission, 100 F Street, NE., Washington, DC 20549 (202–551–8090).

Applicant's Representations:

1. Each Insurance Investment Company is, or will be, registered as an open-end management investment company under the 1940 Act. The Trust (File Nos. 333–61759/811–08961) currently consists of, and offers shares of beneficial interest in, ten (10) investment portfolios that are sold only to separate accounts of TIAA–CREF Life which fund variable life and variable annuity contracts. The Trust may offer one or more additional series or classes of shares in the future. The Trust sells its shares directly or indirectly to TIAA–CREF Life, which holds the shares in its separate accounts to support variable annuity and variable life insurance contracts.

2. TIAA–CREF Life is a New York stock insurance company. TIAA–CREF Life is licensed to do business in all fifty (50) United States and the District of Columbia. TIAA–CREF Life is a wholly owned subsidiary of TIAA–CREF Enterprises, Inc., which is a wholly owned subsidiary of Teachers Insurance and Annuity Association of America (''TIAA''), a stock life insurance company organized under the laws of the State of New York.

3. Advisors is the investment adviser to the Trust and also is responsible for providing or obtaining at its own expense most of the services necessary to operate the Trust on a day-to-day basis, including custodial, administrative, portfolio accounting, dividend disbursing, auditing, and ordinary legal services. Advisors, a Delaware corporation, is registered as an investment adviser under the Investment Advisers Act of 1940, as amended, and is a wholly-owned indirect subsidiary of TIAA.

4. The Trust currently offers shares of the Insurance Funds only to the separate accounts of TIAA–CREF Life, an affiliated insurance company, in order to fund benefits under variable annuity and other variable insurance contracts. In the future, the Insurance Investment Companies intend to offer shares of the Insurance Funds to (a) both registered and unregistered separate accounts of affiliated and unaffiliated insurance companies in order to fund variable annuity and variable life insurance contracts (collectively, ''Separate Accounts''); (b) Qualified Plans; (c) any Manager; and (d) any General Accounts.

5. Affiliated or unaffiliated insurance companies whose Separate Account(s) may now or in the future own shares of the Insurance Funds are referred to herein as ''Participating Insurance Companies.'' The Participating Insurance Companies have established or will establish their own Separate Accounts and design their own variable contracts. Each Participating Insurance Company has or will have the legal obligation to satisfy all applicable requirements under both state and federal law. Participating Insurance Companies may rely on Rules 6e–2 and 6e–3(T) under the 1940 Act in connection with the establishment and maintenance of variable life insurance Separate Accounts, although some Participating Insurance Companies, in connection with variable life insurance contracts, may rely on individual exemptive orders as well. Each

Participating Insurance Company will enter into a participation agreement with the applicable Insurance Investment Company on behalf of the Insurance Funds in which that Participating Insurance Company invests. The role of the Insurance Funds under this arrangement, insofar as federal securities laws are applicable, will consist of offering their shares to the Separate Accounts and fulfilling any conditions that the Commission may impose upon granting the order requested in the Application.

6. The Insurance Investment Companies intend to offer shares of the Insurance Funds directly to Qualified Plans outside of the separate account context. Qualified Plans may choose any of the Insurance Funds that are offered as the sole investment under the Plan or as one of several investments. Plan participants may or may not be given an investment choice depending on the terms of the Plan itself. Shares of any of the Insurance Funds sold to such Qualified Plans would be held or deemed to be held by the trustee(s) of said Plans. Certain Qualified Plans, including Section 403(b)(7) Plans and Section 408(a) Plans, may vest voting rights in Plan participants instead of Plan trustees. Exercise of voting rights by participants in any such Qualified Plans, as opposed to the trustees of such Plans, cannot be mandated by the Applicants. Each Plan must be administered in accordance with the terms of the Plan and as determined by its trustee or trustees.

7. Shares of each Insurance Fund also may be offered to a Manager or to General Accounts, in reliance on regulations issued by the Treasury Department (Treas. Reg. 1.817–5) that established diversification requirements for variable annuity and variable life insurance contracts (''Treasury Regulations''). Treasury Regulation 1.817–5(f)(3)(ii) permits such sales as long as the return on shares held by the Manager is computed in the same manner as for shares held by the Separate Accounts, and the Manager does not intend to sell to the public shares of the Insurance Investment Company that it holds. An additional restriction is imposed by the Treasury Regulations on sales to the Manager, who may hold shares only in connection with the creation or management of the Insurance Investment Company. Applicants represent that sales in reliance on Treasury Regulation 1.817–5(f)(3)(ii) will be made to a Manager consistent with the above conditions and for the purpose of providing seed capital. Treasury Regulation 1.817–51(f)(3) permits sales to general accounts of insurance companies and their corporate affiliates as long as the return on shares held by such persons is computed in the same manner as for shares held by a Separate Account, such persons do not intend to sell to the public shares of the Insurance Fund that they hold, and a segregated asset account of the life insurance company whose general account holds those shares also holds or will hold a beneficial interest in the Insurance Fund. Applicants represent that sales to General Accounts will be made consistent with these provisions.

Applicants' Legal Analysis:

1. Applicants request that the Commission issue an order pursuant to Section 6(c) of the 1940 Act granting exemptions from the provisions of Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder (including any comparable provisions of a permanent rule that replaces Rule 6e–3(T)), to the extent necessary to permit shares of each Insurance Investment Company to be offered and sold to, and held by: (1) Separate Accounts funding variable annuity contracts and scheduled premium and flexible premium variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies; (2) Qualified Plans; (3) any Manager to an Insurance Fund; and (4) General Accounts under the circumstances described in the Application.

2. Section 6(c) authorizes the Commission to exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision or provisions of the 1940 Act and/or of any rule thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

3. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account organized as a unit investment trust (''Trust Account''), Rule 6e–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The exemptions granted to an insurance company by Rule 6e–2(b)(15) are available only where each registered management investment company underlying the Trust Account (''underlying fund'') offers its shares ''exclusively to variable life insurance separate accounts of the life insurer or of any affiliated life insurance company * * *.'' (emphasis added). Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity separate account of the same company or of any affiliated life insurance company. The use of a common underlying fund as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.''

4. In addition, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies. The use of a common underlying fund as the underlying investment medium for variable life insurance separate accounts of one insurance company and separate accounts funding variable contracts of one or more unaffiliated life insurance companies is referred to herein as ''shared funding.'' Moreover, because the relief under Rule 6e–2(b)(15) is available only where shares are offered exclusively to variable life insurance separate accounts, additional exemptive relief may be necessary if the shares of the Insurance Investment Companies are also to be sold to General Accounts, Qualified Plans or the Manager.

5. In connection with the funding of flexible premium variable life insurance contracts issued through a Trust Account, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to an underlying fund's shares. The exemptions granted to a separate account by Rule 6e–3(T)(b)(15) are available only where all of the assets of the separate account consist of the shares of one or more underlying funds which offer their shares ''exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company'' (emphasis added). Therefore, Rule 6e–3(T) permits mixed funding with respect to a flexible premium variable life insurance separate account, subject to

certain conditions. However, Rule 6e–3(T) does not permit shared funding because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts (including variable annuity and flexible premium and scheduled premium variable life insurance separate accounts) of unaffiliated life insurance companies. The relief provided by Rule 6e–3(T) is not relevant to the purchase of shares of the Insurance Investment Companies by Qualified Plans, the Manager or General Accounts. However, because the relief granted by Rule 6e–3(T)(b)(15) is available only where shares of the underlying fund are offered exclusively to separate accounts, or to life insurers in connection with the operation of a separate account, additional exemptive relief may be necessary if the shares of the Insurance Investment Companies are also to be sold to Qualified Plans, the Manager or General Accounts.

6. Applicants assert that none of the relief provided for in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) relates to Qualified Plans, the Manager or General Accounts, or to an underlying fund's ability to sell its shares to such purchasers. It is only because some of the Separate Accounts that may invest in the Insurance Investment Companies may themselves be investment companies that rely upon Rules 6e–2 and 6e–3(T) and wish to continue to rely upon that relief provided in those Rules, that the Applicants are applying for the relief described in the Application. If and when a material irreconcilable conflict between the Separate Accounts arises in this context or between Separate Accounts on the one hand and Qualified Plans, the Manager or General Accounts on the other hand, the Participating Insurance Companies, Qualified Plans and the Manager must take whatever steps are necessary to remedy or eliminate the conflict, including eliminating the Insurance Funds as eligible investment options. Applicants have concluded that investment by the Manager or the inclusion of Qualified Plans or General Accounts as eligible shareholders should not increase the risk of material irreconcilable conflicts among shareholders. However, Applicants further assert that even if a material irreconcilable conflict involving the Qualified Plans, Manager or General Accounts arose, the Qualified Plans, Manager or General Accounts, unlike the Separate Accounts, can simply redeem their shares and make alternative investments. By contrast, insurance companies cannot simply redeem their separate accounts out of one fund and invest in another. Time consuming, complex transactions must be undertaken to accomplish such redemptions and transfers. Applicants thus argue that allowing the Manager, General Accounts or Qualified Plans to invest directly in the Insurance Investment Companies should not increase the opportunity for conflicts of interest.

7. Applicants state that Treasury Regulations permit shares of an investment company held by the separate accounts of insurance companies funding variable life insurance contracts to also be held by a Qualified Plan, the investment company's investment manager or its affiliates, or a General Account. Thus, the sale of shares of the same investment company to separate accounts through which variable life insurance contracts and variable annuities are issued to Qualified Plans, to the investment company's investment manager and its affiliates, or to General Accounts (collectively, ''eligible shareholders'') could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15), given the then-current tax law.

8. Applicants state that Paragraph (3) of Section 9(a) provides, among other things, that it is unlawful for any company to serve as investment adviser to or principal underwriter for any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Sections 9(a)(1) or (a)(2). Rule 6e–2(b)(15)(i) and (ii) and Rule 6e–3(T)(b)(15)(i) and (ii) under the 1940 Act provide exemptions from Section 9(a) under certain circumstances, subject to the limitations discussed above on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management or administration of the underlying fund.

The relief provided by Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) permits a person disqualified under Section 9(a) to serve as an officer, director, or employee of the life insurer, or any of its affiliates, so long as that person does not participate directly in the management or administration of the underlying fund.

The relief provided by Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible, pursuant to Section 9(a), are participating in the management or administration of the underlying fund.

Applicants submit that the partial relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) from the requirements of Section 9 limits, in effect, the amount of monitoring of an insurer's personnel, which would otherwise be necessary to ensure compliance with Section 9, to that which is appropriate in light of the policy and purposes of Section 9. Those Rules recognize that it is not necessary for the protection of investors or the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in an insurance company complex, most of whom typically will have no involvement in matters pertaining to investment companies in that organization. Applicants assert that it is also unnecessary to apply Section 9(a) of the 1940 Act to the many individuals employed by Participating Insurance Companies (or affiliated companies of Participating Insurance Companies) who do not directly participate in the administration or management of the Insurance Investment Companies.

Applicants claim there is no regulatory purpose in extending the monitoring requirements to embrace a full application of Section 9(a)'s eligibility restrictions because of mixed funding or shared funding. Many of the Participating Insurance Companies are not expected to play any role in the management or administration of the Insurance Investment Companies. Those individuals who participate in the management or administration of the Insurance Investment Companies will remain the same regardless of which separate accounts or insurance companies use the Insurance Investment Companies. Therefore, applying the monitoring requirements of Section 9(a) to the thousands of individuals employed by the Participating Insurance Companies would not serve any regulatory purpose. Furthermore, the increased monitoring costs would reduce the net rates of return realized by contract owners and Plan participants.

Moreover, the relief requested should not be affected by the sale of shares of the Insurance Investment Companies to Qualified Plans, the Manager or General Accounts under the circumstances described in this Application. The insulation of the Insurance Investment Companies from those individuals who are disqualified under the 1940 Act remains in place. Because Qualified Plans, the Manager and General Accounts are not investment companies and will not be deemed to be affiliated

with the Insurance Investment Companies solely by virtue of their shareholdings, no additional relief is necessary.

9. Applicants submit that Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) under the 1940 Act provide exemptions from the pass-through voting requirement with respect to several significant matters, assuming the limitations on mixed and shared funding are observed. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that an insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund, or any contract between such a fund and its investment adviser, when required to do so by an insurance regulatory authority (subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of Rules 6e–2 and 6e–3(T), respectively, under the 1940 Act). Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(2) provide that an insurance company may disregard the voting instructions of its contract owners if the contract owners initiate any change in an underlying fund's investment policies, principal underwriter, or any investment adviser (provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii), (b)(7)(ii)(B), and (b)(7)(ii)(C), respectively, of Rules 6e–2 and 6e–3(T) under the 1940 Act).

10. Applicants assert that Rule 6e–2 recognizes that a variable life insurance contract is an insurance contract; it has important elements unique to insurance contracts; and it is subject to extensive state regulation of insurance. In adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that state insurance regulators have authority, pursuant to state insurance laws or regulations, to disapprove or require changes in investment policies, investment advisers, or principal underwriters. The Commission also expressly recognized that state insurance regulators have authority to require an insurer to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurer's objection. The Commission therefore deemed such exemptions necessary ''to assure the solvency of the life insurer and performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer.'' In this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts; therefore, Rule 6e–3(T)'s corresponding provisions presumably were adopted in recognition of the same factors. State insurance regulators have much the same authority with respect to variable annuity separate accounts as they have with respect to variable life insurance separate accounts. Insurers generally assume both mortality and expense risks under variable annuity contracts. Therefore, variable annuity contracts pose some of the same kinds of risks to insurers as variable life insurance contracts. The Commission staff has not addressed the general issue of state insurance regulators' authority in the context of variable annuity contracts, and has not developed a single comprehensive exemptive rule for variable annuity contracts.

11. Applicants assert that the Insurance Investment Companies' sale of shares to Qualified Plans, the Manager or General Accounts will not have any impact on the relief requested herein in this regard. Shares of the Insurance Investment Companies sold to Qualified Plans would be held by the trustees of such Plans. The exercise of voting rights by Qualified Plans, whether by the trustees, by participants, by beneficiaries, or by investment managers engaged by the Plans, does not present the type of issues respecting the disregard of voting rights that are presented by variable life separate accounts. With respect to the Qualified Plans, which are not registered as investment companies under the 1940 Act, there is no requirement to pass through voting rights to Plan participants. Similarly, the Manager and General Accounts are not subject to any pass-through voting requirements. Accordingly, unlike the case with Separate Accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with Qualified Plans, the Manager or General Accounts.

12. Applicants assert that shared funding by unaffiliated insurance companies does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all states. A particular state insurance regulatory body could require action that is inconsistent with the requirements of other states in which the insurance company offers its policies. The fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

13. Applicants further assert that shared funding by unaffiliated Participating Insurance Companies is, in this respect, no different than the use of the same investment company as the funding vehicle for affiliated Participating Insurance Companies, which Rules 6e–2(b)(15) and 6e–3(T)(b)(15) permit under various circumstances. Affiliated Participating Insurance Companies may be domiciled in different states and be subject to differing state law requirements. Affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions discussed below are designed to safeguard against and provide procedures for resolving any adverse effects that differences among state regulatory requirements may produce.

14. Applicants maintain that the right under Rules 6e–2(b)(15) and 6e–3(T)(b)(15) of an insurance company to disregard contract owners' voting instructions does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Under Rules 6e–2(b)(15) and 6e–3(T)(b)(15), an insurer can disregard contract owner voting instructions only with respect to certain specified items and under certain specified conditions. Affiliation does not eliminate the potential, if any exists, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) that the insurance company's disregard of voting instructions be reasonable and based on specific good faith determinations. However, a particular Participating Insurance Company's disregard of voting instructions nevertheless could conflict with the majority of contract owner voting instructions. The Participating Insurance Company's action could arguably be different than the determination of all or some of the other Participating Insurance Companies (including affiliated insurers) that the contract owners' voting instructions should prevail, and could either preclude a majority vote approving the change or could represent a minority view. If the Participating Insurance Company's judgment represents a minority position or would preclude a majority vote, the Participating Insurance Company may be required, at an Insurance Investment Company's election, to withdraw its separate account's investment in that Insurance Investment Company, and no

charge or penalty would be imposed as a result of such withdrawal.

15. With respect to voting rights, Applicants assert that it is possible to provide an equitable means of giving such voting rights to contract owners and to Qualified Plans, the Manager or General Accounts. The transfer agent(s) for the Insurance Investment Companies will inform each shareholder, including each separate account, each Qualified Plan, the Manager and each General Account, of its share ownership, in an Insurance Investment Company. Each Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirement. Investment by Qualified Plans or General Accounts in any Insurance Investment Company will similarly present no conflict. The likelihood that voting instructions of insurance company contract owners will ever be disregarded or the possible withdrawal referred to immediately above is extremely remote and this possibility will be known, through prospectus disclosure, to any Qualified Plan or General Account choosing to invest in an Insurance Fund. Moreover, even if a material irreconcilable conflict involving Qualified Plans or General Accounts arises, the Qualified Plans or General Accounts may simply redeem their shares and make alternative investments.

16. Applicants assert that there is no reason that the investment policies of an Insurance Fund would or should be materially different from what they would or should be if such Insurance Fund funded only variable annuity contracts or variable life insurance policies, whether flexible premium or scheduled premium policies. Each type of insurance product is designed as a long-term investment program. Similarly, the investment strategy of Qualified Plans and General Accounts (i.e., long-term investment) coincides with that of variable contracts and should not increase the potential for conflicts. Each of the Insurance Funds will be managed to attempt to achieve its investment objective, and not to favor or disfavor any particular Participating Insurance Company or type of insurance product or other investor. There is no reason to believe that different features of various types of contracts will lead to different investment policies for different types of variable contracts. The sale and ultimate success of all variable insurance products depends, at least in part, on satisfactory investment performance, which provides an incentive for the Participating Insurance Company to seek optimal investment performance.

17. Furthermore, Applicants assert that no one investment strategy can be identified as appropriate to a particular insurance product. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance needs and investment goals. An Insurance Fund supporting even one type of insurance product must accommodate these diverse factors in order to attract and retain purchasers. Permitting mixed and shared funding will provide economic justification for the growth of the Insurance Investment Company. In addition, permitting mixed and shared funding will facilitate the establishment of additional Insurance Funds serving diverse goals. The broader base of contract owners and shareholders can also be expected to provide economic justification for the creation of additional series of each Insurance Investment Company with a greater variety of investment objectives and policies.

18. Applicants maintain that Section 817(h) of the Code is the only section in the Code where separate accounts are discussed. Section 817(h) imposes certain diversification standards on the underlying assets of variable annuity contracts and variable life contracts held in the portfolios of management investment companies. Treasury Regulation 1.817–5, which established diversification requirements for such portfolios, specifically permits, in paragraph (f)(3), among other things, ''qualified pension or retirement plans,'' ''the general account of a life insurance company,'' ''the manager * * * of an investment company'' and separate accounts to share the same underlying management investment company. Applicants therefore have concluded that neither the Code nor the Treasury Regulations nor Revenue Rulings thereunder present any inherent conflicts of interest if Qualified Plans, Separate Accounts, the Manager and General Accounts all invest in the same underlying fund.

19. Applicants maintain that the ability of the Insurance Investment Companies to sell their shares directly to Qualified Plans, the Manager or General Accounts does not create a ''senior security,'' as such term is defined under Section 18(g) of the 1940 Act, with respect to any variable contract, Qualified Plan, Manager or General Accounts. As noted above, regardless of the rights and benefits of contract owners or Qualified Plan participants, the Separate Accounts, Qualified Plans, the Manager and the General Accounts have rights only with respect to their respective shares of the Insurance Investment Companies. They can only redeem such shares at net asset value. No shareholder of any of the Insurance Investment Companies has any preference over any other shareholder with respect to distribution of assets or payment of dividends.

20. Applicants considered whether there is a potential for future conflicts of interest between Participating Separate Accounts and Qualified Plans created by future changes in the tax laws. Applicants do not see any greater potential for material irreconcilable conflicts arising between the interests of participants under Qualified Plans and contract owners of Participating Separate Accounts from possible future changes in the federal tax laws than that which already exists between variable annuity contract owners and variable life insurance contract owners.

21. Applicants assert that permitting an Insurance Investment Company to sell its shares to the Manager in compliance with Treas. Reg. 1.817–5 will enhance Insurance Investment Company management without raising significant concerns regarding material irreconcilable conflicts.

22. Applicants submit that given the conditions of Treas. Reg. 1.817–5(i)(3) and the harmony of interest between an Insurance Investment Company, on the one hand, and its Manager(s) or a Participating Insurance Company, on the other, little incentive for overreaching exists. Applicants assert that such investments should not implicate the concerns discussed above regarding the creation of material irreconcilable conflicts. Instead, Applicants assert that permitting investment by the Manager or General Accounts will permit the orderly and efficient creation and operation of Insurance Investment Companies, and reduce the expense and uncertainty of using outside parties at the early stages of Insurance Investment Company operations.

23. Applicants assert that various factors have limited the number of insurance companies that offer variable contracts. These factors include the costs of organizing and operating a funding medium, the lack of expertise with respect to investment management (principally with respect to stock and money market investments) and the lack of name recognition by the public of certain Participating Insurance Companies as investment experts. In particular, some smaller life insurance companies may not find it economically feasible, or within their investment or administrative expertise, to enter the variable contract business on their own. Use of the Insurance Investment

Companies as a common investment medium for variable contracts, Qualified Plans and General Accounts would help alleviate these concerns, because Participating Insurance Companies, Qualified Plans and General Accounts will benefit not only from the administrative expertise of Advisors and its affiliates, as well as the investment expertise of any investment manager to an Insurance Fund, but also from the cost efficiencies and investment flexibility afforded by a large pool of funds. Therefore, making the Insurance Investment Companies available for mixed and shared funding and permitting the purchase of Insurance Investment Company shares by Qualified Plans and General Accounts may encourage more insurance companies to offer variable contracts, and this should result in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges. Mixed and shared funding also may benefit variable contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Furthermore, granting the requested relief should result in an increased amount of assets available for investment by the Insurance Investment Companies. This may benefit variable contract owners by promoting economies of scale, by reducing risk through greater diversification due to increased money in the Insurance Investment Companies, or by making the addition of new Insurance Funds more feasible.

Applicants' Conditions:

Applicants and the Manager agree that the order granting the requested relief shall be subject to the following conditions, which shall apply to the Trust as well as any future Insurance Investment Company that relies on the order:

1. A majority of the Board of Trustees or Board of Directors (''Board'') of each Insurance Investment Company shall consist of persons who are not ''interested persons'' of the Insurance Investment Company, as defined by Section 2(a)(19) of the 1940 Act and the rules thereunder and as modified by any applicable orders of the Commission (''Independent Board Members''), except that if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or director, then the operation of this condition shall be suspended: (i) For a period of 90 days if the vacancy or vacancies may be filled by the Board; (ii) for a period of 150 days if a vote of shareholders is required to fill the vacancy or vacancies; or (iii) for such longer period as the Commission may prescribe by order upon application or by future rule.

2. The Board of each Insurance Investment Company will monitor the Insurance Investment Company for the existence of any material irreconcilable conflict among and between the interests of the contract owners of all Separate Accounts, participants of Qualified Plans, the Manager or General Accounts investing in that Insurance Investment Company, and determine what action, if any, should be taken in response to such conflicts. A material irreconcilable conflict may arise for a variety of reasons, including: (i) An action by any state insurance regulatory authority; (ii) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretative letter, or any similar action by insurance, tax, or securities regulatory authorities; (iii) an administrative or judicial decision in any relevant proceeding; (iv) the manner in which the investments of any Insurance Fund are being managed; (v) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners, and trustees of the Qualified Plans; (vi) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (vii) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Plan participants.

3. Participating Insurance Companies (on their own behalf, as well as by virtue of any investment of General Account assets in all Insurance Investment Companies), a Manager, and any trustee on behalf of any Qualified Plan that executes a fund participation agreement upon becoming an owner of 10% or more of the assets of an Insurance Investment Company (''Participating Qualified Plan'') (collectively, ''Participants'') will report any potential or existing conflicts to the Board. Participants will be responsible for assisting the Board in carrying out the Board's responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever contract owner voting instructions are disregarded and, if pass-through voting is applicable, an obligation by each trustee for a Qualified Plan that is a Participant to inform the Board whenever it has determined to disregard Plan participant voting instructions. The responsibility to report such information and conflicts and to assist the Board will be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in the Insurance Investment Company, and such responsibilities will be carried out with a view only to the interests of the contract owners. The responsibility to report such information and conflicts and to assist the Board also will be contractual obligations of all Participating Qualified Plans under their agreements governing participation in the Insurance Investment Company, and such agreements will provide that these responsibilities will be carried out with a view only to the interests of Qualified Plan participants.

4. If it is determined by a majority of the Board of an Insurance Investment Company, or a majority of its Independent Board Members, that a material irreconcilable conflict exists, the relevant Participant shall, at its expense and to the extent reasonably practicable (as determined by a majority of the Independent Board Members), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (i) Withdrawing the assets allocable to some or all of the Separate Accounts from the relevant Insurance Investment Company or any series therein and reinvesting such assets in a different investment medium (including another Insurance Fund, if any); (ii) in the case of Participating Insurance Companies, submitting the question of whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity contract owners or variable life insurance contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; (iii) withdrawing the assets allocable to some or all of the Qualified Plans from the affected Insurance Investment Company or any Insurance Fund and reinvesting those assets in a different investment medium; and (iv) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a Participating Insurance Company's decision to disregard contract owner voting instructions and that decision represents a minority position or would preclude a majority vote, the

Participating Insurance Company may be required, at the Insurance Investment Company's election, to withdraw its Separate Account's investment in the Insurance Investment Company, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of the Insurance Investment Company, to withdraw its investment in the Insurance Investment Company, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and to bear the cost of such remedial action shall be a contractual obligation of all Participants under their agreements governing participation in the Insurance Investment Company, and these responsibilities will be carried out with a view only to the interests of the contract owners or Plan participants.

For the purposes of this Condition (4), a majority of the Independent Board Members shall determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Insurance Investment Company or its Manager be required to establish a new funding medium for any variable contract. No Participating Insurance Company shall be required by this Condition (4) to establish a new funding medium for any variable contract if an offer to do so has been declined by vote of a majority of contract owners materially and adversely affected by the material irreconcilable conflict. No Qualified Plan shall be required by this Condition (4) to establish a new funding medium for such Qualified Plan if (i) a majority of Qualified Plan participants materially and adversely affected by the material irreconcilable conflict vote to decline such offer or (ii) pursuant to governing Qualified Plan documents and applicable law, the Qualified Plan makes such decision without Qualified Plan participant vote.

5. The Board's determination of the existence of a material irreconcilable conflict and its implications shall be made known promptly in writing to all Participants.

6. Participating Insurance Companies will provide pass-through voting privileges to all variable contract owners whose contracts are funded through a registered Separate Account as required by the 1940 Act as interpreted by the Commission. However, as to variable contracts issued by unregistered Separate Accounts, pass-through voting privileges will be extended to contract owners to the extent granted by the issuing insurance company. Accordingly, such Participating Insurance Companies, where applicable, will vote shares of each Insurance Fund held in their Separate Accounts in a manner consistent with voting instructions timely received from such contract owners. Participating Insurance Companies shall be responsible for assuring that each of their Separate Accounts investing in an Insurance Investment Company calculates voting privileges in a manner consistent with all other Participating Insurance Companies, as instructed by the Insurance Investment Company.

The obligation to calculate voting privileges as provided in this Application shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in the Insurance Investment Company. Each Participating Insurance Company will vote shares for which it has not received timely voting instructions, as well as shares held in its General Account or otherwise attributed to it, in the same proportion as it votes those shares for which it has received voting instructions. Each Plan will vote as required by applicable law and governing Plan documents.

7. As long as the 1940 Act requires pass-through voting privileges to be provided to variable contract owners or the Commission interprets the 1940 Act to require the same, a Manager and any General Account will vote their respective shares in the same proportion as all variable contract owners having voting rights with respect to that Insurance Investment Company or Insurance Fund, as the case may be; provided, however, that a Manager or any General Account shall vote its shares in such other manner as may be required by the Commission or its staff.

8. An Insurance Fund will make its shares available to a Separate Account and/or Qualified Plans at or about the same time it accepts any seed capital from any Manager or any General Account of a Participating Insurance Company.

9. An Insurance Investment Company will notify all Participants that disclosure regarding potential risks of mixed and shared funding may be appropriate in prospectuses for any of the Separate Accounts and in Plan disclosure documents. Each Insurance Investment Company will disclose in its prospectus that: (i) Shares of the Insurance Investment Company may be offered to insurance company Separate Accounts that fund both variable annuity and variable life insurance contracts, and to Qualified Plans; (ii) due to differences of tax treatment or other considerations, the interests of various contract owners participating in the Insurance Investment Company and the interests of Qualified Plans or General Accounts investing in the Insurance Investment Company might at some time be in conflict; and (iii) the Board will monitor events in order to identify the existence of any material irreconcilable conflicts and to determine what action, if any, should be taken in response to any such conflict.

10. All reports received by the Board of potential or existing conflicts, and all Board action with regard to determining the existence of a conflict, notifying Participants of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

11. If and to the extent Rule 6e–2 and Rule 6e–3(T) under the 1940 Act are amended, or Rule 6e–3 is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed or shared funding on terms and conditions materially different from any exemptions granted in the order requested in this Application, then each Insurance Investment Company and/or the Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 and Rule 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent such rules are applicable.

12. Each Insurance Investment Company will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in the shares of that Insurance Investment Company or Insurance Fund, as the case may be), and in particular each Insurance Investment Company will either provide for annual meetings (except insofar as the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act (although each Insurance Investment Company is not, or will not be, one of the trusts described in Section 16(c) of the 1940 Act) as well as with Section 16(a) of the 1940 Act and, if and when applicable, Section 16(b) of the 1940 Act. Further, each Insurance Investment Company

will act in accordance with the Commission's interpretation of the requirements of Section 16(a) of the 1940 Act with respect to periodic elections of directors (or trustees) and with whatever rules the Commission may promulgate with respect thereto.

13. Each Participant shall at least annually submit to the Board of an Insurance Investment Company such reports, materials or data as the Board may reasonably request so that it may fully carry out the obligations imposed upon it by the conditions contained in this Application. Such reports, materials and data shall be submitted more frequently, if deemed appropriate, by the Board. The obligations of the Participants to provide these reports, materials and data to the Board of the Insurance Investment Company when it so reasonably requests, shall be a contractual obligation of the Participants under their agreements governing participation in each Insurance Investment Company.

14. Each Insurance Investment Company will not accept a purchase order from a Qualified Plan if such purchase would make the Qualified Plan an owner of 10% or more of the assets of the Insurance Investment Company unless the trustee for such Plan executes a participation agreement with such Insurance Investment Company which includes the conditions set forth herein to the extent applicable. A trustee for a Qualified Plan will execute an application containing an acknowledgment of this condition at the time of such Plan's initial purchase of the shares of any Insurance Investment Company or Insurance Fund.

Conclusion: Applicants submit that, for the reasons summarized above, the requested exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, in accordance with the standards of Section 6(c) of the 1940 Act, are in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29697 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59068; File No. SR–CBOE–2008–120]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Non-Member Market-Maker Transaction Fees

December 8, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 26, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') proposes to amend its Fees Schedule regarding non-member market-maker transaction fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to lower the Exchange's non-member market-maker transaction fee for certain orders. The Exchange currently charges non-member market-makers $.45 per contract for electronically executed orders and $.25 per contract for manually executed orders.[1] In order to encourage non-member market-makers to provide liquidity in the Exchange's Automated Improvement Mechanism (''AIM''), the Exchange proposes to charge a discounted transaction fee of $.20 per contract for non-member market-maker orders executed on AIM.[2] The Exchange proposes to make this fee change effective December 1, 2008.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act''),[3] in general, and furthers the objectives of Section 6(b)(4)[4] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities. The Exchange believes the proposed rule change should enhance liquidity on AIM by reducing fees for non-member market-makers trading on AIM.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[5] and subparagraph (f)(2) of Rule 19b–4[6] thereunder. 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

[1] These fees are reflected as ''broker-dealer'' transaction fees on the CBOE Fees Schedule. All transaction fees are assessed to CBOE members.

[2] AIM is an electronic auction system that exposes certain orders electronically in an auction to provide such orders with the opportunity to receive an execution at an improved price. AIM is governed by CBOE Rule 6.74A.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–120 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-CBOE–2008–120. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–120 and should be submitted on or before January 6, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29682 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59075; File No. SR–FINRA–2008–055]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Proposed Rule Change To Adopt FINRA Rule 2114 (Recommendations to Customers in OTC Equity Securities) in the Consolidated FINRA Rulebook

December 10, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–5 thereunder,[2] notice is hereby given that on November 4, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. 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

FINRA is proposing to adopt NASD Rule 2315 (Recommendations to Customers in OTC Equity Securities) as FINRA Rule 2114 in the Consolidated FINRA Rulebook, subject to certain amendments.

The text of the proposed rule change is available at FINRA, on its Web site (*http://www.finra.org*), and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing the new consolidated rulebook (''Consolidated FINRA Rulebook''),[3] FINRA is proposing to adopt in the Consolidated FINRA Rulebook NASD Rule 2315 (Recommendations to Customers in OTC Equity Securities) with certain modifications.

a. The Current Rule

NASD Rule 2315 is intended to address potential fraud and abuse in transactions involving securities not listed on an exchange and certain other higher risk securities. The rule mandates that a member conduct a due diligence review of an issuer's current financial and business information before recommending a covered security. The rule supplements existing FINRA rules and the federal securities law, including suitability obligations and the requirement that any recommendation to a customer have a reasonable basis. The rule requirements go beyond the basic suitability obligations to ensure that a registered representative has, at a minimum, confirmed the existence of and reviewed essential information that reveals the financial condition and business prospects of these riskier issuers.

Specifically, the rule requires a member to review ''current financial statements'' and ''current material business information'' before it recommends the purchase or short sale of those securities that are published or quoted in a ''quotation medium'' and are either (1) not listed on Nasdaq or a national securities exchange or (2) are listed on a regional securities exchange and do not qualify for dissemination of transaction reports via the Consolidated Tape. Such securities may be more susceptible to fraud and abuse because they often are thinly capitalized or lack the profitability, liquidity or available

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook includes, in addition to FINRA Rules, (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). For more information about the rulebook consolidation process, *see* FINRA *Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

business and financial information that listing standards require. The rule does not apply to recommendations to sell long positions and also exempts certain other transactions, including those with an ''institutional account'' under NASD Rule 3110(c)(4), a ''qualified institutional buyer'' under Rule 144A of the Securities Act of 1933 (''Securities Act''), or a ''qualified purchaser'' under Section 2(a)(51) of the Investment Company Act of 1940.[4]

The rule defines ''current financial statements'' to include balance sheets, statements of profit and loss and publicly available financial statements and reports. The definition makes certain distinctions between foreign private issuers and all other issuers. FINRA has interpreted the term ''current material business information'' to mean information that is available or relates to events that have occurred in the 12 months prior to the recommendation. The proposed definition of ''current material business information,'' discussed below, would supersede this prior interpretation.[5]

The required review must be conducted by a Series 24 principal or someone supervised by a Series 24 principal. Members are required to keep a written record of the information reviewed, the date of the review and the name of the person who conducted the review. The proposed rule change would add a requirement that, in the event the person designated to perform the review is not registered as a Series 24 principal, the member must document the name of the Series 24 principal who supervised the designated person. FINRA believes this change will help document the Series 24 principal with supervising responsibility in association with review.[6]

b. Proposed Changes to the Current Rule

The proposed rule change would expand the scope of the rule to cover a recommendation to buy any ''OTC Equity Security,'' irrespective of whether the security is published on a quotation medium. The term ''OTC Equity Security'' would have the same meaning as in NASD Rule 6610 (which will be renumbered as FINRA Rule 6420 in the Consolidated FINRA Rulebook[7]) and encompasses any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade dissemination. FINRA believes that those OTC Equity Securities not published on a quotation medium pose the same, if not greater, risk of fraud and manipulation that the rule seeks to redress.

The proposed rule change also would add an express definition of ''current material business information'' to include ''information that is ascertainable through the reasonable exercise of professional diligence and that a reasonable person would take into account in reaching an investment decision.''

Finally, the proposed rule change would eliminate the exemption from the rule for a security with a worldwide average daily trading volume value of at least $100,000 during each of the six calendar months preceding the recommendation, as well as a related exemption for a convertible security where the underlying security satisfies the trading volume exemption requirements. FINRA believes that the advent of the Internet and the increased number of trading venues has rendered that threshold unreliable to screen out less risky securities.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of the trade, and in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help protect investors against fraud in the trading of unlisted and certain other riskier securities and will clarify and streamline NASD Rule 2315 for adoption as a FINRA Rule in the new Consolidated FINRA Rulebook. NASD Rule 2315 has previously have been found to meet the statutory requirements, and FINRA believes that rule has since proven effective in achieving the statutory mandates.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–FINRA–2008–055 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-FINRA–2008–055. This file number should be included on the

[4] Among the other exemptions, the Rule's requirements also do not apply to transactions that meet the requirements of Rule 504 of Regulation D of the Securities Act; those involving a security of an issuer with at least $50 million in total assets and $10 million in shareholder's equity; and those involving a security with worldwide average daily trading volume value of at least $100,000 during each of the six months preceding the recommendation.

[5] Telephone conference among Philip Shaikun, Associate Vice President and Associate General Counsel, FINRA, and Haimera Workie, Branch Chief, Securities and Exchange Commission, and Darren Vieira, Attorney Advisor, Commission, on December 3, 2008.

[6] Telephone conference among Philip Shaikun, FINRA, and Haimera Workie, Branch Chief and Darren Vieira, Attorney Advisor, on December 3, 2008.

[7] *See* Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (Order Approving SR–FINRA–2008–021; SR–FINRA–2008–022; SR–FINRA–2008–026; SR–FINRA–2008–028 and SR–FINRA–2008–029).

[8] 15 U.S.C. 78o–3(b)(6).

subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–055 and should be submitted on or before January 6, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29696 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59076; File No. SR–FINRA–2008–053]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend Section 4(c) of Schedule A of the FINRA By-Laws To Increase Certain Qualification Examination Fees

December 10, 2008.

I. Introduction

On October 15, 2008, the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Section 4(c) of Schedule A of the FINRA By-Laws (''Schedule A'') to increase certain qualification examination fees. The proposed rule change was published for comment in the **Federal Register** on October 29, 2008.[3] The Commission received one comment letter on the proposed rule change.[4] This order approves the proposed rule change.

II. Description

Any person associated with a member firm who is engaged in the securities business of the firm must register with FINRA. As part of the registration process, securities professionals must pass a qualification examination to demonstrate competence in each area in which they intend to work. These mandatory qualification examinations cover a broad range of subjects on the markets, products, a person's responsibilities in a given position, securities industry rules and the regulatory structure. The proposed rule change amends Schedule A to increase certain qualification examination fees.[5]

III. Comment Letter

The Commission received one comment letter in response to the proposed rule change.[6] People's Securities, Inc. (''People's Securities'') submitted a comment letter in opposition to the proposal, arguing that FINRA's decision to increase examination fees comes at a time when many firms are suffering from a reduction in business and have resorted to measures such as reducing the number of new hires and current staff in order to decrease expenditures. People's Securities states that an increase in examination fees would result in a ''significant burden'' on firms, and for People's Securities in particular, as many of the proposed fee increases are for the examinations that People's Securities uses the most. People's Securities suggests that if FINRA increases these fees, these changes will result in fewer registered representatives which will detrimentally affect the ability of firms to service the needs of investors.

In its response to the People's Securities Letter,[7] FINRA acknowledged People's Securities' economic arguments but explained that FINRA has experienced a rise in its own costs of developing, administering, and delivering the exams, and consequently had to raise examination fees. In support of its decision, FINRA stated that it had not raised any examination fees since 2006, and that it had conducted a test based on a sample of its regulated firms and concluded that its proposed fee changes would increase a firm's overall examination fees on average by less than 10% each year.

IV. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[8] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act,[9] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. The filing increases certain qualification examination fees to reflect FINRA's increased costs in developing, administering and delivering qualification examinations. While the Commission recognizes the issues raised by People's Securities, FINRA has represented that an increase in fees is necessary to account for increases in its own costs to manage its qualification examinations, many of which are utilized throughout the securities industry and are used to ensure that registered persons new to the securities industry have the basic knowledge to enable them to do their jobs and comply with industry rules and regulations. The Commission notes FINRA's representation that it will continue to maintain an examination fee structure at a reasonable cost in light of the current economic culture.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58832 (October 22, 2008); 73 FR 64374 (''Notice'').

[4] *See* Letter to Florence E. Harmon, Acting Secretary, Commission, from Dennis P. Beirne, Vice President and Chief Compliance Officer, People's Securities, Inc., dated November 12, 2008 (''People's Securities Letter'').

[5] Schedule A sets forth examination fees for those examinations that are sponsored or co-sponsored by FINRA and/or that may be required by FINRA for its members.

[6] *Supra* note 4.

[7] *See* Letter to Florence E. Harmon, Acting Secretary, Commission, from Erika L. Lazar, Senior Attorney, FINRA, dated November 26, 2008 (''FINRA Letter'').

[8] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78*o*–3(b)(5).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–FINRA–2008–053) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29702 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59081; File No. SR–Phlx–2008–79)]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change Relating to Reduction of Option Limit Order Exposure Periods From Three Seconds to One Second

December 11, 2008.

I. Introduction

On November 10, 2008, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to reduce certain order exposure periods from three seconds to one second. The proposed rule change was published for comment in the **Federal Register** on November 25, 2008.[3] The Commission received no comments on the proposal. This order approves the proposed rule change on an accelerated basis.

II. Description of the Proposal

The purpose of the proposed rule change is to reduce the exposure time during which Order Entry Firms[4] may not execute as principal against orders they represent as agent from three seconds to one second. Specifically, the Exchange proposes to amend Exchange Rule 1080(c)(1), which currently provides that Order Entry Firms may not execute as principal against orders on the limit order book they represent as agent unless such agency orders are first exposed on the limit order book for at least three seconds, the Order Entry Firm has been bidding or offering on the Exchange for at least three seconds prior to receiving an agency order that is executable against such order, or the Order Entry Firm proceeds in accordance with the crossing rules contained in Exchange Rule 1064.[5] In addition, the Exchange proposes to amend Exchange Rule 1080(c)(2), which provides that Order Entry Firms must expose orders they represent as agent for at least three seconds before such orders may be automatically executed, in whole or in part, against orders solicited from members and non-member broker-dealers to transact with such orders. Under the proposal, these three-second exposure periods would be reduced to one second.

III. Discussion and Commission Findings

After carefully reviewing the proposed rule change, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[7] which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[8] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that, given the electronic environment of Phlx XL, reducing each of these exposure periods from three seconds to one second could facilitate the prompt execution of orders, while continuing to provide market participants with an opportunity to compete for exposed bids and offers. To substantiate that Phlx members could receive, process, and communicate a response back to the Exchange within one second, the Exchange stated that it distributed a survey to its members that regularly participate in orders executed on Phlx XL that would be affected by the proposal. Phlx stated that the survey results indicated that it typically takes not more than 250 milliseconds for members to receive, process, and respond to orders exposed on the limit order book. According to Phlx, members who responded to the survey also indicated that reducing the exposure period to one second would not impair their ability to participate in orders affected by the proposal.[9] Based on Phlx's statements regarding the survey results, the Commission believes that market participants should continue to have opportunities to compete for exposed bids and offers within a one second exposure period. Accordingly, the Commission believes that it is consistent with the Act for Phlx to reduce the order handling and exposure times discussed herein from three seconds to one second.

The Commission finds good cause to approve the proposed rule change prior to the thirtieth day after publication for comment in the **Federal Register**. The Commission notes that the proposed rule change was noticed for a fifteen-day comment period, and no comments were received. The Commission believes that the Exchange has provided reasonable support for its belief that the Exchange's market participants would continue to have an opportunity to compete for exposed bids and offers if the exposure periods were reduced to one second as proposed. Finally, the Commission also notes that the proposed rule change is similar to recently approved proposals submitted by the Chicago Board Options Exchange, Incorporated and the International Securities Exchange, LLC.[10] Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[11] to approve the proposed rule change on an accelerated basis.

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[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(l).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58949 (November 14, 2008), 73 FR 71709 (''Notice'').

[4] The term ''Order Entry Firm'' means a member organization of the Exchange that is able to route orders to the Exchange's AUTOM system. *See* Exchange Rule 1080(c)(ii)(A)(1).

[5] Exchange Rule 1064 sets forth the procedures that must be followed before an Options Floor Broker who holds orders to buy and sell the same option series may cross such orders.

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(8).

[9] The Phlx stated that all of the eight members that responded to the timing questions indicated that reducing the crossing exposure timer to one second would not impair their ability to participate in orders affected by this proposal. *See* Notice.

[10] *See* Securities Exchange Act Release Nos. 58088 (July 2, 2008), 73 FR 39747 (July 10, 2008) (SR–CBOE–2008–16) and 58224 (July 25, 2008), 73 FR 44303 (July 30, 2008) (SR–ISE–2007–94).

[11] 15 U.S.C. 78s(b)(2).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–Phlx–2008–79), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29731 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59070; File No. SR–NASDAQ–2008–092]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Trade the Shares of the MacroShares $100 Oil Up Trust and the MacroShares $100 Oil Down Trust

December 9, 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 December 1, 2008, The NASDAQ Stock Market LLC (''Nasdaq'' 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 Nasdaq. Nasdaq has designated the proposed rule change as constituting a rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to trade, pursuant to unlisted trading privileges (''UTP''), shares of the MacroShares $100 Oil Up Trust (''Up Trust'') and the MacroShares $100 Oil Down Trust (''Down Trust'', and, together with the Up Trust, the ''Trusts''). The shares of the Up Trust are referred to as the Up MacroShares, and the shares of the Down Trust are referred to as the Down MacroShares (collectively, the ''Shares'').

The text of the proposed rule change is available from Nasdaq's Web site at *http://nasdaq.cchwallstreet.com,* at Nasdaq'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, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below, and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to trade the Shares pursuant to UTP. The Commission has recently approved the substantially identical filing of NYSE Arca, Inc. for the listing and trading of the same product.[5] Also, the Commission has previously approved the listing and/or trading of a product similar to the Shares.[6] The Up MacroShares and the Down MacroShares will be offered by the Up Trust and the Down Trust, respectively, established by MACRO Securities Depositor LLC, as depositor, under the laws of the State of New York. The Trusts are not registered with the Commission as investment companies.[7] The Trusts are currently listed on NYSE Alternext U.S. LLC (''NYSE Alternext US'' (formerly, the American Stock Exchange LLC (''Amex'')) and are traded pursuant to UTP.[8] Prior to listing on NYSE Arca, Inc., the Trusts would be required to satisfy the applicable delisting procedures of NYSE Alternext U.S. and applicable statutory and regulatory requirements, including, without limitation, Section 12 of the Act,[9] relating to listing the Shares on NYSE Arca, Inc.[10]

Nasdaq deems the Shares to be equity securities, thus rendering the trading in the Shares subject to its existing rules governing the trading of equity securities, including Nasdaq Rule 4630, which governs trading of Commodity-related Securities. The Shares will trade on Nasdaq from 7 a.m. until 8 p.m. Eastern Time (''ET'').[11] The Trusts have represented that they are relying on the exemption provided for passive trusts under Rule 10A–3(c)(7)[12] under the Act with respect to establishment of an independent audit committee.

More information regarding the Shares, the Trusts, the Applicable Reference Price of Crude Oil, quarterly distributions, final distributions, underlying values, risks, fees and expenses, termination triggers, and creation and redemption procedures can be found in the Registration Statements and the Amex Order.[13]

Availability of Information

Intraday Indicative Values. Quotations for and last sale information regarding the Shares are disseminated through the Consolidated Tape Association (''CTA''). Throughout each price determination day, NYSE

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 58873 (October 28, 2008), 73 FR 65709 (November 4, 2008) (SR-NYSEArca-2008–110) (''NYSE Arca Order'').

[6] The Commission approved the trading of a similar product on Nasdaq pursuant to UTP when it approved Securities Exchange Act Release No. 55740 (May 10, 2007) (SR-NASDAQ–2007–048), 72 FR 27889 (May 17, 2007) (approving UTP trading of Claymore MACROshares Oil Up Tradeable Shares and Claymore MACROshares Oil Down Tradeable Shares). See also Securities Exchange Act Release No. 55033 (December 29, 2006), 72 FR 1253 (January 10, 2007) (SR–NYSEArca–2006–75) (approving UTP trading of Claymore MACROshares Oil Up Tradeable Shares and Claymore MACROshares Oil Down Tradeable Shares). The Commission also approved such product for listing and trading on the American Stock Exchange LLC. See Securities Exchange Act Release No. 54839 (November 29, 2006), 71 FR 70804 (December 6, 2006) (SR–Amex–2006–82) (approving listing and trading Claymore MACROshares Oil Up Tradeable Shares and Claymore MACROshares Oil Down Tradeable Shares).

[7] The Shares are being offered by the Trusts under the Securities Act of 1933, as amended. On April 17, 2008, the depositor filed with the Commission a Registration Statement on Form S–1 for both the Up MacroShares (File No. 333–150282–01) (''Up Trust Registration Statement'') and the Down MacroShares (File No. 333–150282–02) (''Down Trust Registration Statement'' and together with the Up Trust Registration Statement, the ''Registration Statements'').

[8] *See* Securities Exchange Act Release No. 58057 (June 30, 2008), 73 FR 38474 (July 7, 2008) (SR-Amex-2008–36) (order approving listing of the Trusts on the Amex) (''Amex Order''); Securities Exchange Act Release No. 58058 (June 30, 2008), 73 FR 38484 (July 7, 2008) (SR–NYSEArca–2008–65) (order approving trading of the Trusts on the Exchange pursuant to UTP).

[9] 15 U.S.C. 78(l).

[10] NYSE Arca, Inc. has represented that it will seek the voluntary consent of the issuer of the Shares to be delisted from NYSE Alternext U.S. and listed on NYSE Arca, Inc. NYSE Arca, Inc. has noted that its approval of the Trusts' listing applications would be required prior to listing. *See* NYSE Arca Order, *supra* note 3, 73 FR at 65710.

[11] *See* E-mail from Jonathan Cayne, Associate General Counsel, NASDAQ OMX to Mitra Mehr, Special Counsel, Division of Trading and Markets, Commission, dated December 8, 2008 (clarifying trading hours).

[12] 17 CFR 240.10A–3(c)(7).

[13] Terms relating to the Trusts referred to, but not defined herein, are defined in the Registration Statements.

Alternext US, acting as the calculation agent for each Trust, will calculate and disseminate, at least every 15 seconds from 9:30 a.m. until 4:15 p.m. during the time the Shares trade on Nasdaq, through the facilities of the CTA, an estimated value (referred to as an ''Intraday Indicative Value'' or ''IIV'') for the underlying value per Share of both the Up MacroShares and the Down MacroShares. The purpose of this disclosure is to promote liquidity and intraday pricing transparency with respect to these estimated per-Share underlying values, which can be used in connection with other related market information. To enable this calculation, the NYSE Alternext U.S. will receive real time price data from the NYMEX through two major market data vendors for the light sweet crude oil futures contract of the designated maturity that trades on the NYMEX.

Because the NYMEX market for the light sweet crude oil futures contract will be closed for portions of the period from 9:30 a.m. until 4:15 p.m. ET, the IIV calculated values will become fixed and will not be updated at such times that the NYMEX contract is not trading.[14] Conversely, at times when the light sweet crude oil futures contract of the designated maturity is trading on NYMEX, those trades will be used to update the IIV values.

Availability of Other Information and Data. At the end of each price determination day, NYSE Alternext U.S. will also calculate the premium or discount of the midpoint of the bid/offer for the Up MacroShares at their close relative to the underlying value of one of those Shares for that price determination day. NYSE Alternext U.S. will also perform the same calculation with respect to the Down MacroShares. MacroMarkets LLC (''MacroMarkets'') will then post thesepremiums/discounts, together with the end-of-day price information for the Shares, on itsWeb site at *http: // www.macromarkets.com.* Further, MacroMarkets will post on its Web site the Applicable Reference Price of Crude Oil that was reported by NYMEX for any price determination day. NYSE Arca, Inc. also intends to disseminate a variety of data with respect to the Shares on a daily basis by means of CTA and CQ High Speed Lines, including quotation and last sale data information.

On each price determination day, State Street Bank and Trust Company, the trustee for the Trusts, will calculate the underlying value of the Up Trust and the Down Trust and the per-Share underlying value of one Up MacroShare and one Down MacroShare, based on the Applicable Reference Price of Crude Oil established and reported by NYMEX. The trustee will then provide such values to MacroMarkets, which will post them on its Web site, and information posted on such Web site will be made available to all market participants at the same time. All investors and marketparticipants will have access to MacroMarkets' Web site at no charge. Information regarding secondary market prices and volume of the Shares will be broadly available on a real-time basis throughout the trading day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers.

Trading Halts

Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. The conditions for a halt include a regulatory halt by the listing market. UTP trading in the Shares will also be governed by provisions of Nasdaq Rule 4120(b) relating to temporary interruptions in the calculation or wide dissemination of the IIV. Additionally, Nasdaq may cease trading the Shares if other unusual conditions or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c). Nasdaq also will stop trading the Shares if the listing market delists them.

If the Exchange becomes aware that the underlying value per Share of each Up Share and Down Share is not disseminated to all market participants at the same time, it will halt trading in the Up MacroShares or the Down MacroShares, as the case may be, until such time as the underlying value per share is available to all market participants.

Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to its existing rules governing the trading of equity securities, including Rule 4630, which governs trading of Commodity-Related Securities. The trading hours for the Shares on the Exchange would be 7 a.m. to 8 p.m., ET, unless such trading hours are changed by a subsequent rule change.

Surveillance

Nasdaq believes that its surveillance procedures are adequate to address any concerns about the trading of the Shares on Nasdaq. Trading of the Shares through Nasdaq will be subject to FINRA's surveillance procedures for equity securities in general and ETFs in particular.[15] The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG.[16]

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares of the Trusts (and that Shares are not individually redeemable); (2) Nasdaq Rule 2310, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; and (6) trading information.

The Exchange notes that investors purchasing Shares directly from a Trust will receive a prospectus. Members purchasing Shares from a Trust for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will reference that the Shares are subject to various fees and expenses described in the Registration Statements. The Information Circular will also reference that the CFTC has regulatory jurisdiction over the trading of futures contracts.

[14] The IIV calculated during the period following the daily opening of the regular session trading at 9:30 a.m. but prior to any trades taking place on the NYMEX in the relevant light sweet crude oil futures contract will be based on the final price of the futures contract on the prior trading day.

[15] FINRA surveils trading on Nasdaq pursuant to a regulatory services agreement. Nasdaq is responsible for FINRA's performance under this regulatory services agreement.

[16] For a list of the current members and affiliate members of ISG, see *http://www.isgportal.com.*

The Information Circular will also disclose the trading hours of the Shares and that the NAV for the Shares will be calculated after 4 p.m. ET each trading day. The Information Circular will disclose that information about the Shares and the corresponding Indexes will be publicly available on the Shares' Web site.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act [17] in general and 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, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission has approved the NYSE Arca, Inc. listing and trading of the Shares.[19]

In addition, Nasdaq believes that the proposal is consistent with Rule 12f–5 under the Act [20] because it deems the Shares to be an equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and Rule 19b–4(f)(6) thereunder.[22]

Nasdaq has asked the Commission to waive the 30-day operative delay. The Commission believes that such waiver is consistent with the protection of investors and the public interest because such waiver should benefit investors by creating, without undue delay, additional competition in the market for the Shares. The Commission has previously approved the listing and trading of the Shares on another exchange [23] and does not believe that the proposed rule change presents any novel or significant regulatory issues. Therefore, the Commission designates the proposed rule change as operative upon filing.[24]

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–NASDAQ–2008–092 on the subject line.

Paper Comments

- Send paper comments in triplicate to the Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–092. 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 such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–092 and should be submitted on or before January 6, 2009.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–29695 Filed 12–15–08; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *See supra* note 5.

[20] 17 CFR 240.12f–5.

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). The Commission notes that Nasdaq has satisfied the five day pre-filing notice requirement.

[23] *See supra* note 5.

[24] For purposes only of waiving the operative date of this proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11471 and #11580]

New Hampshire Disaster Number NH–00005

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Hampshire (FEMA–1799–DR), dated 10/03/2008.

Incident: Severe Storms and Flooding.

Incident Period: 09/06/2008 through 09/07/2008.

EFFECTIVE DATE: 12/05/2008.

Physical Loan Application Deadline Date: 12/02/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 07/03/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of New Hampshire, dated 10/03/2008, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Merrimack.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–29719 Filed 12–15–08; 8:45 am]

BILLING CODE 8025–01–P

TENNESSEE VALLEY AUTHORITY

Notice of Consideration of Energy Efficiency and Smart Grid Standards

SUMMARY: The Tennessee Valley Authority (TVA) is considering adopting for itself and the distributors of TVA power certain energy efficiency and Smart Grid standards. The standards being considered are the Integrated Resource Planning, Rate Design Modifications to Promote Energy Efficiency Investments, Consideration of Smart Grid Investments, and Smart Grid Information standards listed in section 111(d) of the Public Utility Regulatory Act of 1978 (Pub. L. 95–617) as amended by the Energy Independence and Security Act of 2007 (Pub. L. 110–140). The standards will be considered on the basis of their effect on conservation of energy, efficient use of facilities and resources, equity among electric consumers, and the objectives of the Tennessee Valley Authority Act. Comments are requested from the public on whether TVA should adopt these standards or any variations on them.

DATES: All comments on these standards must be received by April 30, 2009. Written comments may be mailed to: Veenita Bisaria, Tennessee Valley Authority, 400 W. Summit Hill Drive, WT3D–K, Knoxville, TN 37902, (865) 632–3939. Comments may also be submitted via the Web, at *http://www.tva.com/purpa.*

FOR FURTHER INFORMATION CONTACT: Veenita Bisaria, Tennessee Valley Authority (contact information above).

SUPPLEMENTARY INFORMATION: Of the standards being considered, the Public Utility Regulatory Act of 1978 (Pub. L. 95–617) as amended by the Energy Independence and Security Act of 2007 (Pub. L. 110–140) requires that TVA consider these standards. Accordingly, data, views, and comments are requested from the public on the Integrated Resource Planning, Rate Design Modifications to Promote Energy Efficiency Investments, Consideration of Smart Grid Investments, and Smart Grid Information standards. Comments on variations in any of the standards, as well as views for or against their adoption are welcome. These standards are being presented in order to initiate consideration and obtain the public's views on the need and desirability of such standards. Determinations on the appropriateness of the standards will be made by the TVA Board of Directors. The TVA Board will also determine, what, if any, standards included in this notice will be implemented by TVA for itself and the distributors of TVA power.

Standards: The standards about which a determination will be made are:

(1) *Integrated Resource Planning.* Each electric utility shall (A) integrate energy efficiency resources into utility, State, and regional plans; and (B) adopt policies establishing cost-effective energy efficiency as a priority resource.

(2) *Rate design modifications to promote energy efficiency investments.* (A) The rates allowed to be charged by any electric utility shall (i) align utility incentives with the delivery of cost-effective energy efficiency; and (ii) promote energy efficiency investments.

(3) *Consideration of smart grid investments.* Each State shall consider requiring that, prior to undertaking investments in nonadvanced grid technologies, an electric utility of the State demonstrate to the State that the electric utility considered an investment in a qualified smart grid system based on appropriate factors, including (i) Total costs; (ii) cost-effectiveness; (iii) improved reliability; (iv) security; (v) system performance; and (vi) societal benefit.

(4) *Smart Grid information.* (A) All electricity purchasers shall be provided direct access, in written or electronic machine-readable form as appropriate, to information from their electricity provider as provided in subparagraph (B).

(B) Information. Information provided under this section, to the extent practicable, shall include:

(i) Prices. Purchasers and other interested persons shall be provided with information on (I) time-based electricity prices in the wholesale electricity market; and (II) time-based electricity retail prices or rates that are available to the purchasers.

(ii) Usage. Purchasers shall be provided with the number of electricity units, expressed in kwh, purchased by them.

(iii) Intervals and projections. Updates of information on prices and usage shall be offered on not less than a daily basis, shall include hourly price and use information, where available, and shall include a day-ahead projection of such price information to the extent available.

(iv) Sources. Purchasers and other interested persons shall be provided annually with written information on the sources of the power provided by the utility, to the extent it can be determined, by type of generation, including greenhouse gas emissions associated with each type of generation, for intervals during which such information is available on a cost-effective basis.

(C) Access. Purchasers shall be able to access their own information at any time through the Internet and on other means of communication elected by that utility for Smart Grid applications. Other interested persons shall be able to access information not specific to any purchaser through the Internet. Information specific to any purchaser shall be provided solely to that purchaser.

Procedures: Written data, views, and comments on the standards are requested from the public. All material relating to the standards must be received by 5 p.m. EST on April 30, 2009. All materials received by TVA before this designated time will be considered by TVA. Written statements of TVA staff concerning the standards will be made part of the official record at least 30 days before the date the record closes, at which time they will be made available to the public on request. In order to assist interested consumers in preparing written data, views, and comments for the record, TVA will operate a Web site (*http://www.tva.com/purpa*) on which interested parties can be informed about the standards set out in this notice and on which interested parties can submit comments and materials on the standards. The official record will consist of all comments and materials submitted electronically and all written materials submitted within the time set forth above. A summary of the record will be prepared by TVA staff and will be transmitted to the TVA Board of Directors along with the complete record. The record will be used by the Board in making the determinations required by section 111(d) of the Public Utility Regulatory Policies Act of 1978 (Pub. L. 95–617) as amended by the Energy Independence and Security Act of 2007 (Pub. L. 110–140) and in fulfilling its obligation under the Tennessee Valley Authority Act. Individual copies of the record will

be available to the public at cost of reproduction. Copies will also be kept on file for public inspection at the following locations: Tennessee Valley Authority, 400 W. Summit Hill Drive, WT3D–K, Knoxville, TN 37902, and on the Web at *http://www.tva.com/purpa*.

Dated: December 8, 2008.

Maureen H. Dunn,

Executive Vice President and General Counsel.

[FR Doc. E8–29713 Filed 12–15–08; 8:45 am]

BILLING CODE 8120–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In November 2008, there were six applications approved. This notice also includes information on four applications, one approved in May 2008 and the other three approved in October 2008, inadvertently left off the May 2008 and October 2008 notices, respectively. Additionally, 10 approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Grand Forks Regional Airport Authority, Grand Forks, North Dakota.

Application Number: 08–07–C–00–GFK.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $362,368.

Earliest Charge Effective Date: January 1, 2009.

Estimated Charge Expiration Date: February 1, 2010.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use: Purchase land for runway protection zone.

Construct east/west runway.

Decision Date: May 28, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Schauer, Bismarck Airports District Office, (701) 323–7383.

Public Agency: City of Valdosta, Georgia.

Application Number: 08–09–C–00–VLD.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $30,300.

Earliest Charge Effective Date: August 1, 2009.

Estimated Charge Expiration Date: December 1, 2009.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Rehabilitate airfield lighting/signs phase I (design).

Rehabilitate airfield lighting/signs phase II (construction).

Airfield drainage rehabilitation.

PFC application development.

Brief Description of Withdrawn Projects:

Expand commercial ramp.

Design new air traffic control tower.

Build new air traffic control tower.

Demolition and removal of old pavements.

Date of Withdrawal: October 27, 2008.

Decision Date: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Anna Guss, Atlanta Airports District Office, (404) 305–7146.

Public Agency: City of Cody, Wyoming.

Application Number: 08–06–C–00–COD.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $79,500.

Earliest Charge Effective Date: February 1, 2011.

Estimated Charge Expiration Date: January 1, 2013.

Class of Air Carriers Not Required To Collect PFCs: On-demand, non-scheduled air taxi/commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Yellowstone Regional Airport.

Brief Description of Projects Approved for Collection and Use:

Taxiway B rehabilitation.

Security plan.

Gate relocation.

Acquire snow plow blade.

Brief Description of Withdrawn Projects:

Vehicle purchase. Airport radios.

Security upgrades.

Replace aircraft rescue and firefighting equipment.

Expand aircraft rescue and firefighting building.

Acquire snow removal equipment.

Overlay taxiway A.

Date of Withdrawal: October 23, 2008.

Decision Date: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: County of Humboldt, Eureka, California.

Application Number: 08–09–C–00–ACV.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $926,450.

Earliest Charge Effective Date: March 1, 2009.

Estimated Charge Expiration Date: May 1, 2011.

Class of Air Carriers Not Required To Collect PFCs: Non-scheduled, on demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Arcata Airport (ACV).

Brief Description of Projects Approved for Collection at ACV and Use at ACV:

Terminal improvements.

Install/upgrade airfield guidance signs.

Runway safety area enhancements, design.

Rehabilitate runway lighting, design.

Construct aircraft rescue and firefighting building, design.

PFC administration costs.

Brief Description of Project Approved for Collection at ACV and Use at Garberville Airport (016): Rehabilitate/expand apron, design.

Brief Description of Project Approved for Collection at ACV and Use at Rohnerville Airport (FOT): Rehabilitate apron, design.

Brief Description of Project Approved for Collection at ACV (For and Future Use at 016): Install automated weather observing system.

Brief Description of Projects Approved for Collection at ACV (For Future Use at Murray Field): Install automated weather observing system. Install perimeter fencing.

Brief Description of Project Approved for Collection at ACV (For Future Use at FOT): Install automated weather observing system.

Brief Description of Project Approved for Collection at ACV (For Future Use at Kneeland Airport): Erosion control/stabilization, design.

Decision Date: October 30, 2008.

FOR FURTHER INFORMATION CONTACT: Ron Biaoco, San Francisco Airports District Office, (650) 876–2778, extension 626.

Public Agency: Parish of East Baton Rouge, City of Baton Rouge, Louisiana.

Application Number: 09–07–C–00–BTR.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $25,627,674.

Earliest Charge Effective Date: March 1, 2024.

Estimated Charge Expiration Date: July 1, 2031.

Class of Air Carriers Not Required To Collect PFCs: Part 135 on-demand air taxi/commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Baton Rouge Metropolitan Airport.

Brief Description of Projects Approved for Collection and Use:

Terminal atrium expansion.

Acquisition of property for development.

Taxiway fillet construction.

Ticket lobby expansion.

Decision Date: November 12, 2008.

FOR FURTHER INFORMATION CONTACT: Ilia Quinones, Louisiana/New Mexico Airports Development Office, (817) 222–5646.

Public Agency: County of San Diego, El Cajon, California.

Application Number: 09–01–C–00–CRQ.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $4,947,065.

Earliest Charge Effective Date: January 1, 2009.

Estimated Charge Expiration Date: February 1, 2043.

Class of Air Carriers Not Required to Collect PFCs: Nonscheduled/on-demand air carriers, filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at McClellan-Palomar Airport.

Brief Description of Projects Approved for Collection and Use:

Construct taxiway C.

Construct terminal apron.

Enhance runway safety area and infield drainage.

Construct blast fence.

Construct access road.

Enhance airport security system.

Construct passenger movement facility (elevators and bridge).

Design and construct terminal building.

Acquire aircraft rescue and firefighting vehicle.

PFC administrative costs.

Decision Date: November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Darlene Williams, Los Angeles Airports District Office, (310) 725–3625.

Public Agency: City of Saint Louis Airport Authority, Saint Louis, Missouri.

Application Number: 08–09–C–00–STL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $783,625,492.

Charge Effective Date: May 1, 2002.

Estimated Charge Expiration Date: February 1, 2022.

Class of Air Carriers Not Required to Collect PFCs: Air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Lambert-St. Louis International Airport.

Brief Description of Projects Approved for Collection and Use at a $3.00 PFC Level:

Terminal improvement program.

Emergency generators.

Runways 12R/30L and 12L130R centerline panels.

Taxiway reconstruction (D and S).

Relocation of McDonnell Boulevard, phases I and II.

Part 150 study.

Master plan update—phase II.

Perimeter security fence.

Expansion of 800 Mhz radio system.

Noise monitoring system upgrade.

Terminal improvements (Federal Inspection Services).

Brief Description of Project Approved for Collection at a $3.00 PFC Level: Taxiway reconstruction (F and V).

Brief Description of Projects Approved for Collection and Use at a $4.50 PFC Level: Balance of real property acquisition for airport expansion projects. Carrolton Schools replacement facility.

Program management (includes program management/airport development program consultant fees).

Site development and roadway infrastructure.

New runway.

New Runway: Taxiways.

New Runway: Perimeter Road.

New Runway: Security Fences.

New west aircraft rescue and firefighting building.

Taxiway Delta improvements.

Decision Date: November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Mark Schenkelberg, Central Region Airports Division, (816) 329–2645.

Public Agency: County of Routt, Hayden, Colorado.

Application Number: 09–08–C–00–HDN.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $1,691,312.

Earliest Charge Effective Date: August 1, 2012.

Estimated Charge Expiration Date: September 1, 2015.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Acquire aircraft rescue and firefighting truck.

Taxiway A rehabilitation.

Master plan update.

Snow removal equipment building.

Emergency generator.

Fingerprint equipment.

PFC application and administrative fees.

Snow removal equipment.

Decision Date: November 25, 2008.

FOR FURTHER INFORMATION CONTACT: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: County of Clinton, Plattsburgh, New York.

Application Number: 09–01–C–00–PBG.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $732,355.

Earliest Charge Effective Date: January 1, 2009.

Estimated Charge Expiration Date: December 1, 2012.

Class of Air Carriers Not Required to Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Relocate runway lighting, remarking, and airfield signage.

Runway 17/35 rehabilitation.
Taxiway lighting and marking.
Passenger terminal building.
Perimeter fencing.
Runway 17/35 navigational aids.
Acquire aircraft rescue and firefighting vehicle.
PFC application.
Decision Date: November 25, 2008.

FOR FURTHER INFORMATION CONTACT: Andrew Brooks, New York Airports District Office, (516) 227–3816.

Public Agency: County of Campbell/Gillette-Campbell County Airport Board, Gillette, Wyoming.

Application Number: 09–07–C–00–GCC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $433,172.

Earliest Charge Effective Date: March 1, 2010.

Estimated Charge Expiration Date: July 1, 2014.

Class of Air Carriers Not Required to Collect PFCs: None.

Brief Description of Projects Approved for Collection and Use:

Rehabilitate pavement markings.

Rehabilitate airfield signs.

Remodel terminal security screening area.

Rehabilitate south general aviation apron.

PFC administration.

Decision Date: November 25, 2008.

FOR FURTHER INFORMATION CONTACT: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Amendment to PFC Approvals:

Amendment No., city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
00–07–C–03–MDW Chicago, IL	10/29/08	$795,708,154	$807,154,315	04/01/34	04/01/34
02–09–C–02–MDW Chicago, IL	10/29/08	181,326,845	187,374,819	08/01/38	08/01/38
06–11–C–01–MDW Chicago, IL	10/29/08	1,300,000	0	09/01/38	09/01/38
02–06–C–06–MSY New Orleans, LA	10/31/08	255,936,769	276,286,494	09/01/16	12/01/17
96–05–C–05–MDW Chicago, IL	11/03/08	178,087,493	180,380,371	11/01/16	11/01/16
05–07–C–02–FLL Fort Lauderdale, FL	11/05/08	146,549,617	110,428,401	11/01/08	11/01/08
06–11–C–01–MHT Manchester, NH*	11/12/08	17,257,727	24,553,090	12/01/22	12/01/22
07–12–U–01–MHT Manchester, NH	11/12/08	NA	NA	12/01/22	12/01/22
06–07–C–02–BUR Burbank, CA	11/14/08	26,793,195	27,193,195	09/01/12	04/01/13
04–07–C–02–CMH Columbus, OH	11/14/08	80,836,858	77,072,441	02/01/10	10/01/09

Notes: The amendment denoted by an asterisk (*) includes a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Manchester, NH this change is effective on January 1, 2021.

Issued in Washington, DC on December 5, 2008.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. E8–29522 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–04–19477]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 13 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 14, 2009. Comments must be received on or before January 15, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–04–19477, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted 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 19476). This information is also available at *http://DocketInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202)-366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m.

Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 13 individuals who have requested a renewal of their exemption in accordance with FMCSA procedures. FMCSA has evaluated these 13 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Johnny Becerra
Ross E. Burroughs
Lester W. Carter
Christopher L. DePuy
John B. Ethridge
Larry J. Folkerts
Paul W. Hunter
Ray P. Lenz
Michael B. McClure
Francis M. McMullin
Norman Mullins
Harold W. Mumford
David J. Triplett

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 13 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (69 FR 64806; 70 FR 2705; 72 FR 1056). Each of these 13 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 14, 2009.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 13 individuals from the vision requirement in49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 8, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–29689 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–02–12844; FMCSA–04–19477; FMCSA–06–26066]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 13 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 17, 2009. Comments must be received on or before January 15, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–02–

12844; FMCSA–04–19477; FMCSA–06–26066, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted 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 19476). This information is also available at *http://DocketInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 13 individuals who have requested a renewal of their exemption in accordance with FMCSA procedures. FMCSA has evaluated these 13 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Howard F. Breitkreutz,
John E. Evenson,
Steven C. Humke,
Neil W. Jennings,
Craig M. Landry,
Joe L. Meredith, Jr.,
Richard E. Nordhausen, Jr.,
Tony E. Parks,
Andrew H. Rusk,
Jesse J. Sutton,
Kenneth E. Vigue, Jr.,
David G. Williams, and
Richard A. Winslow.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 13 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1053; 69 FR 64806; 70 FR 2705; 71 FR 63379; 72 FR 1050). Each of these 13 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 15, 2009.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 13 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications.

The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 8, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–29690 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking approval of the following information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than February 17, 2009.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 17, Washington, DC 20590, or Ms. Nakia Jackson, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–New.'' Alternatively, comments may be transmitted via facsimile to (202) 493–6216 or (202) 493–6497, or via e-mail to Mr. Brogan at *robert.brogan@dot.gov*, or to Ms. Jackson at *nakia.jackson@dot.gov*. Please refer to the assigned OMB control number and the title of the information collection in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Ms. Nakia Jackson, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6073). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law No. 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval of such activities by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(I)–(iv); 5 CFR 1320.8(d)(1)(I)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of the proposed information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Notice Requesting Expressions of Interest in Implementing a High-Speed Inter-city Passenger Rail Corridor. (Please see the other FRA Notice in today's **Federal Register** that provides details of this proposed information collection.)

OMB Control Number: 2130–New.

Abstract: Section 502 of the Passenger Rail Investment and Improvement Act of 2008, Public Law 110–432 (October 16, 2008), requires the Secretary of Transportation to ''issue a request for proposals for projects for the financing, design, construction, operation, and maintenance of a high-speed intercity passenger rail system operating within'' either the Northeast Corridor or a Federally-designated high-speed rail (HSR) corridor. To satisfy this requirement, FRA is soliciting and encouraging the submission of Expressions of Interest for potential projects to finance, design, construct, operate, and maintain an improved HSR intercity passenger system in the Northeast Corridor or in one of ten Federally-designated corridors. FRA envisions this as the first phase of a qualification process that Congress may follow with more specific actions regarding particular concepts in one or more corridors. Section 502 prescribes that Expressions of Interest received will be considered by FRA and possibly by commissions, representing affected and involved governors, mayors, freight railroads, transit authorities, labor organizations, and Amtrak. The results of these reviews will be summarized in one or more reports to Congress, which will make recommendations for further action regarding no more than one project concept for each corridor. FRA envisions this as the first phase of a qualification process that Congress may follow with more specific actions

regarding particular concepts in one or more corridors.

Although authorized, no funds have been appropriated to support implementation of HSR under this program, and the availability of such funds in the future is not known. Respondents to the request in today's **Federal Register** acknowledge, by virtue of their response, that the likelihood of future funding and implementation of the projects covered by that notice is unknown, and that the Federal Government will not be liable for any costs incurred in the preparation of responses to this notice.

The information collected will be used by the Federal Railroad Administration (FRA), commissions to be formed in accordance with Section 502, and Congress. The collection of information—responses that describe high speed rail proposals—will be used to inform the Department and Congress about the benefits to the public and the national transportation system from high speed rail proposals received. Upon receipt of responses and after the close of the Expression of Interest solicitation, FRA will evaluate them and determine if each Expression of Interest is complete and if there is evidence provided in the response that would support conclusions, based on criteria specified in Section 502. If FRA determines that one or more Expressions of Interest satisfy this screening evaluation, FRA would form a commission for each relevant corridor to review and consider the response(s).

Form Number(s): N/A.

Affected Public: Businesses, States, Individuals, Entities.

Respondent Universe: 50 Individuals or Entities.

Frequency of Submission: On occasion; annually.

REPORTING BURDEN

RFEI notice	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Responses to Notice	50 Individuals or Entities	10 responses	3,400 hours	34,000
—Identifying Letters to FRA regarding RFEI questions.	50 Individuals or Entities	25 letters	30 minutes	13
—RFEI Informational Sessions with FRA.	50 Individuals or Entities	25 sessions	2 hours	50

Total Responses: 60.

Estimated Total Annual Burden: 34,063 hours.

Status: Regular Review.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on *December 11, 2008.*

Kimberly Orben,

Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. E8–29788 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice Requesting Expressions of Interest in Implementing a High-Speed Intercity Passenger Rail Corridor

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice Requesting Expressions of Interest.

SUMMARY: Section 502 of the Passenger Rail Investment and Improvement Act of 2008, Public Law 110–432 (October 16, 2008), requires the Secretary of Transportation to ''issue a request for proposals for projects for the financing, design, construction, operation, and maintenance of a high-speed intercity passenger rail system operating within'' either the Northeast Corridor or a Federally designated high-speed rail (HSR) corridor. To satisfy this requirement, the FRA is soliciting and encouraging the submission of Expressions of Interest for potential projects to finance, design, construct, operate, and maintain an improved HSR intercity passenger system in the Northeast Corridor or in one of ten Federally designated corridors. FRA envisions this as the first phase of a qualification process that Congress may follow with more specific actions regarding particular proposals in one or more corridors.

DATES: All Expressions of Interest submitted in response to this notice shall be submitted by 5 p.m. e.t. on Monday, September 14, 2009, in accordance with the instructions in **ADDRESSES** below. In order to gauge possible interest in this process, FRA is requesting that participants considering filing a response to this notice provide a letter with names and contact information by Friday, January 30, 2009. The initial letter will help FRA gauge interest in the Request for Expressions of Interest (RFEI) process and will facilitate future communications to participants, including invitation to a possible information session in the spring of 2009 to further invite questions from participants and to provide information and guidance regarding the RFEI process. Failure to provide a letter will not prevent participants from submitting an Expression of Interest in accordance with this notice.

ADDRESSES: Any questions, responses or Expressions of Interest in response to this notice shall be submitted under the docket number FRA–2008–0140 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *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.
- *Fax:* 1–202–493–2251.

Instructions: All submissions must include the agency name and docket number (FRA–2008–0140) for this RFEI process. Note that all comments received will be posted, without change, to *http://www.regulations.gov,* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials. Internet users may access comments received by DOT at *http://www.regulations.gov.*

If you wish to submit any information under a claim of confidentiality, submit

a version from which you have deleted the claimed confidential business information to the docket as specified above and send two copies of your complete submission, including the information you claim to be confidential business information, following the steps outlined in ''Requests for Confidential Treatment'' in the **SUPPLEMENTARY INFORMATION** section of this document to Mr. David Valenstein as specified below.

FOR FURTHER INFORMATION CONTACT: For information from FRA, please contact Mr. David Valenstein, Office of Railroad Development, Federal Railroad Administration, 1200 New Jersey Avenue, SE., MS–20/W38–303, Washington, DC 20590. Phone (202) 493–6368.

SUPPLEMENTARY INFORMATION: FRA anticipates that participants will have questions during the RFEI process. In order to assure that all respondents have equal access to such questions and their answers, questions about this notice must be submitted to the docket as specified in **ADDRESSES** above. Any responses provided by the FRA will be posted to the docket; summary questions and answers will also be posted on the FRA Web page for the RFEI process.

Background on High-Speed Rail (HSR): HSR is self-guided intercity passenger ground transportation that is time competitive with air and/or auto on a door-to-door basis for trips in the approximate range of 100 to 500 miles. A corridor is a natural grouping of metropolitan areas and markets that, by their proximity and configuration, lend themselves to efficient service by HSR. The U.S. Department of Transportation study that yielded these definitions, *High-Speed Ground Transportation for America* (1997, available at [*http://www.fra.dot.gov/us/content/515*]), went on to suggest that HSR—once built—could potentially provide significant public benefits (congestion relief, emissions reductions, and petroleum savings) while supporting its continuing operations and future investment requirements from the farebox. Actual results would vary from one corridor to another, and would depend on a host of factors, including travel demand, fare policies, characteristics of competing modes, source of motive power, and operating practices and costs.

Background on This Request for Expressions of Interest (RFEI): Section 502 of the Passenger Rail Investment and Improvement Act of 2008 (''Section 502'') (Pub. L. 110–432, October 16, 2008), requires the Secretary of Transportation to ''issue a request for proposals for projects for the financing, design, construction, operation, and maintenance of a high-speed intercity passenger rail system operating within'' either the Northeast Corridor or a federally designated HSR corridor. Section 502 prescribes that Expressions of Interest received will be considered by the Secretary and possibly by commissions representing affected and involved governors, mayors, freight railroads, transit authorities, labor organizations, and Amtrak. The results of these reviews will be summarized in one or more reports to Congress, which will make recommendations for further action regarding no more than one project concept for each corridor. FRA envisions this as the first phase of a qualification process that Congress may follow with more specific actions regarding particular proposals in one or more corridors.

Although authorized, no funds have been appropriated to support implementation of HSR under this program, and the availability of such funds in the future is not known. Respondents to this request acknowledge, by virtue of their response, that the likelihood of future funding and implementation of the projects covered by this notice is unknown, and that the Federal Government will not be liable for any costs incurred in the preparation of responses to this notice.

Who May Respond: Responses to this RFEI are welcome from all sources. Section 502 calls for comprehensive proposals that will address all the tasks necessary to implement HSR. Potential proposers are advised to verify, before committing resources to responding to this RFEI, that they would be able to assemble a cohesive team that can plan, organize, finance, design, and construct a complete HSR system in an eligible corridor, as well as gain the support of the key public and private stakeholders, and successfully operate and maintain it on a long-term basis.

Performance Standards for HSR Systems: Section 502 requires that the HSR proposals for which Expressions of Interest are requested meet certain travel time performance standards and meet any standards established by the Secretary. The required performance standards are:

(A) Northeast Corridor between New York and Washington: Proposed express service must link Pennsylvania Station, New York, with Union Station, Washington, with a reliable travel time of two hours.

(B) All other eligible corridors, including the Northeast Corridor between New York and Boston: Existing minimum intercity rail scheduled service trip times (as shown in Amtrak's published timetable in effect on October 16, 2008) between endpoints and all other main corridor city-pairs must be reduced by a minimum of 25 percent, and a reliable service provided. If no service presently exists in the corridor, the proposer will need to demonstrate that the proposed service will be reliable and time competitive in accordance with the definition of HSR above.

Eligible Corridors: Responses to this notice must address HSR proposals located in part or all of one or more of the following corridors that connect and serve the key metropolitan areas listed (shown on the map at: *http://www.fra.dot.gov/us/content/1272*):

(A) ''Northeast Corridor'' between Washington, DC; Baltimore, MD; Wilmington, DE; Philadelphia, PA; Trenton, NJ; New York, NY; New Haven, CT; Providence, RI; and Boston, MA. Separate service standards apply north and south of New York City; see Performance Standards for HSR Systems, above.

(B) ''California Corridor'' connecting and between the San Francisco Bay Area, Sacramento, Los Angeles, and San Diego, CA;

(C) ''Empire Corridor'' between New York City, Albany and Buffalo, NY, over the route of the former New York Central Railroad;

(D) ''Pacific Northwest Corridor'' between Eugene and Portland, OR; Seattle, WA; and Vancouver, BC, Canada;

(E) ''South Central Corridor'' along three branches between Dallas/Fort Worth, TX, and:

(1) Austin and San Antonio, TX;

(2) Oklahoma City and Tulsa, OK; and

(3) Texarkana and Little Rock, AR;

(F) ''Gulf Coast Corridor'' along three branches between New Orleans, LA, and:

(1) Birmingham, AL, and Atlanta, GA;

(2) Houston, TX; and

(3) Mobile, AL;

(G) ''Chicago Hub Network'' along six routes between:

(1) Chicago, IL; Milwaukee, WI; and Minneapolis-St. Paul, MN;

(2) Chicago, IL, and Detroit, MI;

(3) Chicago, IL, Toledo and Cleveland, OH;

(4) Chicago, IL; Indianapolis, IN; and both Cincinnati, OH, and Louisville, KY;

(5) Chicago, IL; St. Louis, MO; and Kansas City, MO; and

(6) The transversal extension between Cleveland, Columbus, and Cincinnati, OH;

(H) ''Florida Corridor'' between Miami, Orlando, and the Tampa Bay region, FL;

(I) ''Keystone Corridor'' between Philadelphia, Harrisburg, and Pittsburgh, PA, over the route of the former Pennsylvania Railroad;

(J) ''Northern New England Corridor'' along three branches between Boston, MA, and:

(1) Portland/Lewiston-Auburn, ME;

(2) Concord, NH; Montpelier, VT; Montreal, QE, Canada; and

(3) Springfield, MA, and to both New Haven, CT, and Albany, NY; and

(K) ''Southeast Corridor'' along three branches between:

(1) Washington, DC; Richmond, VA; Raleigh, Greensboro and Charlotte, NC; Greenville, SC; and Atlanta, GA;

(2) Raleigh, NC; Columbia, SC; Savannah, GA; Jacksonville, FL; and

(3) Atlanta, Macon, and Jesup, GA, thence either or both Savannah, GA and Jacksonville FL.

Required Contents of Expressions of Interest: Complete responses must contain the required contents, and will be evaluated by FRA to determine if they satisfy the selection criteria in Evaluation and Selection Process for Expressions of Interest below. The following minimum requirements may be satisfied through a narrative statement submitted by the applicant and supported by spreadsheet documents, tables, graphics, drawings, and/or other materials, as appropriate. Each Expression of Interest must:

1. Designate a point of contact for the Expression of Interest and provide his or her name and contact information, including a telephone number, mailing address and e-mail address.

2. Provide the name(s) and qualifications of the person(s) submitting the Expression of Interest, and the names and qualifications of the lead entity and each member/entity of the team proposed to finance, design, construct, operate, and maintain the railroad, railroad equipment, and related facilities, stations, and infrastructure. Describe how such entities would be related to the lead entity.

3. Provide a short executive summary overview of the proposed project concept, including:

a. Markets served, including a concept map;

b. Station locations;

c. Trip times for major markets indicating that program performance standards will be met;

d. Peak and average operating speeds of the train service;

e. Proposed routes and alignments, noting the extent of new rights-of-way (ROW) and use of existing ROW, as well as a general discussion of how the intended reliability requirements will be achieved;

f. Type of train equipment to be used, the maximum speed of that equipment, and any technologies used to meet trip time goals;

g. Proposed organizational structure;

h. Salient features of the intended operation as they may affect operating practices and unit costs;

i. Total capital cost and expected contributions by Federal, state, and other public and private sources; and

j. The benefits to the public and the national transportation system, including an explanation as to why the project is cost-effective and what advantages it offers over existing services.

4. Provide a detailed technical description of the project, including:

a. Populations of markets served by each of the proposed stations;

b. Existing intercity traffic (passengers, vehicle capacity, frequency) by mode;

c. Proposed station locations and, for each, whether it is existing or new, and how it maximizes the use of existing infrastructure;

d. How the project will facilitate convenient intermodal travel connections with other transportation services and systems;

e. Trip time and fare comparisons among proposed services, existing rail services, if any, and competing modes for major city pairs;

f. An operating plan with train service frequency, timetable, and information on intermodal connections;

g. Annual ridership and revenue projections for 10 years with documentation of assumptions and methods and peaking characteristics;

h. Operating costs with documentation of assumptions and methods;

i. The impact of the project on highway and aviation congestion, energy consumption, pollutant emissions, land use and economic development;

j. A description of how the design, construction, implementation, and operation of the project will accommodate and allow for future growth of existing and projected intercity, commuter, and freight rail service;

k. The impact of the project on other intercity, commuter, and freight rail services;

l. Proposed routes and alignments noting the extent of new ROW and use of existing ROW;

m. Required infrastructure investments and improvements, including the feasibility of building new track and method for securing required ROW;

n. How adverse impacts of the project would be mitigated;

o. The type and quantity of train equipment to be used, with technical specifications, such as consist, maximum speed, passenger capacity, energy consumption profile, acceleration and deceleration rates;

p. Project capital costs for major categories of expenditures (track structures, tunnels, bridges, vehicles, stations, maintenance equipment and facilities, communication and control systems, and power systems), with documentation of assumptions and methods;

q. A detailed analysis of the methods and technologies for achieving the required reductions in trip times and the intended reliability standards; and

r. Synopses and references for any past high-speed rail studies deemed relevant.

5. Present a detailed financial plan for the proposed project, including:

a. Projected annual operating revenues by year and sources;

b. Estimates of annual operating costs by type of expenditure;

c. Annual schedule of capital costs required both initially and in subsequent years to maintain a state-of-good-repair and to recapitalize as necessary to sustain the initially proposed level of service or higher levels of service;

d. Sources and descriptions of capital funds, including terms, conditions and expectation for return on equity, and

e. Credit assumptions including sources, guarantees, terms, maturity and special conditions;

f. A description of the insurance program contemplated for construction and operation;

g. A description of construction cost risk sharing and rationale for the proposed approach;

h. A description of revenue and operating cost risk sharing and rationale for the proposed approach;

i. Projected funding for the full fair market compensation for any asset, property right or interest, or service acquired from, owned, or held by a private person or Federal entity that would be acquired, impaired, or diminished in value as a result of a project, except as otherwise agreed to by the private person or entity; and

j. A projected financial statement for the proposed organization showing annual revenues, costs, investments, and debt service from project inception through construction, testing, and the first 20 years of operation.

6. Describe the institutional framework and address other institutional issues, including:

a. A project structure organization chart showing the proposer team and all the relationships among the public and private entities involved in the proposed project, a description of the relationships among the entities responsible for the financing, design, construction, operation and maintenance of the proposed project (including their equity stakes), and the roles of other participants in the operational aspects of the project;

b. Any new entities required and how they will be structured legally and financially;

c. Integration of the proposed service with Amtrak, other HSR rail services, other intercity passenger systems, and local access/egress systems;

d. The feasibility of gaining access to required ROW, the approach to track capacity including building new track, and any public and private agreements for facility access and the expected costs of each;

e. Required governmental actions and approvals and the role of the state government(s) in implementing the proposal; and

f. The relationship to state rail plans and programs or, if not already part of such plans or programs, a statement describing plans for integration into them.

7. Identify legislative actions needed, if any, to facilitate all aspects of the proposed project, including:

a. Required Federal, state and/or local legislation to authorize and create a sponsoring entity for the project, or to remove legal impediments to project implementation, or otherwise facilitate the project;

b. Required public funding commitments, Federal, state and/or local;

c. Any legislative action required to allow the project to benefit from government-sponsored credit assistance programs, such as the Railroad Rehabilitation and Improvement Financing program and the Transportation Infrastructure Finance and Innovation Act program; and

8. Describe how the project will be implemented to comply with Federal, state and local laws, including but not limited to:

a. Laws governing the rights and status of employees associated with the route and service, including those specified in section 24405 of title 49 United States Code;

b. Rail safety and security laws, orders, and regulations governing HSR operations, including, but not limited to, the railroad safety provisions in Part 49 of the Code of Federal Regulations and the requirements of the Rail Safety Improvement Act of 2008;

c. Environmental laws and regulations and the status or any progress towards completion of required documentation or actions under the National Environmental Policy Act, the National Historic Preservation Act, section 4(f) of the DOT Act, or other applicable Federal or state environmental impact assessment laws; and

d. The Americans With Disabilities Act.

Optional Contents Requested for Inclusion in Submissions: In addition to the required contents, respondents are requested to provide, at their option, their perspectives on what type of contracting and financing strategies are most likely to facilitate successful HSR projects. FRA is particularly interested in perspectives that draw on prior experience with HSR projects. In responding to this request, Expressions of Interest should address the following:

a. What type of contracting structure is likely to provide the most effective allocation of the risk and responsibility for each element of the project (design, construction, financing, operation and maintenance) between the private and public sectors?

b. Should all of the project elements to be performed by the private sector be procured in a single procurement or separately (for example, separate procurements for civil works, the provision of systems and equipment, and long-term operations and maintenance of the system)?

c. Should the project's financing rely on commercial ticket fares and other revenue generated directly by the facility to pay for all or any portion of the project's cost, and should the private partner assume the risk that these revenues will be sufficient to repay all or any portion of the project's financing?

d. What role should public sector commitments play in financing the project or particular components of the project, and what type of public commitment would be most effective?

e. What measures or commitments would be needed, including possible legislation, to provide and facilitate multi-year Federal commitments of any Federal financing needed for the project?

f. What role should private equity play in financing the project or particular components of the project and how would terms and conditions affect public sector participation?

g. Are there any key considerations that will encourage or dissuade private sector involvement in the financing, design, construction, and long-term operations and maintenance of HSR in the corridors identified above?

h. Should the commissions required by Section 502 be organized and their work structured in the same way for all corridors, and what structures and models should be considered to guide the commissions?

i. How would the proposal contribute to the development of a national HSR system?

Format for Submissions: Each Expression of Interest shall be submitted according to the instructions in **ADDRESSES** above. At a minimum, two (2) hard copies and electronic format on optical media (except oversized engineering drawings and maps, which may be submitted solely in hard copy) shall be submitted. Responses may include maps or graphics when they would illustrate information more effectively than text.

Text and graphic documents shall be submitted both as MS Word documents and Adobe PDF documents, in Times New Roman, 12 point font, with 1-inch margins. Spreadsheets containing financial information shall be submitted as Microsoft Excel (or compatible) documents and Adobe PDF documents.

Each Expression of Interest should not exceed a maximum total of 75 pages, excluding appendices. The following sections shall be included in any submission: Cover page, proposer name(s) and contact information, project overview, detailed technical description, detailed financial plan, institutional information, legislative actions, legal compliance issues, and appendices containing any spreadsheets, drawings, and tables. Optional content should be provided as an additional section not included in the page count. The executive summary project overview should not exceed two (2) pages in length.

Evaluation and Selection Process for Expressions of Interest: FRA will review responses and make determinations within 60 days of the closing date, under Dates above. The Secretary will evaluate each Expression of Interest in a two-step process. First, it will be screened for its completeness in responding to this RFEI. Second, it will undergo substantive review according to the selection criteria outlined below.

Selection Criteria: FRA will consider the extent to which each Expression of Interest satisfies the following selection factors: (1) The project detailed in the Expression of Interest demonstrates the ability to achieve the specified reduction in minimum intercity rail service trip times and the intended reliability standards. (2) The Expression

of Interest is complete and includes all the elements in the Requirements for Expressions of Interest section, above. (3) The project detailed in the Expression of Interest is sufficiently credible to warrant further consideration. (4) The project detailed in the Expression of Interest is likely to result in a positive impact on the Nation's transportation system. (5) The project detailed in the Expression of Interest is cost-effective. (6) The project detailed in the Expression of Interest is in the public interest.

Step 1—Screening Process: Upon receipt of responses and after the close of the Expression of Interest solicitation, FRA will evaluate them and determine if each Expression of Interest is complete and if there is evidence provided in the response that would support conclusions, based on criteria 3 through 6 above. If FRA determines that one or more Expressions of Interest satisfy this screening evaluation, the Secretary would form a commission for each relevant corridor to review and consider the response(s).

Step 2—Selection Process: Section 502 requires the Secretary to establish and support the formation of commissions, representing affected and involved governors, mayors, freight railroads, transit authorities, labor organizations, and Amtrak, that would assess the responses, and authorizes appropriation of necessary funds for this purpose. No funds have been appropriated for this purpose as of the date of this RFEI. The commission(s) would review the Expressions of Interest and prepare a report to the Secretary making recommendations for further consideration.

Following receipt of each commission's evaluation and recommendations, the Secretary will consider the commission report(s) and select Expression(s) of Interest that (i) demonstrate a high likelihood of providing substantial benefits to the public and the national transportation system; (ii) are cost-effective, considering public commitments necessary for implementation and operation; and (iii) promise significant advantages over existing services operating in the same HSR corridor. The Secretary will then submit a report to Congress on all selected Expression(s) of Interest. Subject to appropriations and after submission of reports to Congress, up to $5,000,000.00 may be made available for preliminary engineering under 49 U.S.C. Section 26104(a) for one selected proposal per corridor.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of FRA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of a State, association, business, or labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

Freedom of Information Act Applicability: Documents submitted to the agency pursuant to this notice become agency records subject to the public access provisions of the Freedom of Information Act (FOIA) (5 U.S.C. 552). FOIA generally provides that any person has a right, enforceable in court, to obtain access to Federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. The Department of Transportation's regulations implementing the FOIA are found at 49 CFR Part 7. See the discussion later in this notice about the treatment of trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

Requests for Confidential Treatment: FRA recognizes that Expressions of Interest submitted to the agency pursuant to this notice may contain certain information that is or should be exempt from public release, principally because the information constitutes trade secrets or commercial or financial information obtained from a person that is privileged or confidential as provided for in Freedom of Information Act exemption 4 (5 U.S.C. 552(b)(4)). The term ''trade secret'' has been fairly narrowly defined as a ''secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. *Public Citizen Health Research Group* v. *FDA,* 704 F.2d 1280, 1288 (DC Cir. 1983). FRA expects that there should be very limited, if any, need to submit trade secret information in connection with this notice. Commercial or financial information obtained from a person that is privileged or confidential and thus exempt from release under FOIA exemption typically involves information the release of which is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Association* v. *Morton,* 498 F.2d 765, 770 (DC Cir. 1974). This is a fairly restrictive standard and should serve to limit the volume of exempt material that might be submitted.

FRA also recognizes that the nature of the process established through section 502 of the Passenger Rail Investment and Improvement Act of 2008, with the potential involvement of a multi-member commission that could be charged with reviewing proposals submitted pursuant to this notice, could present significant challenges in managing any confidential information that is submitted. Thus, submitters are encouraged to carefully review the applicable standards governing what constitutes trade secrets or confidential commercial or financial information and to limit the submission of such information to that specifically needed to respond to this notice.

A request for confidential treatment with respect to a document or portion thereof may be made in accordance with instructions in **ADDRESSES** above on the basis that the information is—(1) Exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552); (2) Required to be held in confidence by 18 U.S.C. 1905; or (3) Otherwise exempt by law from public disclosure. Any document containing information for which confidential treatment is requested shall be accompanied at the time of filing by a detailed statement justifying non-disclosure and referring to the specific legal authority claimed. Any document containing any information for which confidential treatment is requested shall be marked ''CONFIDENTIAL'' or ''CONTAINS CONFIDENTIAL INFORMATION'' in bold letters. If confidentiality is requested as to the entire document, or if it is claimed that non-confidential information in the document is not reasonably segregable from confidential information, the accompanying statement of justification shall so indicate and support with specific legal authority. If confidentiality is requested as to a portion of the document, then the person filing the document shall file, together with the document, a second copy of the document from which the information for which confidential treatment is requested has been deleted. If the person filing a document, of which only a portion is requested to be held in confidence, does not submit a second copy of the document with the confidential information deleted, FRA may assume that there is no objection to public disclosure of the document in its entirety. FRA retains the right to make its own determination with regard to any claim of confidentiality. Notice of a decision by the FRA to deny a claim, in whole or in part, and an opportunity to

respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure. FRA intends to address protection of confidential information by any commission(s) formed to review submitted proposals through the commission formation process. Submitters are welcome to offer suggestions for managing confidential data along with their proposals.

Issued in Washington, DC, on December 11, 2008.

Mark E. Yachmetz,

Associate Administrator for Railroad Development.

[FR Doc. E8–29795 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Special Permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before January 15, 2009.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT:

Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington, DC or at *http://dms.dot.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 8, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials Special Permits and Approvals.

NEW SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14791–N	.....	Heliqwest International Inc., Montrose, CO.	49 CFR 172.101 HMT Column (9B), 172.200, 172.300, 172.400.	To authorize the transportation of certain forbidden explosives and other hazardous materials by helicopter in remote areas of the US for seismic exploration without being subject to hazard communication requirements and quantity limitations. (mode 4)
14792–N	.....	CP Industries, McKeesport, PA.	49 CFR 180.205(f)(3) and 180.212	To authorize the transportation in commerce of certain DOT 3AAX and DOT 3T seamless cylinders that have been repaired. (modes 1, 2, 3)
14794–N	.....	Worthington Cylinders of Canada Corp., Tilbury, Ontario.	49 CFR 173.301(a)(1) and (a)(2) and 173.302a(a)(1).	To authorize the manufacture, marking, sale and use of a non-DOT specification cylinder conforming in part with DOT Canada Specifications 4BA for transportation of certain Division 2.2 compressed gases. (modes 1, 2, 3, 4)

[FR Doc. E8–29638 Filed 12–15–08; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–314 (Sub-No. 4X)]

Chicago Central & Pacific Railroad Company—Abandonment Exemption—in Linn County, IA

Chicago Central & Pacific Railroad Company (CCP) has filed a verified notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 0.25-mile line of railroad extending between milepost 229.50 and milepost 229.75 in Cedar Rapids, Linn County, IA. The line traverses United States Postal Service Zip Code 52302.

CCP has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.*—

Abandonment—Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 15, 2009, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 26, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 5, 2009, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CCP's representative: Thomas J. Healey, 17641 S. Ashland Avenue, Homewood, IL 60430.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

CCP has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 19, 2008. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CCP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CCP's filing of a notice of consummation by December 16, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 5, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–29343 Filed 12–15–08; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,500. *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2008 update,* STB Ex Parte No. 542 (Sub–No. 15) (STB served June 18, 2008).

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 10, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. 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, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before January 15, 2009 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1029.
Type of Review: Revision.
Form: 8693.
Title: Low-Income Housing Credit Disposition Bond or Treasury Direct Account Application.
Description: Form 8693 is needed per IRC section 42(j)(6) to post bond or establish a Treasury Direct Account and waive the recapture requirements under section 42(j) for certain disposition of a building on which the low-income housing credit was claimed. Internal Revenue regulations section 301.7101–1 requires that the posting of a bond must be done on the appropriate form as determined by the Internal Revenue Service.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 1,128 hours.

OMB Number: 1545–0127.
Type of Review: Extension.
Form: 1120–H.
Title: U.S. Income Tax Return for Homeowners Associations.
Description: Homeowners associations file Form 1120–H to report income, deductions, and credits. The form is also used to report the income tax liability of the homeowners association. The IRS uses Form 1120–H to determine if the income, deductions, and credits have been correctly computed. The form is also used for statistical purposes.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 3,665,832 hours.

OMB Number: 1545–1467.
Type of Review: Revision.
Form: 9779, 9779(SP), 9783, 9783(SP), 9787, 9787(SP), 9789/9789 (SP).
Title: Electronic Federal Tax Payment System (EFTPS).
Description: Enrollment is vital to the implementation of the Electronic Federal Tax Payment System (EFTPS). EFTPS is an electronic remittance processing system that the Service will use to accept electronically transmitted federal tax payments. This system is a necessary outgrowth of advanced information and communication technologies.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 766,446 hours.

OMB Number: 1545–1819.
Type of Review: Revision.
Title: REG–116641–01 (TD 9136—Final) Information Reporting and Backup Withholding for Payment Card Transactions; (REG–163195–05 (NPRM)).
Description: This document contains final regulations relating to the information reporting requirements, information reporting penalties, and backup withholding requirements for payment card transactions. This document also contains final regulations relating to the IRS TIN Matching Program.
Respondents: Businesses or other for-profits.
Estimated Total Burden Hours: 37,239,570 hours.

OMB Number: 1545–0718.
Type of Review: Extension.
Form: 941–M.
Title: Employer's Monthly Federal Tax Return.

Description: Form 941–M is used by certain employers to report payroll taxes on a monthly rather than quarterly basis. Employers who have failed to file Form 941 or who have failed to deposit taxes as required are notified by the District Director that they must file Form 941–M monthly.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 166,320 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Nicholas A. Fraser, (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E8–29738 Filed 12–15–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 10, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. 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 January 15, 2009 to be assured of consideration.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

OMB Number: 1513–0043.

Type of Review: Extension.

Form: TTB F 5110.31.

Title: Application and Permit to Ship Puerto Rican Spirits to the United States without Payment of Tax.

Description: TTB F 5110.31 is used to allow a person to ship spirits in bulk into the U.S. without payment of tax. The form identifies the person in Puerto Rico from where shipments are to be made, the person in the U.S. receiving the spirits, and amounts of spirits to be shipped.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 750 hours.

OMB Number: 1513–0040.

Type of Review: Extension.

Form: TTB F 5110.25.

Title: Application for Operating Permit under 26 U.S.C. 5171(d).

Description: TTB F 5110.25 is completed by proprietors of Distilled Spirits Plants who engage in certain specified types of activities. TTB National Revenue Center personnel uses the information on the form to identify the applicant, the location of the business, the types of activities to be conducted, and the qualifications of the applicant.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 20 hours.

OMB Number: 1513–0037.

Type of Review: Extension.

Form: TTB F 5100.11.

Title: Withdrawal of Spirits, Specially Denatured Spirits, or Wines for Exportation.

Description: TTB F 5100.11 is completed by exporters to report the withdrawal of spirits, denatured spirits, and wines from internal revenue bonded premises, without payment of tax for direct exportation, transfer to a foreign trade zone, Customs manufacturer's bonded warehouse or Customs bonded warehouse, or for use as supplies on vessels or aircraft.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 6,000 hours.

OMB Number: 1513–0112.

Type of Review: Extension.

Form: TTB F 5630.5t; TTB F 5630.5a; TTB F 5630.5d.

Title: Special (occupational) Tax Registration and Return.

Description: On August 10, 2005, President Bush signed into law the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,'' Public Law 109–59. Section 11125 of that act permanently repealed, effective July 1, 2008, the special (occupational) taxes on all taxpayers except for Tobacco Products Mfrs (TPM), Cigarette Papers and Tubes Mfrs (CPTM), and TP Export Warehouse Proprietors (TPEWP). TTB F 5630.5 is amended into TTB F 5630.5t and only for collection of taxes from the TPM, CPTM, and TPEWP; the new TTB F 5630.5a is a tax return/registration for the period on and before 7/1/08; and the new TTB F 5630.5d is used to register Alcohol Dealers on and after 7/1/08.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 14,583 hours.

OMB Number: 1513–0078.

Type of Review: Extension.

Form: TTB F 5200.3; TTB F 5200.16; TTB F 5230.4; TTB F 5230.5.

Title: Application for a Permit as a Manufacture of Tobacco Products or an Export Warehouse Proprietor; Application for an Amended Permit as a Manufacture of Tobacco Products or an Export Warehouse, *et al.*

Description: These forms are used by the tobacco industry members to obtain and amend permits necessary to engage in business as a manufacturer of tobacco products, importer of tobacco products, or proprietor of an export warehouse.

Respondents: State, Local, and Tribal Governments.

Estimated Total Burden Hours: 1,130 hours.

OMB Number: 1513–0024.

Type of Review: Revision.

Form: TTB F 5220.4.

Title: Report—Export Warehouse Proprietor.

Description: Proprietors account for taxable articles on this report. TTB uses this information to ensure that Federal laws and regulations have been complied with and determined taxes have been paid.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 797 hours.

OMB Number: 1513–0008.

Type of Review: Extension.

Form: TTB F 5170.7.

Title: Application and Permit to Ship Liquors and Articles of Puerto Rican Manufacture Taxpaid to the United States.

Description: TTB F 5170.7 is used to document the shipment of taxpaid Puerto Rican Liquors and articles into the U.S. The form is reviewed by Puerto Rican and U.S. Treasury Officials to certify that products are either taxpaid or deferred under appropriate bond. This serves as a method of protecting the revenue.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 100 hours.

OMB Number: 1513–0033.

Type of Review: Revision.

Form: TTB F 5210.5.

Title: Report—Manufacturer of Tobacco Products or Cigarette Papers and Tubes.

Description: Manufacturers account for their taxable articles on this report.

TTB uses this information to ensure that taxes have been properly paid and the Federal laws and regulations are compiled with.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 2,304 hours.

Clearance Officer: Frank Foote, (202) 927–9347, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G. Street, NW., Washington, DC 20005.

OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E8–29739 Filed 12–15–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

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 Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Application By Voluntary Guardian of Incapacitated Owner of United States Savings Bonds/Notes.

DATES: Written comments should be received on or before February 12, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Application By Voluntary Guardian Of Incapacitated Owner of United States Savings Bonds/Notes.

OMB Number: 1535–0036.

Form Number: PD F 2513.

Abstract: The information is requested to establish the right of a voluntary guardian to act on behalf of an incompetent bond owner.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or households.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 333.

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.

Dated: December 8, 2008.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E8–29444 Filed 12–15–08; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

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 Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Application for Relief on Account of Loss, Theft, or Destruction of United States Savings and Retirement Securities and Supplemental Statement Concerning United States Securities.

DATES: Written comments should be received on or before February 12, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Titles: Application for Relief on Account of Loss, Theft or Destruction of United States Savings and Retirement Securities and Supplemental Statement Concerning United States Securities.

OMB Number: 1535–0013.

Form Numbers: PD F 1048 and PD F 2243.

Abstract: The information is requested to issue owners substitute securities or payment in lieu of lost, stolen or destroyed securities.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or households.

Estimated Number of Respondents: 80,000.

Estimated Time per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 26,400.

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.

Dated: December 8, 2008.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E8–29445 Filed 12–15–08; 8:45 am]

BILLING CODE 4810–39–P

Federal Register

Tuesday,
December 16, 2008

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (Enhydra lutris kenyoni); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R7–ES–2008–0105; 92210–1117–0000–FY08–B4]

RIN 1018–AV92

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (Enhydra lutris kenyoni)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 15,225 square kilometers (km^2) (5,879 square miles (mi^2)) fall within the boundaries of the proposed critical habitat designation. The proposed critical habitat is located in Alaska.

DATES: We will accept comments received on or before February 17, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 30, 2009.

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

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R7–ES–2008–0105; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Detailed, colored maps of areas proposed as critical habitat in this proposed rule are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm*. Hard copies of maps can be obtained by contacting the Marine Mammals Mangement Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Douglas M. Burn, Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907/786–3800; facsimile 907/786–3816. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of habitat of the southwest Alaska DPS of the northern sea otter,
- What areas occupied at the time of listing and that contain features essential for the conservation of the species we should include in the designation and why, and
- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) Any areas that might be appropriate for exclusion from the final designation under section 4(b)(2) of the Act.

(6) Special management considerations or protections that the proposed critical habitat may require.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366). More detailed information on northern sea otter biology and ecology that is directly relevant to designation of critical habitat is discussed under the Primary Constituent Elements section below.

Description and Taxonomy

Sea otters are the only completely marine species of the aquatic lutrinae, or otter subfamily of the family Mustelidae (skunks, weasels, minks, badgers, and honey badgers) (Wozencraft 1993, pp. 310). In an exhaustive systematic review and analysis of sea otter skull morphology, Wilson *et al.* (1991, p. 33–34) concluded there were three subspecies, the Russian sea otter (*Enhydra lutris lutris*) from Asia to the Commander Islands, southern sea otter (*E. l. nereis*) from California, and a newly described subspecies, the northern sea otter (*E. l. kenyoni*), from Alaska.

Currently there are three population stocks of sea otters recognized in Alaska, as defined under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*): (1) Southeast Alaska; (2) southcentral Alaska; and (3) southwest Alaska (Gorbics and Bodkin 2001, p. 632). The southwest Alaska population

stock (DPS) is listed as threatened under the Act.

The sea otter is one of the largest mustelids, and the sexes are moderately dimorphic (two distinct forms). Adult males attain weights of 45 kilograms (kg) (99.2 pounds (lbs)) and total lengths of 148 centimeters (cm) (58.3 inches (in)), and adult females attain weights of 36 kg (79.4 lbs) and total lengths of 140 cm (55.1 in). Size appears to vary among populations and to a large extent may represent the status of the population relative to available food resources.

Fur and the air trapped within it provide the primary source of insulation and buoyancy for the sea otter, and in contrast to most other marine mammals (which rely on a thick blubber layer), there is little or no subcutaneous fat. The ability of the sea otter to thermoregulate is dependent on maintaining the integrity of the pelage (fur), in conjunction with an extremely high metabolic rate (as discussed below). This requires a nearly constant, yet gradual, molt, as well as frequent and vigorous grooming. The color of the pelage ranges from light brown to nearly black. As animals age, they may attain a grizzled appearance, with whitening occurring in the head, neck, and torso regions. Newborn pups have a pale brown, woolly natal pelage until about 3 months of age.

Distribution and Habitat

The southwest Alaska DPS of the northern sea otter ranges from Attu Island at the western end of Near Islands in the Aleutians, east to Kamishak Bay on the western side of lower Cook Inlet, and includes waters adjacent to the Aleutian Islands, the Alaska Peninsula, the Kodiak archipelago, and the Barren Islands.

As a species, sea otters occur only in the North Pacific Ocean. The historical range includes coastal habitats around the Pacific Rim between central Baja California and northern Japan. The range currently occupied extends from southern California to northern Japan, with extralimital sightings in central Baja California and near Wrangel Island in the Chukchi Sea. The northward limits in distribution appear related to the southern limits of sea ice, which can preclude access to foraging habitat. Seasonal and inter-annual variation in the southern extent of sea ice results in constriction and expansion of the sea otter's northern range. During periods of advancing winter sea ice along their northern range, sea otters occasionally become trapped and sometimes die (Nikolaev 1965, p. 35; Schneider and Faro 1975, p. 91). Sea otters attempting to travel tens of kilometers over the Alaska Peninsula to access the ice-free Pacific were observed in 1971 and 1972 (Schneider and Faro 1975, pp. 93–96) and again in 1982, 1999, and 2000 (USGS unpub. data). Although some otters may succeed in such efforts, many apparently die from starvation or predation by wolves (*Canis lupus*), red foxes (*Vulpes vulpes*), and wolverines (*Gulo gulo*). Southern range limits are less well understood but appear to coincide with the southern limits of coastal upwelling, associated canopy-forming kelp forests, and the 20–22° Celsius (68–72° Fahrenheit) isotherm (Kenyon 1969, p. 135; Estes 1980, p. 133).

Sea otters occupy and use all habitats within the nearshore marine ecosystem, from protected bays and estuaries to exposed outer coasts and offshore islands. Because they need to dive to the sea floor to forage (Bodkin 2001, p. 2616), the seaward limit of their usual distribution is defined by their diving ability and is approximated by the 100 meter (m) (328.1 feet (ft)) depth contour. While sea otters may be found at the surface in water deeper than 100 m (328.1 ft), either resting or swimming, they are most commonly observed in waters within a few km of shore (Riedman and Estes 1990, p. 22), and higher densities are frequently associated with shallow water (Laidre *et al.* 2002, p. 1177). Bodkin and Udevitz (1999, p. 22) found 80 percent of the otters in Prince William Sound (PWS) where water depths are less than 40 m (131.2 ft), although the proportion of total habitat within this bathymetric zone was about 33 percent. Where relatively shallow waters or islands extend far offshore, sea otters can also be found in high densities (Kenyon 1969, p. 57). While they periodically haul out on intertidal or supratidal shores (flooded by very high tides), particularly during winter months, and generally remain close to the sea-land interface, no aspect of their life history requires leaving the ocean (Kenyon 1969, pp. 59–104; Riedman and Estes 1990, p. 24). Although sea otter habitat occurs in the nearshore marine environment, it is important to note that activities that occur in the broader Bering Sea and Gulf of Alaska ecosystems may affect their habitat and populations (Estes *et al.* 1998, p. 475).

Sea otters forage in diverse bottom types, from fine mud and sand to rocky reefs. Recent research employing archival time depth recorders recovered from sea otters in southeast Alaska showed that 84 percent of foraging occurred in depths between 2–30 m (6.6–98.4 ft), and that 16 percent of all foraging was between 30–100 m (98.4–328.1 ft) (Bodkin *et al.* 2004, p. 305). Maximum foraging depths averaged 61 m (200.1 ft) and ranged from 35–100 m (114.8–328.1 ft). Less than 2 percent of all foraging dives were greater than 55 m (180.4 ft). Females dove to depths less than 20 m (65.6 ft) on 85 percent of their foraging dives while males dove to depths greater than 45 m (147.6 ft) on 50 percent of their foraging dives. Recent research from California suggests these patterns may be similar among populations (Tinker *et al.* 2006, p. 148).

Previous Federal Actions

The southwest Alaska DPS of the northern sea otter was listed as threatened on August 9, 2005 (70 FR 46366). Critical habitat was considered to be prudent, but not determinable, and therefore was not designated for this DPS at the time of listing. When a not determinable finding is made, we must, within one year of the publication date of the final listing rule, designate critical habitat, unless the designation is found to be not prudent. On December 19, 2006, the Center for Biological Diversity filed suit against the Service for failure to designate critical habitat within the statutory time frame (Center for Biological Diversity *et al.* v. Kempthorne *et al.*, No. 1:06–CV–02151–RMC (D.D.C. 2007)). On April 11, 2007, the U.S. District Court for the District of Columbia entered an order approving a stipulated settlement of the parties requiring the Service on or before November 30, 2008, to submit to the **Federal Register** a determination as to whether designation of critical habitat for the southwest Alaska DPS is prudent, and if so, to publish a proposed rule. We have subsequently reaffirmed that critical habitat for the southwest Alaska DPS of the northern sea otter is prudent. This proposed rule complies with the court order and section 4(b)(2) of the Act. For more information on previous Federal actions concerning the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366).

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by the landowner. Where the landowner seeks or requests Federal agency funding or authorization for an activity that may affect a listed species or critical habitat, the consultation requirements of section 7 of the Act would apply. However, even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection. Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential to the conservation needs of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be proposed as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designated critical habitat may not include all of the habitat areas that we may eventually determine, based on scientific data not now available to the Service, are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act and our other wildlife authorities. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain features essential to the conservation of the southwest Alaska DPS of the northern sea otter, and areas unoccupied at the time of listing that are essential to the conservation of the DPS, or both. In proposing critical habitat for the southwest Alaska DPS of the northern sea otter, we reviewed the relevant information available, including peer-reviewed journal articles, unpublished reports, the final listing rule, and unpublished materials (such as survey results and expert opinions). In general, sea otters occupy the vast majority of the available habitat within southwest Alaska. Exceptions include portions of Kodiak Island where otters have yet to recolonize their former range, and there may also be some individual islands in the Aleutian archipelago where otters have disappeared (Doroff *et al.* 2003, p. 58). We are not currently proposing any areas outside the geographical area presently occupied by the DPS because designating only occupied areas is sufficient for the conservation of the species.

We have also reviewed available information that pertains to the habitat requirements of this species including research published in peer-reviewed articles and presented in academic theses and agency reports. We also discussed habitat requirements with members of the southwest Alaska sea otter recovery team at several meetings. The sea otter recovery team includes representatives from University of Alaska Fairbanks, Fish and Wildlife Service, University of British Columbia, Marine Conservation Alliance, U.S. Geological Survey (USGS), Alaska Veterinary Pathology Services, Defenders of Wildlife, National Marine Fisheries Service, The Alaska SeaLife Center, Alaska Department of Fish and Game, Smithsonian National Zoological Park, The Alaska Sea Otter and Steller Sea Lion Commission, University of California Santa Cruz, University of Alaska Sea Grant Program, and Sand Point, Alaska.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied at the time of listing to propose as critical habitat, we consider areas containing the physical and biological features that are essential to the conservation of the species and may require special management considerations or protection. These features are the specific primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific primary constituent elements (PCEs) for the southwest Alaska DPS from its biological needs, as described in the Background section of this proposed rule and the following information.

Space for Individual and Population Growth and for Normal Behavior

Sea otters exhibit complex movement patterns related to habitat characteristics, social organization, and reproductive biology. It is likely that movements differ among populations depending on whether a population is at or near carrying capacity or has access to unoccupied suitable habitat into which it can expand (Riedman and Estes 1990, p. 58). Most research into sea otter movements has been conducted where unoccupied habitat is available to dispersing animals. Early research in the Aleutian Islands by Kenyon (1969, p. 204) also found that males have larger home ranges than females and described the female sea otter's home range as including 8–16 km (5.0–9.9 mi) of contiguous coastline. Male sea otter home ranges are highly variable. For territorial (breeding) males, the area defended is smaller than that of a female range, but the territory is not necessarily defended year-round and may include larger scale movements to more productive feeding grounds. Breeding may not occur until a male is older (7–10 years) and in an established population. Little is known about the home range of non-breeding males. In the listed region, where dramatic reduction in numbers have occurred, even less is known about movement patterns and home range sizes (A. Doroff, USFWS, pers. comm. 2008).

At present, sea otters occur throughout nearly all of their former range in southwest Alaska, albeit at considerably lower densities than were present prior to the recent population decline that led to the listing of the DPS. Space for individual and population growth and for normal behavior does not appear to be a limiting factor for this DPS.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The sea otter is a generalist predator, known to consume a wide variety of different prey species (Kenyon 1969, p. 110; Riedman and Estes 1990, p. 36; Estes and Bodkin 2002, p. 847). With few exceptions, their prey consist of sessile, or slow-moving, benthic invertebrates such as mollusks, crustaceans, and echinoderms, including sea urchins. Foraging occurs in habitats with rocky and soft sediment substrates between the high intertidal zone to depths slightly in excess of 100 m (328.1 ft). Preferred foraging habitat is generally in depths less than 40 m (131.2 ft; Riedman and Estes 1990, p. 31), although studies in southeast Alaska have found that some animals forage mostly at depths from 40–80 m (131.2–262.5 ft; Bodkin et. al. 2004, p. 318).

The diet of sea otters is usually studied by observing prey items brought to the surface for consumption, and therefore diet composition is usually expressed as a percentage of all identified prey that belong to a particular prey species or type. Although the sea otter is known to prey on a large number of species, only a few tend to predominate in the diet in any particular area. Prey type and size depends on location, habitat type, season, and length of occupation.

Sea otters can be very diverse in their diets. Different habitats offer different types of prey. There are about 200 known prey species for sea otters, but the dominant ones that tend to sustain the population are crab, clam, urchin, and mussel. The predominately soft-sediment habitats of southeast Alaska, Prince William Sound, and Kodiak Island support populations of clams that are the primary prey of sea otters. Throughout most of southeast Alaska, burrowing clams (species of *Saxidomus, Protothaca, Macoma*, and *Mya*) predominate in the sea otter's diet (Kvitek *et al.* 1993, p. 172). They account for more than 50 percent of the identified prey, although urchins (*S. droebachiensis*) and mussels (*Modiolis modiolis, Mytilus* spp., and *Musculus* spp.) can also be important. In Prince William Sound and Kodiak Island, clams account for 34–100 percent of the otter's prey (Calkins 1978, p. 127; Doroff and Bodkin 1994, p. 202; Doroff and DeGange 1994, p. 706). Mussels (*Mytilus trossulus*) apparently become more important for sea otters as a prey base as the length of occupation by sea otters increases, ranging from 0 percent of their prey base at newly occupied sites at Kodiak to 22 percent of their prey base in long-occupied areas (Doroff and DeGange 1994, p. 709). Crabs (*C. magister*) were once important sea otter prey in eastern Prince William Sound, but apparently have been depleted by otter foraging and are no longer eaten in large numbers (Garshelis *et al.* 1986, p. 642). Sea urchins are minor components of the sea otter's diet in Prince William Sound and the Kodiak archipelago. In contrast, the diet in the Aleutian, Commander, and Kuril Islands is dominated by sea urchins and a variety of fin fish (Kenyon 1969, p. 116; Estes *et al.* 1982, p. 250). Sea urchins tend to dominate the diet of low-density sea otter populations, whereas more fishes are consumed in populations near equilibrium density (Estes *et al.* 1982, p. 250). For unknown reasons, fish are rarely consumed by sea otters in regions east of the Aleutian Islands.

As the population has declined in the past 20 years throughout much of the range of the southwest Alaska DPS of the northern sea otter, prey species such as sea urchins have increased in both size and abundance (Estes *et al.* 1998, p. 474). Recent studies of sea otter body condition indicate improved overall health and suggest that limited nutritional resources were not the cause of the observed population decline (Laidre *et al.* 2006, p. 987). Although food, water, air, light, minerals, or other nutritional or physiological requirements do not appear to be a limiting factor, availability of sufficient prey resources and areas in which to forage is essential to the conservation of the DPS.

Cover or Shelter

Estes *et al.* (1998, p. 473) believe the decline of sea otters in southwest Alaska is the result of increased predation, most likely by killer whales (*Orcinus orca*). These authors examined a suite of information and concluded that the recent population decline was likely not due to food limitation, disease, or

reduced productivity. Several lines of evidence, including increased frequency of killer whale attacks and significantly higher mortality rates in Kuluk Bay on Adak Island, as compared to Clam Lagoon, a protected area that is inaccessible to killer whales, also support this conclusion (Estes *et al.* 1998, p. 473).

A shift in distribution toward the shoreline has also been observed in the western and central Aleutian Islands, which may allow otters easier escape onto the land. In August 2007, the Service and USGS conducted skiff-based surveys in the Near and Rat Island groups in the western Aleutians. In addition to recording the number and approximate location of every otter sighting, observers also recorded the approximate distance to the nearest shore. The median distance to shore for 811 sea otters observed was 10 m (32.8 ft); 90 percent of all otters observed were within 100 m (328.1 ft) (USFWS unpublished information). Aerial survey data indicate that in some areas, the majority of the remaining sea otter population inhabits sheltered bays and coves, which may also provide protection from marine predators (USFWS unpublished information).

Canopy-forming kelps (including species of *Macrocystis, Alaria*, and to a lesser extent *Nereocystis*), provide resting habitat (Kenyon 1969, p. 57; Riedman and Estes 1990, p. 23), and may also provide protection from marine predators (C. Matkin, personal communication). Kelp forests occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition, killer whales may be less likely to forage in shallow, constricted areas less than 2 m (6.6 ft) in depth (C. Matkin, personal communication).

Based on our understanding of threats to the southwest Alaska DPS, we believe that features that provide protection from marine predators, especially killer whales, are essential to the conservation of the DPS.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

There appears to be a positive relationship between shoreline complexity and sea otter density (Riedman and Estes 1990, p. 23). Although not obligatory, headlands, coves, and bays appear to offer preferred resting habitat, particularly to females with pups, presumably because they provide protection from high wind and sea conditions. Surveys of sea otters in southwest Alaska do not indicate that pup production is a limiting factor for the DPS (USFWS and USGS unpublished information).

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

Within the range of the southwest Alaska DPS of the northern sea otter, the vast majority of sea otter habitats are undisturbed, and are representative of the historical, geographical, and ecological distributions of the species.

Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter

Within the geographical area occupied by the southwest Alaska DPS of the northern sea otter at the time of listing, we must identify the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS (i.e., the essential physical and biological features) that may require special management considerations or protections.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species, we have determined that the southwest Alaska DPS of the northern sea otter's PCEs are:

(1) Shallow, rocky areas where marine predators are less likely to forage, which are waters less than 2 m (6.6 ft) in depth,

(2) Nearshore waters that may provide protection or escape from marine predators, which are those within 100 m (328.1 ft) from the mean high tide line and

(3) Kelp forests that provide protection from marine predators, which occur in waters less than 20 m (65.6 ft) in depth.

(4) Prey resources within the areas identified by PCEs 1–3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

We propose units for designation because each of these units contains sufficient PCEs to support at least one of the species' life history functions. Some units contain all of these and support multiple life processes, while some units contain only a portion of PCEs, necessary to support the species' particular use of that habitat.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the occupied areas contain features that are essential to the conservation of the species and that may require special management considerations or protections. The range of the southwest Alaska DPS of the northern sea otter is sparsely populated by humans. There are only 31 populated communities located within an area that contains approximately 18,000 km (11,184 mi) of coastline. The human population within the range of the DPS is approximately 17,000 persons living in 31 communities (State of Alaska Department of Commerce, Community, and Economic Development Database 2006). The scale of human activities that occur within the proposed critical habitat areas is exceedingly small. Potential activities that could harm the identified physical and biological features include, but are not limited to, dredging or filling associated with construction of airports, seaports, and harbors; commercial shipping; and oil and gas development and production.

Pollution from various potential sources, including oil spills from vessels, or discharges from oil and gas drilling and production, could render areas containing the identified physical and biological features unsuitable for use by sea otters, effectively negating the conservation value of these features. Because of the vulnerabilities to pollution sources, these features may require special management or protection through such measures as placing conditions on Federal permits or authorizations to stimulate special operational restraints, mitigative measures, or technological changes.

The shipping industry transports various types of petroleum products both as fuel and cargo within the range of the southwest Alaska DPS. Information about the types and quantities of both persistent and non-persistent oil has been summarized in a report on vessel traffic within the Aleutians subarea (Nuka Research and Planning Group 2006). Persistent fuels such as #6 bunker oil, bunker C, and IFO 380 have low dissipation and evaporation rates, and will remain on the surface of marine waters or along shorelines much longer than non-persistent fuel such as diesel, gasoline, and aviation fuel. Approximately 3,100 ship voyages occur through the Aleutians each year. Most of these voyages are by bulk and general freight ships (1,300) and container ships (1,200). The median fuel capacity for bulk and general freight ships is 470,000 gallons of persistent fuel oil; for container ships, the median capacity is 1.6 million gallons of persistent fuel oil. In addition, there are about 265 voyages by motor vehicle carriers with an estimated average fuel capacity of 500,000 gallons of persistent fuel oil.

There are also approximately 22 voyages by tanker ships transporting about 400 million gallons of refined oil. The figures quoted above are for the Aleutians subarea only, which includes the North Pacific great circle route from the west coast of North America to Asia. Information about shipping traffic that occurs in other parts of the southwest Alaska DPS is not well-documented, though it is presumably on a much smaller scale compared to what occurs through the Aleutians.

Numerous instances of vessel incidents have been documented in the Aleutians over the past 15 years, including loss of maneuverability, grounding, and oil spills (Nuka Research and Planning Group 2006, p. 29). Nearly 500 incidents affecting the seaworthiness of U.S. vessels were reported in the Aleutians from 1990 through July 2006. U.S. vessels reporting incidents were usually smaller than foreign vessels, and were primarily fishing vessels. An additional 48 incidents affecting seaworthiness of foreign vessels were reported between 1991 and July 2006. The bulk grain ship *M/V Selendang Ayu* which ran aground on Unalaska Island in December 2004, is known to have resulted in the death of two sea otters. The long-term impacts of that spill on sea otter habitat use are not yet known.

Various safeguards have been established since the 1989 *Exxon Valdez* oil spill to minimize the likelihood of another spill of catastrophic proportions in Prince William Sound. Tankers, other vessels, fuel barges, and onshore storage facilities are potential sources of oil and fuel spills that could affect sea otters in the southwest Alaska DPS. A review of the Alaska Department of Environmental Conservation database indicates no crude-oil spills were reported within the range of the southwest Alaska DPS during the 10-year period from July 1, 1995, to June 30, 2005. Of the 520 reported spills of refined products, 82 percent were from vessels; most of these (70 percent) involved quantities smaller than 10 gallons. The majority of vessel spills occurred in the western Aleutian (149), eastern Aleutian (107), and Kodiak, Kamishak, Alaska Peninsula (130) management units. Only 7 spills were reported where the quantity was greater than 5,000 gallons of material. The largest was the *M/V Selendang Ayu*, which spilled 321,052 gallons of IFO 380 fuel and an additional 14,680 gallons of diesel.

In 2006, the U.S. Coast Guard, the State of Alaska, and the National Academies of Science met to begin plans for the development of a comprehensive risk assessment for the Aleutian Islands. Although the probability of occurrence of a catastrophic oil spill may be relatively small, the potential for disastrous consequences suggest that measures to prevent or respond to spills may be important to the recovery of the southwest Alaska DPS. The Coast Guard and Maritime Transportation Act of 2004 (H.R. 2443) requires oil-spill contingency plans for vessels over 400 gross tons that call on U.S. ports. In addition to contingency plans for vessels of this size class, the Alaska Department of Environmental Conservation (ADEC) has both a unified spill-response plan as well as 10 Subarea plans. The southwest Alaska DPS is covered by the Aleutian, Bristol Bay, Kodiak, and Cook Inlet Subarea plans. In addition, ADEC is developing Geographic Response Strategies (GRS) that are designed to be a supplement to the Subarea Contingency Plans for Oil and Hazardous Substances Spills and Releases. The GRS are the current standard for site-specific oil-spill-response planning in Alaska.

The first and primary phase of an oil-spill response is to contain and remove the oil at the scene of the spill or while it is still on the open water, thereby reducing or eliminating impacts on shorelines or sensitive habitats. If some of the spilled oil escapes the first-phase containment and removal, the second, but no less important, phase is to intercept, contain, and remove the oil in the nearshore area. The intent of phase two is the same as phase one: remove the spilled oil before it affects sensitive environments. If phases one and two are not fully successful, a third phase (GRS) is designed to protect sensitive areas in the path of the oil. The purpose of phase three is to protect selected sensitive areas from the impacts of a spill or to minimize that impact to the maximum extent practical. Proposed critical habitat for the southwest Alaska DPS of the northern sea otter will be incorporated into the GRS system to facilitate this additional level of spill response.

Existing commercial fishing activities, and their target species (which are not considered prey for sea otters), within southwest Alaska primarily occur outside of the areas proposed as critical habitat in this rule (Funk 2003, p. 2). With the exception of oil spills from shipwrecks, we do not believe that existing commercial fishing activities in southwest Alaska have the potential to harm the identified physical and biological features for the southwest Alaska DPS of the northern sea otter.

Criteria Used To Identify Critical Habitat

We are proposing to designate critical habitat for the southwest Alaska DPS of the northern sea otter in areas that were occupied at the time of listing and contain sufficient PCEs: (1) To support life history functions essential to the conservation of the DPS, and (2) which may require special management considerations or protection. Much of the range of the DPS occurs within the Aleutian archipelago, and although it is possible that otters have disappeared from some of the small islands since the time of listing, we have no information that indicates any portion should be considered unoccupied habitat. As a result, we consider the Aleutian archipelago to be occupied habitat.

Unlike habitats for terrestrial species, some of the various characteristics of sea otter habitat are poorly mapped. Although shoreline boundaries are reasonably well-documented, the bathymetric data for southwest Alaska exist at a variety of spatial resolutions. Benthic substrate types are also poorly mapped. Other features, such as the distribution and abundance of sea otter prey species, and the spatial extent of kelp beds, may be dynamic over time. This lack of specificity makes it difficult to explicitly identify and map areas that contain the PCEs for this DPS beyond a certain geographic scale.

Areas that provide protection from marine predators are likely the most essential to the conservation of this DPS. Despite the absence of information necessary to map these areas with precision, we can define criteria that will contain the essential PCEs. Kelp forests that provide resting habitat and protection from marine predators occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition to identifying an approximate seaward extent of kelp forests, the 20-m (65.6-ft) depth contour also encompasses the nearshore shallow areas (less than 2 m (6.6 ft)) where marine predators may be less likely to forage. The 20-m (65.6-ft) depth contour also has considerable overlap with the nearshore (<100 m (328.1 ft)) areas where otters can escape predators by hauling out on land. Areas of shallow water less than 20 m (65.6 ft) in depth that are not contiguous with the mean high tide line may provide less protection from marine predators. Nearshore marine waters ranging from mean high tide to 20 m (65.6 ft) in water depth or that occur within 100 m (328.1 ft) of the mean high tide line (or both) therefore contain the necessary PCEs for protection from marine predators

(Figure 1). Based on numerous studies of sea otter foraging depths, as well as the distribution of the remaining sea otter population in nearshore, shallow water areas, we believe that the areas defined by PCEs 1–3 also contain sufficient sea otter prey resources. We have no reason to believe that any of the areas within the proposed critical habitat designation are unable to support the energetic requirements of this species.

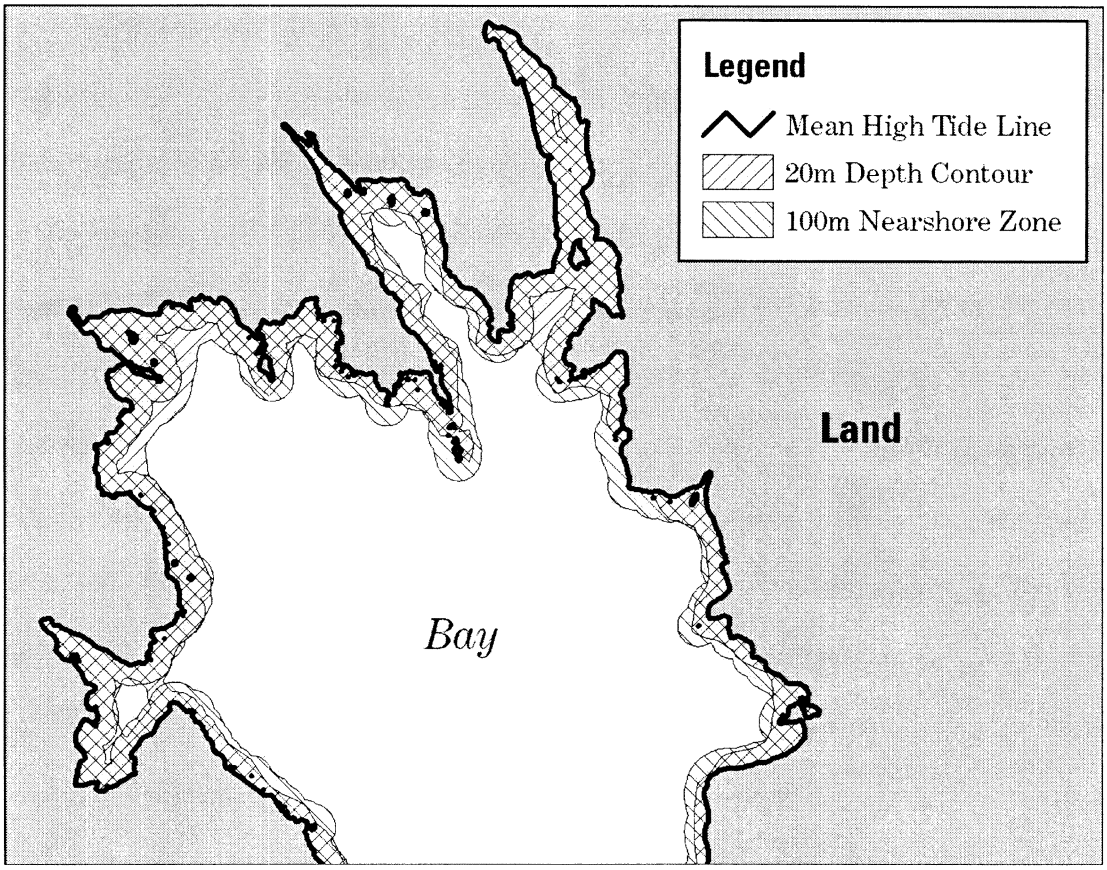


Figure 1. Shaded areas included within either the 20-m (65.6-ft) depth contour or the 100-m (328.1-ft) nearshore zone, or both (i.e., where they overlap) are considered critical habitat for the southwest Alaska DPS of the northern sea otter.

When determining proposed critical habitat boundaries within this proposed rule, we made every effort to avoid including developed areas that lack PCEs for the southwest Alaska DPS of the northern sea otter. The scale of the map we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas, such as piers, docks, harbors, marinas, jetties, and breakwaters. Any such structures inadvertently left inside critical habitat boundaries shown on the map of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

Proposed Critical Habitat Designation

We are proposing five units as critical habitat for the southwest Alaska DPS of the northern sea otter. In 2006, the Service convened a Recovery Team to develop a recovery plan for the southwest Alaska DPS of the northern sea otter. As of the publication date of this proposed rule, the Recovery Team has met five times, and a draft recovery plan is in preparation. As the range of the southwest Alaska DPS of the northern sea otter includes approximately 18,000 km (11,184.7 mi) of coastline, the team has proposed that the DPS be subdivided into 5 management units, based on criteria such as habitat type and population trajectory. In the interest of clarity, we propose designating critical habitat units that correspond to the management units proposed by the Recovery Team. Only those areas within each management unit that meet the criteria identified above are being proposed as critical habitat—namely, those areas that contain one or more PCEs and may require special management considerations or protection. Detailed, colored maps of areas proposed as critical habitat in this proposed rule are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm.* Hard copies of maps can be obtained by contacting the Marine Mammals

Management Office (see **FOR FURTHER INFORMATION CONTACT**).

The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the DPS. Table 1 shows the occupied units. The 5 units we propose as critical habitat are: (1) Western Aleutian Unit; (2) Eastern Aleutian Unit; (3) South Alaska Peninsula Unit; (4) Bristol Bay Unit; and (5) Kodiak, Kamishak, Alaska Peninsula Unit.

TABLE 1—OCCUPANCY OF NORTHERN SEA OTTERS BY PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Currently occupied?	Estimated size of unit in km² (mi²)	State/Federal ownership ratio (percent)
1. Western Aleutian	Yes	Yes	1,551 (599)	100/0
2. Eastern Aleutian	Yes	Yes	893 (345)	100/0
3. South Alaska Peninsula	Yes	Yes	4,945 (1,909)	85/15
4. Bristol Bay	Yes	Yes	1,080 (417)	96/4
4a. Amak Island	Yes	Yes	31 (12)	77/23
4b. Izembek Lagoon	Yes	Yes	337 (130)	100/0
4c. Port Moller/Herendeen Bay	Yes	Yes	712 (275)	94/6
5. Kodiak, Kamishak, Alaska Peninsula	Yes	Yes	6,757 (2,609)	89/11
Total			15,226 (5,879)	90/10

We present brief descriptions of all proposed critical habitat units, and reasons why they meet the definition of critical habitat for the southwest Alaska DPS of the northern sea otter, below. Calculation of areas for units and subunits that include the 20-m (65.6-ft) depth contour as a criterion are approximations estimated from GIS data layers of hydrographic survey data compiled by the National Oceanic and Atmospheric Administration (NOAA), the U.S. Geological Survey, and the Service. Consultations under section 7 of the Act should use the best available bathymetric data on a case-by-case basis. In some instances, these data may be based on other units of measurement (such as feet or fathoms), in which case the bathymetric contour that is closest to 20 m (65.6 ft) should be used. For users of NOAA nautical charts, the 10-fathom (60-ft) depth contour is a suitable approximation for the 20-m (65.6-ft) depth contour.

Although no lands above mean high tide are proposed as critical habitat, ownership of lands adjacent to critical habitat may be of interest to reviewers of this proposal (Table 2).

TABLE 2—OWNERSHIP STATUS OF LANDS ADJACENT TO PROPOSED CRITICAL HABITAT

Unit	Federal (percent)	State (percent)	Private (percent)	Alaska Native (percent)
1. Western Aleutian	80.2	0.0	0.0	19.8
2. Eastern Aleutian	10.2	0.0	0.0	89.8
3. South Alaska Peninsula	21.1	0.4	0.0	78.5
4. Bristol Bay	36.7	41.5	0.0	21.8
4a. Amak Island	100.0	0.0	0.0	0.0
4b. Izembek Lagoon	89.4	0.0	0.0	10.6
4c. Port Moller/Herendeen Bay	4.9	66.1	0.0	29.0
5. Kodiak, Kamishak, Alaska Peninsula	30.2	17.4	0.0	52.4
Total	37.9	8.5	0.0	53.6

Unit 1: Western Aleutian Unit

Unit 1 consists of at least 1,551 km² (599 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Hydrographic survey data in the vicinity of Atka and Amlia islands is insufficient to delineate the 20-m (65.6-ft) depth contour, so our area calculation may slightly underestimate the total area of this unit. This unit ranges from Attu Island in the west to Kagamil Island in the east, was occupied at the time of listing, and is currently occupied. The majority (80.2 percent) of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. In addition, all of the proposed critical habitat within this unit is located within State of Alaska waters (defined as those within 3 mi (4.82 km) of mean high tide).

The Western Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 2: Eastern Aleutian Unit

Unit 2 consists of an estimated 893 km² (345 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This unit ranges from Samalga Island in the west to Ugamak Island in the east, was occupied at the time of listing, and is currently occupied. The majority (89.8 percent) of the lands bordering this unit are owned or selected (but not yet conveyed) by Alaska Natives. In addition, all of the proposed critical habitat within this unit is located within State of Alaska waters.

The Eastern Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 3: South Alaska Peninsula Unit

Unit 3 consists of an estimated 4,945 km² (1,909 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for this unit have considerably lower spatial resolution than the other units. This unit ranges from Unimak Island in the west to Castle Cape in the east, was occupied at the time of listing, and is currently occupied. The majority (78.5 percent) of the lands bordering this unit are owned or selected (but not yet conveyed) by Alaska Natives. The vast majority (85 percent) of the proposed critical habitat within this unit is located within State of Alaska waters.

The South Alaska Peninsula Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region and along the northern great circle route.

Unit 4: Bristol Bay Unit

Unit 4 consists of an estimated 1,080 km² (417 mi²) of the nearshore marine environment. This unit is further subdivided into 3 subunits: (4a) Amak Island; (4b) Izembek Lagoon; and (4c) Port Moller/Herendeen Bay. With the exception of Amak Island, the coastline contained within this unit is relatively simple and lacks kelp forests. For most of this unit, the 20-m (65.6-ft) depth contour used as a criterion for critical habitat in other units does not identify features that provide protection from marine predators, and is applicable only to the Amak Island subunit. Other criteria are used to identify the Izembek Lagoon and Port Moller/Herendeen Bay subunits, as described below. All three subunits within the Bristol Bay unit were occupied at the time of listing, and are currently occupied. Additional information about each subunit is included below.

Subunit 4a: Amak Island Subunit

Subunit 4a consists of an estimated 31 km² (12 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This subunit surrounds Amak Island in Bristol Bay, was occupied at the time of listing, and is currently occupied. Large groups of sea otters have been observed within the kelp forests within this subunit (USFWS unpublished information). All of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. Most (77 percent) of the proposed critical habitat within this subunit is located within State of Alaska waters, a small portion of which (1.2 km², 0.46 mi²) is also located within the boundaries of the Izembek State Game Refuge.

The Amak Island Subunit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this unit. An environmental impact statement is in preparation, and will be completed prior to the lease sale. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4b: Izembek Lagoon Subunit

Subunit 4b consists of an estimated 337 km² (130 mi²) of the nearshore marine environment within the Izembek Lagoon and Moffett Lagoon systems. Sea otters are known to frequent the lagoon system and regularly haul out on the islands and sandbars that form the northern boundary of these systems, such as Glen, Operl, and Neumann Islands (USFWS unpublished information). Large numbers of otters have also been observed hauling out along the edges of the sea ice within the lagoon in winter (USFWS unpublished information). This subunit was occupied at the time of listing, and is currently occupied. The majority (89.4 percent) of the lands bordering this unit are federally owned within the Izembek National Wildlife Refuge. The proposed critical habitat within this subunit is located within State of Alaska waters, most of which (99 percent) is also within the boundaries of the Izembek State Game Refuge.

The Izembek Lagoon Subunit contains some of the PCEs (1, 2 and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4c: Port Moller/Herendeen Bay Subunit

Subunit 4c consists of an estimated 712 km² (275 mi²) of the nearshore marine environment within the Port Moller and Herendeen Bay systems. This subunit was occupied at the time of listing, and is currently occupied. Aerial surveys conducted in 2000 and 2004, as well as additional reported observations, indicate that these areas may contain several thousand sea otters at any given time (Burn and Doroff 2005, p. 277; USFWS unpublished information). The seaward boundary of this subunit extends from Point Edward on the Alaska Peninsula to the western tip of Walrus Island, and from Wolf Point on the eastern tip of Walrus Island to Entrance Point on the Alaska Peninsula. The majority (66.1 percent) of the lands bordering to this unit are owned or selected (but not yet conveyed) by the State of Alaska. Most (94 percent) of the critical habitat within this subunit is located within State of Alaska waters, with a portion (140.8 km² (54.4 mi²)) located within the boundaries of the Port Moller State Critical Habitat area.

The Port Moller/Herendeen Subunit contains some of the PCEs (1,2, and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and

protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Unit 5: Kodiak, Kamishak, Alaska Peninsula Unit

Unit 5 consists of an estimated 6,757 km² (2,609 mi²), collectively, of the nearshore marine environment ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for parts of this unit have considerably lower spatial resolution than the other units. This unit ranges from Castle Cape in the west to Tuxedni Bay in the east, and includes the Kodiak archipelago. This unit was occupied at the time of listing, and is currently occupied. Slightly more than half (52.4 percent) of the lands bordering this unit are either owned or selected (but not yet conveyed) by Alaska Natives. The majority (89 percent) of the proposed critical habitat within this unit is located within State of Alaska waters, a small portion which (41.0 km², 15.8 mi²) is also located within the boundaries of the Tugidak Island State Critical Habitat area.

The Kodiak, Kamishak, Alaska Peninsula Unit contains all the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et. al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

In addition, under section 7(a)(4) of the Act, Federal agencies must confer with the Service on any agency action that is likely to result in destruction or adverse modification of proposed critical habitat.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''Reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the southwest Alaska DPS of the northern sea otter or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized do not require section 7 consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the PCEs to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the southwest Alaska DPS of the northern sea otter.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the southwest Alaska DPS of the northern sea otter include, but are not limited to:

(1) Actions that would directly impact the PCEs that provide protection from marine predators. Such activities could include, but are not limited to, dredging, filling, and construction of docks, seawalls, pipelines, or other structures. Loss of the PCEs could result in increased predation pressure on the remaining sea otter population, and potentially affect the conservation of the DPS.

(2) Actions that would reduce the availability of sea otter prey species. Such activities could include, but are not limited to, dredging, filling, construction of docks, seawalls, pipelines, or other structures, and development of new fisheries for sea otter prey species. Otters that are using critical habitat for protection from marine predators must also be able to feed in these areas. Activities that reduce availability of prey may cause otters to forage outside of these protective areas, thus increasing their vulnerability to predators.

(3) Actions that would render critical habitat areas unsuitable for use by sea otters. Such activities could include, but are not limited to, human disturbance or pollution from a variety of sources, including discharges from oil and gas drilling and production or spills of crude oil, fuels, or other hazardous materials from vessels, primarily in harbors or other construction ports for marine vessels. While it is not legal to discharge fuel or other hazardous materials, it does happen more often in these areas than in other areas. These activities could displace sea otters from areas that provide protection from marine predators.

Exemptions and Exclusions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

Eareckson Air Station, located on Shemya Island within the western Aleutian unit has a completed INRMP that was last updated in 2007. This INRMP recognizes the importance of kelp beds to sea otters (U.S. Air Force 2007, p. 39), and notes that the only impacts to kelp may be from occasional barge traffic. In addition to Eareckson, the Air Force has a completed INRMP for 4 inactive sites (Nikolski, Driftwood Bay, Port Moller, and Port Heiden) within the range of the southwest Alaska DPS (U.S. Air Force 2001). All of these sites were deactivated between 1977 and 1978, and either demolished or removed between 1988 and 1994. Of these, the Port Heiden site is the only one that includes shoreline areas. All critical habitat described in this proposal occurs below the mean high tide line and is therefore not within the boundaries of the Department of Defense facility. Therefore, there are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make the determination that the benefits of excluding a particular area outweigh the benefits of including it in the designation, then we can exclude the area only if such exclusion would not result in the extinction of the species.

Under section 4(b)(2) of the Act, we must consider all relevant impacts, including economic impacts. We consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. We also consider whether the landowners have developed any habitat conservation plans (HCPs) for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter are not owned or managed by the Department of Defense, there are currently no HCPs for the southwest Alaska DPS of the northern sea otter, and the proposed designation does not include any tribal lands or trust resources.

We anticipate no impact to national security, Tribal lands, or HCPs from this proposed critical habitat designation. Based on the best available information, we believe that all of these proposed critical habitat units contain the features essential to the southwest Alaska DPS of the northern sea otter. At this time, we have not analyzed areas for which the benefits of exclusion outweigh the

benefits of inclusion; therefore we are not identifying any specific exclusions for the final rule designating critical habitat for the DPS. However, during the development of a final designation, we will be considering economic and other relevant impacts and additional conservation plans, if available, public comments, and other new information such that areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

Economics

Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if the Secretary determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

In compliance with section 4(b)(2) of the Act, we are preparing an analysis of the economic impacts of proposing critical habitat for the southwest Alaska DPS of the northern sea otter to evaluate the potential economic impact of the designation. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or from the Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**). We may exclude areas from the final rule based on the information in the economic analysis.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are obtaining the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days of the date of publication of this proposal (see the **DATES** section). Send your request to the person named in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Editorial Changes to the Table at 50 CFR 17.11(h)

We also propose certain editorial changes to the northern sea otter's entry in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). First, we would update the entry to accurately reflect the citation of the special rule for this DPS, which was published on August 15, 2006, at 71 FR 46864. In that final rule, we inadvertently neglected to update the entry to note the special rule at 50 CFR 17.40(p). Second, we are providing the ''When Listed'' date for the entry. That date was not included when we published the final rule listing the southwest Alaska DPS of the northern sea otter as threatened (70 CFR 46366). These editorial changes would help ensure the entry for the northern sea otter in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) is complete and accurate.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.''

These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because the areas being proposed for critical habitat designation occur within State of Alaska waters. The State of Alaska does not fit the definition of ''small governmental jurisdiction.'' Waters adjacent to Native-owned lands are still owned and managed by the State of Alaska. In most cases, development around Native villages is happening with funding from Federal or State sources (or both). Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the southwest Alaska DPS of the northern sea otter in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter does not pose significant takings implications for lands within or affected by the designation.

Federalism

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Alaska. The designation of critical habitat in areas currently occupied by the southwest Alaska DPS of the northern sea otter imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the southwest Alaska DPS of the northern sea otter.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This determination was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one

of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. As all the proposed critical habitat units occur seaward from the mean high tide line, we have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation, and no tribal lands essential for the conservation, of the southwest Alaska DPS of the northern sea otter. Therefore, we have not proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter on tribal lands.

We do not expect the proposed critical habitat to have any impact on tribal subsistence activities. All subsistence hunting would take place in or on State lands or waters. Unless subsistence hunting is determined to be ''materially and negatively impacting the DPS,'' then harvest would not be regulated.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from the three subunits of the Bristol Bay proposed critical habitat unit. We do not expect this proposed rule to significantly affect energy supplies, distribution (including shipping channels), or use because most oil and gas development activities would not overlap with the habitats used by northern sea otters, and we would not expect the activities to cause significant alteration of the PCEs. Any proposed development project likely would have to undergo section 7 consultation to ensure that the actions would not destroy or adversely modify designated critical habitat. Consultations may entail modifications to the project to minimize the potential adverse effects to northern sea otter critical habitat. A spill-response plan would have to be developed to minimize the chance that a spill would have negative effects on sea otters or critical habitat. However, we conduct thousands of consultations every year throughout the United States, and in almost all cases, we are able to accommodate both project and species' needs. We expect that to be the case here. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this proposed rulemaking is available upon request from the Field Supervisor, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary author of this package is the Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), revise the entry for ''Otter, northern sea'' under ''MAMMALS'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Otter, northern sea.	*Enhydra lutris kenyoni*	U.S.A., (AK, WA).	Southwest Alaska, from Attu Island to Western Cook Inlet, including Bristol Bay, the Kodiak Archipelago, and the Barren Islands.	T	August 9, 2005.	17.95(a)	17.40(p)
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (a) by adding an entry for ''Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment,'' in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) Mammals.

* * * * *

Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment

(1) Critical habitat units are in Alaska, as described below.

(2) The primary constituent elements of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter are:

(i) Shallow, rocky areas where marine predators are less likely to forage, which are in waters less than 2 m (6.6 ft) in depth;

(ii) Nearshore waters within 100 m (328.1 ft) from the mean high tide line; and

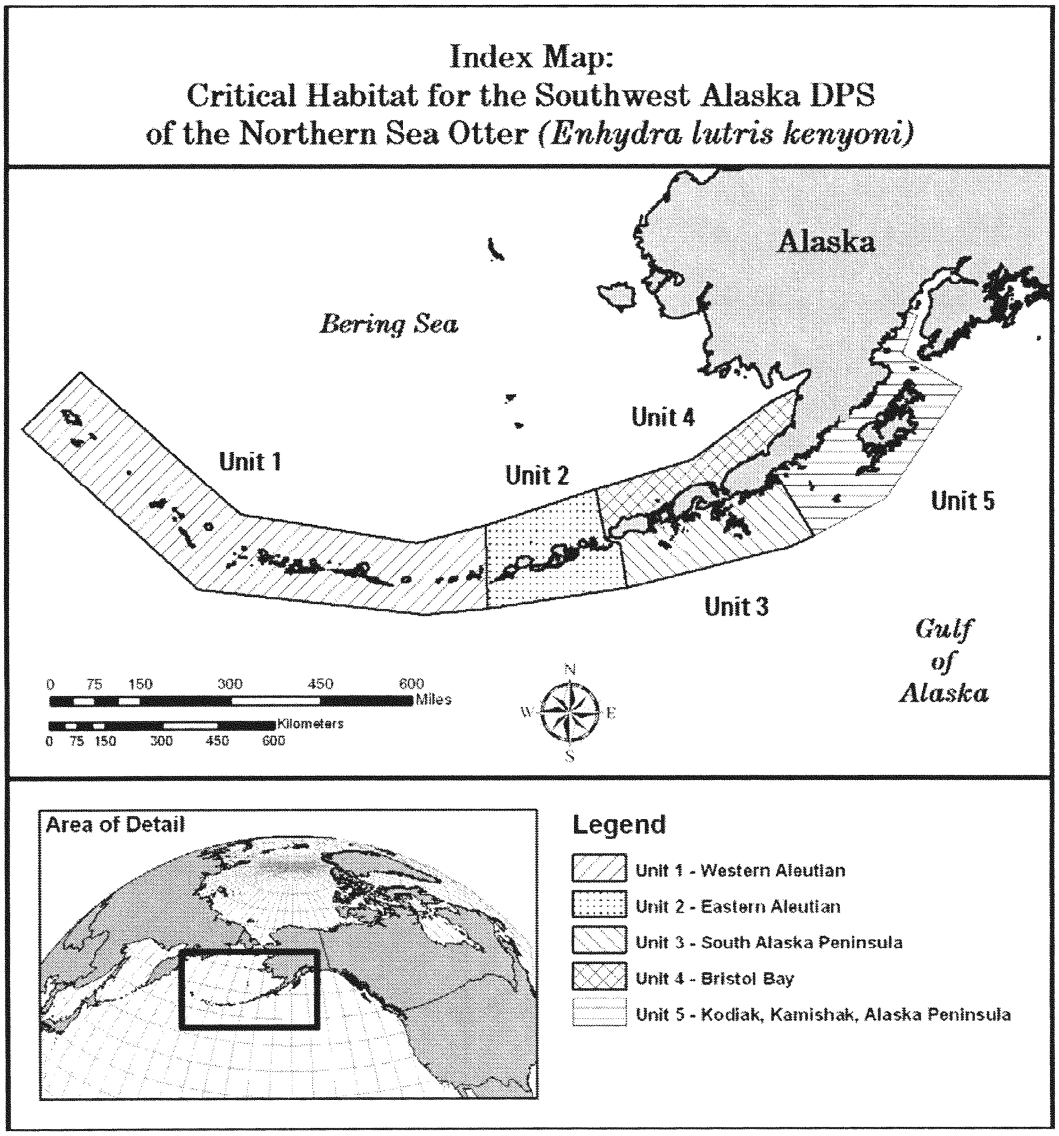
(iii) Kelp forests, which occur in waters less than 20 m (65.6 ft) in depth.

(iv) Prey resources within the areas identified by PCEs 1–3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

(3) Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, or other structures) and the land on which they are located existing within the boundaries on the effective date of this rule.

(4) Critical habitat map units. Boundaries of critical habitat were derived from GIS data layers of hydrographic survey data developed by the National Oceanic and Atmospheric Administration. To estimate the size of each critical habitat unit, the data were projected into Alaska Standard Albers Conical Equal Area on the North American Datum of 1983. Given the large geographic range of this DPS, some two-dimensional areas appear as one-dimensional features at these map scales.

(5) Note: Index Map for critical habitat for the southwest Alaska DPS of the northern sea otter follows:



(6) *Unit 1:* Western Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Adak, Agattu, Alaid, Amatignak, Amchitka, Amlia, Amukta, Anagaksik, Asuksak, Atka, Attu, Aziak, Bobrof, Buldir, Carlisle, Chagula, Chuginadak, Chugul, Crone, Davidof, Elf, Gareloi, Great Sitkin, Herbert, Igitkin, Ilak, Kagalaska, Kagamil, Kanaga, Kanu, Kasatochi, Kavalga, Khvostof, Kiska, Koniuji, Little Kiska, Little Sitkin, Little Tanaga, Nizki, Ogliuga, Oglodak, Rat, Sadatanak, Sagchudak, Salt, Seguam, Segula, Semisopochnoi, Shemya, Skagul, Tagadak, Tagalak, Tanaga, Tanaklak, and Ulak.

(7) *Unit 2:* Eastern Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Aiktak, Akutan, Amaknak, Arangula, Atka, Avatanak, Baby Islands, Bogoslof, Egg, Hog, Kaligagan, Rootok, Samalga, Sedanka, Tigalda, Ugamak, Umnak, Unalaska, Unalga, and Vsevidof.

(8) *Unit 3:* South Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from False Pass (54.242° N, 163.363° W) to Castle Cape (56.242° N, 158.117° W), and adjacent to the following islands: Andronica, Atkins, Big Koniuji, Bird, Brother, Caton, Chankliut, Chernabura, Cherni, Chiachi, Deer, Dolgoi, Egg, Goloi, Guillemot, Inner Iliask, Jacob, Karpof, Korovin, Little Koniuji, Mitrofania, Nagai, Near, Outer Iliask, Paul, Peninsula, Pinusuk, Poperechnoi, Popof, Road, Sanak, Shapka, Simeonof, Spectacle, Spitz, Turner, Ukolnoi, Ukolnoi, Unga, and Unimak Island from Scotch Cap (54.390° N, 164.745° W) to False Pass.

(9) *Unit 4:* Bristol Bay. This unit contains three subunits:

(i) Subunit 4a: Amak Island. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to Amak Island.

(ii) Subunit 4b: Izembek Lagoon. All waters from mean high tide line that occur within the polygon bounded by Glen, Operl, and Neumann Islands to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 55.249° N, 162.990° W; 55.255° N, 162.984° W from Cape Glazenap to Glen Island; 55.324° N, 162.901° W; 55.333° N, 162.888° W from Glen Island to Operl Island; 55.409° N, 162.683° W; 55.408° N, 162.621° W from Operl Island to Neumann Island; and 55.447° N, 162.582° W; 55.447° N, 162.577° W from Neumann Island to Moffet Point.

(iii) Subunit 4c: Port Moller/Herendeen Bay. All waters from mean high tide line that occur within the polygon bounded by Walrus Island to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 56.000° N, 160.877° W; 56.020° N, 160.854° W from Point Edward to Walrus Island; and 56.020° N, 160.805° W; 55.979° N, 160.584° W from Wolf Point to Entrance Point.

(10) *Unit 5:* Kodiak, Kamishak, Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from Castle Cape (56° 14.5′ N, 158° 7.0′ W) eastward to Cape Douglas (58.852° N, 153.250° W), and northward in Cook Inlet to Redoubt Point (60.285° N, 152.417° W), and adjacent to the following islands: Afognak, Aghik, Aghiyuk, Aiaktalik, Akhiok, Aliksemik, Amook, Anowik, Ashiak, Atkulik, Augustine, Ban, Bare, Bear, Central, Chirikof, Chisik, Chowiet, Dark, David, Derickson, Dry Spruce, Eagle, East Amatuli, East Channel, Garden, Geese, Hartman, Harvester, Hydra, Kak, Kateekuk, Kiliktagik, Kiukpalik, Kodiak, Kulik, Long, Marmot, Miller, Nakchamik, Ninagiak, Nord, Nordyke, Poltava, Raspberry, Sally, Shaw, Shuyak, Sitkalidak, Sitkanak, Spruce, Sud, Sugarloaf, Suklik, Sundstrom, Sutwick, Takli, Terrace, Tugidak, Twoheaded, Ugak, Ugalushik, Uganik, Unavikshak, Ushagat, West Amatuli, West Augustine, West Channel, Whale, and Woody.

* * * * *

Dated: December 1, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–28897 Filed 12–15–08; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Tuesday,
December 16, 2008

Part III

Department of Transportation

Federal Motor Carrier Safety Administration

49 CFR Parts 365, 385, 387, and 390
New Entrant Safety Assurance Process; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 365, 385, 387, and 390

[Docket No. FMCSA–2001–11061]

RIN 2126–AA59

New Entrant Safety Assurance Process

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA amends the New Entrant Safety Assurance Program regulations to raise the standard of compliance for passing the new entrant safety audit. The Agency identifies 16 regulations that are essential elements of basic safety management controls necessary to operate in interstate commerce and makes a carrier's failure to comply with any one of the 16 regulations an automatic failure of the safety audit. Additionally, if certain violations are discovered during a roadside inspection, the new entrant now will be subject to expedited actions to correct these deficiencies. The Agency now will also check compliance with the Americans with Disabilities Act and certain household goods-related requirements in the new entrant safety audit, if they apply to the new entrant's operation. Failure to comply with either of these requirements will not affect the outcome of the safety audit; however, the Agency will take appropriate actions to improve compliance. FMCSA clarifies changes to some of the existing new entrant regulations and establishes a separate new entrant application procedure and safety oversight program for non-North America-domiciled motor carriers.

Finally, the Agency has enhanced the quality and availability of its educational and technical assistance (ETA) materials to ensure applicants are knowledgeable about applicable Federal motor carrier safety standards. Because the Agency believes Form MCS–150A—Safety Certification for Application for USDOT Number is not an effective instrument for establishing knowledgeability, it is eliminating that form.

FMCSA believes this rule will improve the Agency's ability to identify at-risk new entrant carriers and ensure deficiencies in basic safety management controls are corrected before the new entrant is granted permanent registration. These changes do not impose additional regulatory requirements on any new entrant carrier because these carriers are already required to comply with all applicable rules.

DATES: *Effective:* This rule is effective: February 17, 2009. *Compliance:* Compliance with this rule is required beginning December 16, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Stephanie Haller, New Entrant Program Manager, Enforcement and Compliance Division. (202) 366–0178, *Stephanie.Haller@dot.gov*. Business hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing a 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; Page 19476).

The preamble is organized as follows:

I. Legal Basis for the Rulemaking
II. Regulatory History
  A. Interim Final Rule
  B. Notice of Proposed Rulemaking
III. Discussion of Comments to the NPRM and Section-by-Section Analysis of the Final Rule
IV. Rulemaking Analyses

I. Legal Basis for the Rulemaking

Title 49 U.S.C. 31144 authorizes the Secretary of Transportation (Secretary) to determine whether an owner or operator is fit to operate safely. Section 210(a) of the Motor Carrier Safety Improvement Act of 1999 [Pub. L. 106–159, 113 Stat. 1764, December 9, 1999] (MCSIA) added section 31144(g) [1] directing the Secretary to establish regulations to require each motor carrier owner and operator granted new operating authority to undergo a safety review within 18 months of starting operations. In issuing these regulations, the Secretary was required to: (1) Establish the elements of the safety review, including basic safety management controls; (2) consider their effects on small businesses; and (3) consider establishing alternate locations where such reviews may be conducted for the convenience of small businesses. The Secretary was also required to phase in the new entrant safety review requirements in a manner that takes into account the availability of certified motor carrier safety auditors. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators. The authority to establish such regulations has been delegated to the Federal Motor Carrier Safety Administration (FMCSA). 49 CFR 1.73(g).

Section 210(b) of MCSIA (codified as a note to 49 U.S.C. 31144) required the Secretary to initiate a rulemaking to establish minimum requirements for applicant motor carriers seeking Federal interstate operating authority to ensure such applicants are knowledgeable about applicable Federal motor carrier safety standards. The Secretary was directed to consider establishment of a proficiency examination, as well as other requirements, to ensure applicant knowledgeability.

In addition to expanding the Secretary's authority under section 31144, section 210 of MCSIA was a specific statutory directive consistent with the more general pre-existing legal authority provided by the Motor Carrier Safety Act of 1984 (the 1984 Act) [49 U.S.C. App. 2505 (1988), recodified at 49 U.S.C. 31136(a)], which requires the Secretary to prescribe regulations on commercial motor vehicle safety. The regulations required by the 1984 Act must prescribe minimum safety standards for commercial motor vehicles (CMVs). At a minimum, the regulations shall ensure: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators.

The rule changes the New Entrant Safety Assurance Program to improve the Agency's ability to identify at-risk new entrant motor carriers and ensures deficiencies are corrected before granting them permanent registration. It also ensures that applicants will become knowledgeable about Federal safety regulations before they commence interstate operations. As such, it implements the section 31136(a)(1)

[1] MCSIA originally codified sec. 31144(g) as sec. 31144(c) and directed that it be added at the end of 49 U.S.C. 31144 following preexisting subsections (c), (d), and (e). Section 4114(c)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, 119 Stat. 1144, August 10, 2005) (SAFETEA–LU) recodified this provision as sec. 31144(g).

mandate that FMCSA regulations ensure CMVs are maintained and operated safely. It does not add any new operational responsibilities on drivers pursuant to sections 31136(a)(2)–(a)(4).

II. Regulatory History

A. Interim Final Rule

In response to the statutory mandate in MCSIA, FMCSA published an interim final rule (IFR) titled *New Entrant Safety Assurance Process* (67 FR 31978) on May 13, 2002, which became effective January 1, 2003. All domestic and Canada-domiciled new entrants are subject to the New Entrant Safety Assurance Process. Mexico-domiciled new entrants are covered under a separate application process and safety monitoring system (see 67 FR 12652, 67 FR 12701, and 67 FR 12757 published March 19, 2002).

Under the existing New Entrant Safety Assurance Program, a motor carrier seeking to register as a new entrant is directed to the FMCSA Internet Web site to either obtain an application by mail or complete the application package online. The application package includes: (1) Form MCS–150—The Motor Carrier Identification Report; (2) Form MCS–150A—Safety Certification for Application for USDOT Number, and (3) application forms to obtain operating authority under 49 CFR part 365, if appropriate. See 49 CFR 385.305. Form MCS–150A requires the applicant to self-certify its knowledge of relevant regulations and to self-certify that basic safety management controls are in place. FMCSA also provides educational and technical assistance materials, upon request. If the application is approved, FMCSA grants new entrant registration through issuance of a United States Department of Transportation (USDOT) Number and an 18-month safety monitoring period for the new entrant begins.

A for-hire motor carrier, unless providing transportation exempt from registration requirements in the ICC Termination Act of 1995 [Pub. L. 104–88, 109 Stat. 888, December 29, 1995], also is required to obtain FMCSA operating authority under 49 U.S.C. 13902, prior to commencing covered operations. Generally, for-hire motor carriers must: (1) Complete the appropriate OP–1 application form for operating authority; (2) file a process agent designation with the Agency using Form BOC–3—Designation of Agents, Motor Carriers, Brokers and Freight Forwarders; and (3) comply with certain insurance filing requirements prior to being granted operating authority.

To maintain its new entrant registration, a carrier must demonstrate sufficient compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs). Within the first 18 months of a new entrant's operation, FMCSA conducts a safety audit of the carrier's operations to educate the carrier on compliance with the FMCSRs and HMRs and to determine if the carrier is exercising basic safety management controls as defined in 49 CFR 385.3. The Agency schedules the safety audit after the carrier has been operating for at least 3 months to ensure sufficient data are on hand to adequately assess the carrier's operations. The Agency conducts the safety audit according to the scoring methodology set forth in Appendix A to part 385.

If the new entrant passes the safety audit, it retains the new entrant registration and remains subject to the new entrant safety monitoring system for the remainder of the 18-month period. FMCSA will grant permanent registration only if the new entrant successfully completes the monitoring period. If the new entrant fails the safety audit, the new entrant must provide FMCSA evidence of corrective action within a specified time period. Carriers operating vehicles designed or used to transport 16 or more passengers and hazardous materials carriers must submit evidence within 45 days; passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers and non-hazardous materials property carriers must do so within 60 days. FMCSA may extend these compliance periods if it determines the new entrant is making a good faith effort to remedy the problems. If within 45 or 60 days, as applicable, the new entrant fails to respond to the notice or fails to correct the deficiencies, FMCSA issues an out-of-service order prohibiting further operations in interstate commerce and revokes the new entrant registration.

A new entrant may appeal the Agency's determination by requesting an administrative review. The decision rendered by the administrative review process is final. A new entrant that fails to make corrections following the safety audit or whose new entrant registration is revoked for failure to submit to a safety audit must wait at least 30 days to reapply for new entrant registration.

Section 210(b) of MCSIA directed that the implementing regulations ensure applicant carriers are knowledgeable about applicable Federal safety requirements before receiving new entrant registration. As part of this rulemaking, the Secretary was directed to consider a proficiency examination, as well as other requirements to ensure applicants understand applicable safety requirements before being granted new entrant registration.

In developing the May 2002 IFR, the Agency considered, but decided against requiring a proficiency examination as the means of ensuring a new motor carrier applicant's knowledge about applicable safety regulations. Instead, the Agency established procedures in the IFR to: (1) Require the new entrant to certify to being knowledgeable about applicable requirements and to certify procedures are in place for basic safety management controls as a condition for receiving new entrant registration; (2) provide the applicant with materials explaining the Federal safety requirements to ensure that a knowledgeability foundation is available to all new entrants; (3) confirm the new entrant's knowledge of safety requirements during the safety audit; and (4) grant permanent registration only to new entrants that successfully complete the safety audit and 18-month safety monitoring system.

B. Notice of Proposed Rulemaking

The Agency received numerous comments to the IFR from industry and public interest groups regarding the self-certification requirement and the effectiveness of the safety audit. These comments indicated that the safety audit is not effective in identifying new entrant motor carriers lacking basic safety management controls. FMCSA field staff also recommends enhancing the New Entrant Safety Assurance Program, based upon its experience in program implementation and administration. In response, the Agency convened a working group to review and improve the program. The Agency proposed enhancements to the New Entrant Safety Assurance Program in a notice of proposed rulemaking (NPRM) titled *New Entrant Safety Assurance Process* (71 FR 76730) on December 21, 2006.

The Agency sought to enhance the new entrant program through the following regulatory proposals and certain non-regulatory actions described in the NPRM:

Automatic failure of the safety audit. Discovery of any one of 11 specific regulatory violations during the safety audit would result in automatic failure. The Agency proposed that these 11 regulatory requirements were essential to demonstrating that basic safety management controls are in place.

Triggers for expedited action. Discovery of any one of seven triggering

incidents, generally determined during a roadside inspection, would result in FMCSA taking some form of expedited action against the new entrant. Expedited actions could include a written demand for corrective action, an expedited safety audit (if the new entrant had not yet received one) or an expedited compliance review.

Elimination of Form MCS–150A. The Agency proposed to eliminate the self-certification of carrier knowledge about applicable Federal requirements. Many carriers were discovered to have falsely certified having such knowledge, and commenters urged the Agency to remove this requirement. The Agency concluded that enhanced educational and technical assistance materials would provide most carriers with sufficient knowledge of applicable regulations and of how to comply with such regulations, as required by section 210(b) of MCSIA.

Americans with Disabilities Act (ADA) and household goods (HHG) compliance.

The Agency proposed to review and include questions regarding a carrier's compliance with ADA and HHG compliance in the safety audit. While responses to these questions would not be a factor in determining the outcome of the safety audit, the Agency would refer violations of the ADA to the U.S. Department of Justice for further investigation and may take enforcement actions for violations of HHG regulations.

Educational and Technical Assistance (ETA) materials. The Agency indicated that it intended to improve and update ETA materials and provide an interactive CD to enhance carrier knowledge of applicable Federal safety requirements. As discussed in the next section, the Agency has made enhancements to the ETA materials.

Corrective action and administrative review processes. The Agency proposed regulatory changes to clarify procedures relating to the corrective action and administrative review processes.

Non-North America-domiciled motor carriers. The Agency proposed a new application process and safety monitoring system for motor carriers domiciled outside of the United States, Canada and Mexico (NNA-domiciled motor carriers). These carriers are currently not covered by a safety monitoring system.

III. Discussion of Comments to the NPRM and Section-by-Section Analysis of the Final Rule

In response to the December 2006 NPRM, FMCSA received 17 comments from 21 entities. The commenters included nine State enforcement agencies; one individual commenter; one motor carrier—Greyhound Lines, Inc., seven motor carrier industry associations and consultants, including the American Trucking Associations (ATA), the Owner-Operator Independent Drivers Association (OOIDA), and the Canadian Trucking Alliance (CTA); one safety enforcement organization—the Commercial Vehicle Safety Alliance (CVSA), one union, the Amalgamated Transit Union and one safety advocacy group, Advocates for Highway and Auto Safety (Advocates).

Based on public comments and the Agency's review of the December 2006 proposal, FMCSA has made changes in the final rule to the proposed revisions to part 385.

A. ''Chameleon'' Carriers—§ 385.306

FMCSA described the term ''chameleon carrier'' as a carrier that attempts to register as a new entrant and operate as a different entity under a new USDOT Number in an effort to evade enforcement action and/or out-of-service orders issued against it by the Agency. FMCSA proposed under § 385.305 that such carriers would be subject to revocation of registration and may be subject to civil and/or criminal penalties. All of the comments received on this issue supported FMCSA's efforts in identifying chameleon carriers. However, some stated that the Agency did not include details on how it will detect chameleon carriers. They recommended revising the new entrant application to request more ''related company'' information. CVSA recommended the Agency coordinate efforts regarding various information systems and projects—including the Creating Opportunities, Methods, Practices, and Securing Safety System (COMPASS), the Licensing & Insurance (L&I) System, the Comprehensive Safety Analysis 2010 (CSA 2010) Initiative, the Commercial Vehicle Information Systems and Networks (CVISN), Unified Carrier Registration (UCR) System, and the Commercial Driver's License Information System (CDLIS) modernization project—to better detect chameleon carriers. OOIDA urged the Agency to look at ''chameleon'' freight brokers.

FMCSA Response:

Actions regarding chameleon carriers. New § 385.306 states that a carrier that provides false or misleading information, or that conceals material information in connection with the application process is subject to revocation of its new entrant registration and civil and/or criminal penalties. The Agency is committed to ensuring that only safe carriers are permitted to continue operating on our Nation's highway. FMCSA has the inherent authority to correct, modify, or revoke new entrant registration issued inadvertently, or obtained by fraud, misrepresentation or other wrongful means.

If FMCSA determines the reapplying motor carrier is not subject to an outstanding order to cease operations under a previous USDOT Number, the Agency will link the history of the old and new companies by identifying the new USDOT Number as the primary active number. The old USDOT Number would be listed in the Agency database as one under which the carrier has also done business, and its safety history, including enforcement actions against the motor carrier, would be linked to records on the new entity.

When a carrier applies for a USDOT Number, the system checks the application against existing motor carrier Census database records to identify possible duplicate records in an effort to prevent assignment of multiple USDOT Numbers to a single motor carrier. The Agency currently is reviewing its information systems to identify ways to enhance its ability to detect chameleon carriers during the application process. FMCSA also plans to address the chameleon carrier issue under a separate rulemaking in response to SAFETEA–LU section 4113 regarding patterns of safety violations by motor carrier management and will reassess the need for additional revisions to its information systems in support of that effort. Finally, under the Unified Registration System rulemaking, the Agency is streamlining its registration process so that we can more efficiently track all FMCSA regulated motor carriers, freight forwarders and brokers.

B. Triggers for Expedited Action—§ 385.308

ATA asked the Agency to clarify what the term ''hazardous materials incident'' means and to identify which hazardous materials incidents could result in an expedited action. Advocates requested more information regarding the rationale for including the violation which involves driver or vehicle out-of-service rates (item 7 on the list under proposed § 385.308). Another commenter asked if the wording of proposed § 385.308 means the Agency will take expedited action whenever one of these violations or incidents is discovered.

FMCSA Response:

Clarification of the term ''hazardous materials incident.'' The Agency agrees that the description of a hazardous

materials incident under §§ 385.308(a) and (b) is unclear. In response, the Agency revises § 385.308 (a)(3) to make a hazardous materials incident criteria consistent with the criteria for a reportable hazardous materials incident under 49 CFR 171.15 and 171.16 of the HMRs with regard to a single incident involving: (1) A highway route-controlled quantity of certain radioactive materials (Class 7); (2) any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3; or (3) any quantity of certain poison inhalation hazard materials (Zone A or B). The Agency revises 49 CFR 385.308(a)(4) to cross reference 49 CFR 171.15 and 171.16 for two or more hazardous materials incidents involving hazardous materials other than those listed in paragraph (a)(3) under § 385.308.

Driver or vehicle out-of-service rates. Under existing § 385.307(a), the Agency may take expedited action against a motor carrier if it were discovered to have an ''accident rate or driver or vehicle violation rate that is higher than the industry average for similar motor carrier operations.'' The Agency expands the list of actions that could trigger expedited actions and specifically replaces existing § 385.307(a) with § 385.308(a)(7), ''having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.'' From an operational standpoint, the ''50 percent or more'' threshold will provide for more effective and efficient monitoring of new entrant performance because it is a non-subjective and easily measured rate.

Requirement to take expedited action. The regulatory text of § 385.308 provides that the Agency may, but is not required to, initiate expedited action following discovery of a triggering action or violation. However, the section heading used the word ''will'' instead of ''may.'' The final rule changes the section heading so that it is consistent with the regulatory text.

C. Corrective Action and Administrative Review Processes—§§ 385.319, 385.323, 385.325, and 385.327

Several commenters supported reducing the timeframes for the corrective action and administrative review processes. Commenters also complained that a paper-based system is an inadequate means of ensuring corrective action for detected deficiencies. Other comments recommended verification be conducted on-site at the carrier's place of business.

FMCSA Response:

Corrective action and administrative review timeframes. FMCSA believes the existing timeframes for corrective action and administrative review should be retained because they reflect a balanced consideration of the due process rights of motor carriers as well as demands on the Agency related to processing corrective action submissions and administrative review requests. Comments on this issue did not provide compelling reasons for shortening the timeframes for the corrective action or administrative review processes.

Depending on the nature and severity of identified violations, the Agency may take expeditious enforcement action against the new entrant without using the corrective action procedures. FMCSA has authority to immediately shut down operations of a motor carrier deemed to be an imminent hazard to highway safety. At all times during which a new entrant is subject to the safety monitoring system in 49 CFR part 385, subpart D, it is also subject to the general safety fitness procedures established in subpart A and to compliance and enforcement procedures applicable to all carriers regulated by FMCSA. Section 385.335, for example, expressly recognizes the Agency's authority to conduct a compliance review instead of a safety audit when circumstances warrant more intensive scrutiny of a new entrant's safety compliance.

The final rule amends § 385.319, which concerns a new entrant's responsibilities for correcting deficient safety management practices discovered during the safety audit, by adding passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers for compensation to the group of carriers that must remedy deficiencies within 45 days of notification by FMCSA. This change achieves consistency with 49 CFR 385.11, which provides a 45-day corrective action period for ''unfit'' motor carriers transporting passengers by CMV. The Agency also amends § 385.319(c), as well as §§ 385.323, 385.325, and 385.327, to make them consistent with timeframes relating to notification of motor carriers of passengers under § 385.11. Section 385.319 is rewritten to cross reference the definition of CMV relating to hazardous materials carriers in 49 CFR 390.5 for purposes of consistency.

The administrative review provisions in § 385.327 were ambiguous with respect to the time during which a carrier was allowed to file a request for administrative review and when it had to file a request for administrative review, if it wanted the review to be completed before its registration was revoked. Accordingly, FMCSA revises § 385.327 to clarify timeframes for requesting administrative review of determinations regarding the safety audit. A new entrant must file the request within 90 days of the date of the notice of audit failure or within 90 days of the date of notice of insufficient corrective action. However, if a new entrant wants a decision before the revocation takes effect, the new entrant must file a request for review within 15 days of the date of the notice of audit failure. Requests filed after the 15th day will be considered, but it is possible the revocation would take effect before the administrative review process is completed, if the carrier waits until after the 15th day.

On-site verification of corrective action. Regarding on-site verification of evidence of corrective action, in most instances written documentation is sufficient to substantiate correction of deficiencies, and an on-site visit is not required. The Agency believes its proposed corrective action process is adequate and is an efficient use of resources.

D. Automatic Failure of the Safety Audit—§ 385.321(b)

Some commenters to the NPRM raised concerns regarding the list of regulatory violations that were proposed to result in automatic failure of the safety audit. Advocates stated that the proposed list is too short and should include more hours-of-service-based violations. ATA stated that regulatory violations which are based on a single driver or a single CMV would unfairly disadvantage larger carriers. Some asked why certain regulatory violations, if discovered during the safety audit, would cause an automatic failure but would not result in expedited action if discovered during a roadside inspection.

FMCSA Response: Under § 385.321(b), the Agency increases from 11 to 16 the number of regulatory violations that will result in automatic failure of the safety audit. The Agency will develop appropriate enforcement guidelines regarding how the Agency will address egregious safety violations found during the safety audit if such violations are not part of the automatic failure violation list and do not result in failure of the safety audit under the evaluation guidelines in Appendix A to part 385. For example, the guidance will provide instructions to document all deficiencies regardless of whether they cause failure of the safety audit, and to include them in the Motor Carrier Management Information System (MCMIS).

Automatic failure determination. Committing any one of the following 16 violations will result in automatic failure of the safety audit in accordance with guidelines in the table to § 385.321(b).

Table to § 385.321(b)

Violations that will result in automatic failure of the new entrant safety audit	
Violation	Guidelines for determining automatic failure of the safety audit
1. § 382.115(a)/§ 382.115(b)—Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively).	Single occurrence.
2. § 382.201—Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function.	Single occurrence.
3. § 382.211—Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382.	Single occurrence.
4. § 382.215—Using a driver known to have tested positive for a controlled substance	Single occurrence.
5. § 382.305—Failing to implement a random controlled substances and/or alcohol testing program.	Single occurrence.
6. § 383.3(a)/§ 383.23(a)—Knowingly using a driver who does not possess a valid CDL	Single occurrence.
7. § 383.37(a)—Knowingly allowing, requiring, permitting, or authorizing an employee with a commercial driver's license which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle.	Single occurrence.
8. § 383.51(a)—Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle.	Single occurrence. This violation refers to a driver operating a CMV as defined under § 383.5.
9. § 387.7(a)—Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage.	Single occurrence.
10. § 387.31(a)—Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility.	Single occurrence.
11. § 391.15(a)—Knowingly using a disqualified driver	Single occurrence.
12. § 391.11(b)(4)—Knowingly using a physically unqualified driver	Single occurrence. This violation refers to a driver operating a CMV as defined under § 390.5.
13. § 395.8(a)—Failing to require a driver to make a record of duty status	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.
14. § 396.9(c)(2)—Requiring or permitting the operation of a commercial motor vehicle declared ''out-of-service'' before repairs are made.	Single occurrence.
15. § 396.11(c)—Failing to correct out-of-service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again.	Single occurrence.
16. § 396.17(a)—Using a commercial motor vehicle not periodically inspected	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.

In response to comments stating that violations based on a single driver or a single CMV unfairly disadvantage larger carriers, the Agency has made adjustments to its approach for the automatic failure determination. Although 14 of the 16 regulatory violations (numbers 1–12, 14 and 15 in the table to § 385.321(b)) would trigger automatic failure of the safety audit based on a single occurrence of the violation, two of the violations will include thresholds. FMCSA continues to believe the severity of 14 of these violations warrants the single-occurrence trigger. However, in the case of §§ 395.8(a) and 396.17(a), the Agency will require a violation threshold of 51% to cause automatic failure of the safety audit. (Both of the threshold violations were included in the December 2006 NPRM). FMCSA has determined that the appropriate standard is preponderance of the evidence, often called the ''51% rule.'' In other words, if the driver did not prepare a record of duty status in more than half of the trips examined, or the carrier failed to perform periodic inspections on more than half of the fleet vehicles examined during the safety audit, there exists a violation threshold indicative of breakdowns in the carrier's management controls which will result in automatic failure of the new entrant safety audit. Violation rates of 50% or less will be taken into consideration in the overall assessment of the carrier's compliance with applicable regulations, and the Agency may use other means to improve the carrier's performance, including assessment of civil penalties following a compliance review of the new entrant.

Discussion of additional regulatory violations. Violation two (§ 382.201) corrects an inadvertent omission from the December 2006 NPRM. While the Agency proposed that a violation of the prohibition against carriers using a driver who tests positive for controlled substances would result in automatic failure of the safety audit, it omitted the corresponding violation regarding the prohibition against carriers knowingly using a driver who has an alcohol concentration of 0.04 or greater.

Violation five (§ 382.305) involves failure to implement random controlled substances and/or alcohol testing, a crucial element of any effective drug and alcohol testing program. The Agency believes implementation of such random testing is essential to deterring use of controlled substances or abuse of alcohol by CMV drivers.

Violation six (§§ 383.3/383.23) is added to close a gap in the list of automatic failure regulatory violations relating to CDL drivers. The NPRM only addressed a carrier that uses a driver with a suspended, revoked or cancelled CDL or a driver who was disqualified to operate a CMV. Using a driver who does not obtain a CDL when one is required is an equally serious safety violation.

Violation 10 (§ 387.31(a)) complements regulatory violation

number nine (§ 387.7) by including financial responsibility requirements for passenger-carrying motor carriers in addition to property carriers. The December 2006 NPRM inadvertently omitted financial responsibility requirements for passenger carriers.

Violation 15 (§ 396.11(c)), failing to correct out-of-service defects listed by the driver, complements violation 14 (§ 396.9(c)(2)), requiring or permitting the operation of a commercial motor vehicle declared out-of-service before repairs are made. Section 396.9(c)(2) relates specifically to a vehicle declared out-of-service as the result of an inspection performed at roadside. Inclusion of § 396.11(c) will ensure that all documented out-of-service defects are corrected before the vehicle is operated again, inasmuch as continued operation of the vehicle could present an imminent hazard to the public.

Distinctions in the lists of regulatory violations (automatic failure vs. expedited actions). Generally, the regulatory violations that would trigger automatic failure of the safety audit are more readily discernible at the carrier's place of business. The regulatory violations that would trigger an expedited action are detectable at the roadside or away from the carrier's place of business. New entrant motor carriers discovered with these violations could be identified during a roadside inspection or by any other means even if the Agency had not yet conducted a safety audit.

E. Elimination of Form MCS—150A—Multiple Conforming Amendments (§§ 385.305, 385.405 and 385.421)

Conforming amendments are made throughout part 385 to eliminate the requirement to complete Form MCS–150A. The purpose of the MCS–150A was for an authorized official of the new entrant to certify to his/her familiarity with relevant regulations and to having a system in place to ensure compliance with the FMCSRs and applicable HMRs. However, based on the safety audits conducted to date, FMCSA has found that self-certification has not been an accurate indicator of knowledgeability. Therefore, FMCSA eliminates the self-certification registration requirement and corresponding Form MCS–150A.

F. Enhanced ETA Materials

The Agency has updated, significantly enhanced and expanded accessibility of its ETA materials. The ETA materials pre-date the New Entrant Safety Assurance Program and were originally intended to help motor carriers prepare for a compliance review. In response to comments regarding the quality of the ETA materials, the Agency has incorporated new information helpful to new entrants seeking knowledge about how to comply with applicable Federal safety standards and preparing for the new entrant safety audit. The new document retains the title ''Educational and Technical Assistance Program—A Motor Carrier's Guide to Improving Highway Safety'' and includes the following enhancements:

- *Updated regulatory requirements.* The regulatory information has been updated to include new requirements imposed since 2001.
- *Revamped Design.* Regulatory information is presented in the same order in which it appears in the Federal Motor Carrier Safety Regulations (49 CFR parts 300–399). In addition to a table of contents, two Quick Reference Guides are added to the front of the document to help readers quickly identify all regulatory requirements relevant to drivers and employers, respectively. The reference guides are written in question-and-answer format with topical subheadings. The regulatory information is attractively presented and easy to understand. We believe these improvements will motivate new entrants to make more effective use of the materials to become familiar with applicable Federal safety standards.
- *Expanded coverage of the New Entrant Safety Assurance Program.* The section on Part 385—Safety Fitness Procedures—includes a clearer discussion of the New Entrant Safety Assurance Program and the Hazardous Materials Safety Permitting Program.

Because the ETA enhancement project was completed in July 2008, prior to publication of this final rule, the section on part 385 reflects new entrant program requirements in effect as of that date and not the new requirements set forth in this final rule; changes made by this final rule will be included in the next revision to the ETA materials.

- *More Accessible.* The ETA materials are available electronically on, and may be downloaded from, the FMCSA Web site. The electronic version includes links directly to desired content from the Driver or Employer Quick-Reference Guides.

The Agency also will publish a separate notice soliciting public comment on other ways to improve carrier knowledgeability of applicable Federal safety standards.

G. The Application Process for Non-North America-Domiciled Motor Carriers—Part 385, Subpart H

General. Subpart H to part 385 adopts without change proposals set forth in the December 2006 NPRM governing the new application process for non-North America-domiciled motor carriers seeking to operate within the United States beyond U.S. municipalities and commercial zones on the U.S.-Mexico international border.

Acceptable licensing for CMV operators used by NNA-domiciled motor carriers. Advocates commented that only a U.S. or Canadian CDL should be acceptable.

FMCSA Response: In November 1991 under the terms of an international agreement, the Administrator of the Federal Highway Administration (FMCSA's predecessor agency) determined that Mexican commercial driver's licenses (Licencias Federal de Conductor) are equivalent to U.S. CDLs. This determination was upheld on judicial review. For this reason, § 385.605(a) continues to require an NNA-domiciled motor carrier to use only drivers who possess a valid CMV driver's license. Included on the list of valid CMV driver's licenses are the CDL, Canadian Commercial Driver's License and Mexican Licencia de Federal de Conductor.

H. Form—OP–1(NNA) for Non-North America-Domiciled Motor Carriers Requesting New Entrant Registration

Advocates strongly opposed reliance on narrative responses to Section V of the OP–1(NNA) and self-certification responses to proposed Sections VIII and IX.

FMCSA Response: FMCSA does not adopt Advocates' recommendations for modifying the Form OP–1(NNA) because the Agency verifies applicant responses during the pre-authorization safety audit (PASA) and prior to granting new entrant registration to them. Instead, Form OP–1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers, is adopted as proposed in the December 2006 NPRM. The Agency corrected the form's instructions: (1) To reflect the Agency's new Headquarters location; and (2) to conform to a technical correction to part 387 concerning the CMV weight threshold.

I. Proposed Safety Monitoring System for Non-North America-Domiciled Motor Carriers—Part 385, Subpart I

The final rule adopts all provisions regarding the safety monitoring system for NNA-domiciled motor carriers as set forth in the December 2006 NPRM without change.

J. Modification of Safety Audit Guidelines Under Appendix A to Part 385

ADA compliance. Commenters suggested that the new entrant program should include more of a focus on ensuring passenger carriers' compliance with the ADA by including compliance with ADA requirements in the pass/fail determination of the safety audit. Other commenters also claimed that the Agency's position on ADA enforcement is contradicted by case law [*Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration* (471 F. 3d 1350 (DC Cir. 2006)].

Congress addressed the issues raised in the *Peter Pan Bus Lines* case by enacting the Over-the-Road Bus Accessibility Act of 2007 [Pub. L. 110–291, 122 Stat. 2915, July 30, 2008]. This law requires FMCSA to consider compliance with DOT's ADA regulations as an element of an over-the-road bus company's fitness for receiving new operating authority. It also authorizes the Agency to suspend, amend, or revoke a motor carrier's registration in the event of a willful failure to comply with DOT's ADA regulations.

Inasmuch as ADA compliance is not indicative of a passenger carrier's ability to operate its vehicles safely, a finding of potential ADA noncompliance will not affect the results of the new entrant safety audit. However, to assist in ensuring ADA compliance, FMCSA will take the following additional steps:

- Begin training enforcement officials to detect ADA compliance violations. Such training will not be included as an auditor certification requirement under 49 CFR Part 385, subpart C.
- Include a question regarding ADA compliance in the safety audit.
- If ADA noncompliance is discovered in the course of a new entrant safety audit or compliance review, FMCSA will forward the information to the U.S. Department of Justice (DOJ), and appropriate action by DOJ and/or DOT will be taken, pursuant to the memorandum of understanding to be established between DOJ and DOT as directed by Public Law 110–291.
- Refer any non-compliant motor carrier that is also a recipient of DOT financial assistance to the Federal Transit Administration (FTA) for administrative enforcement action, as appropriate. FTA administers a program that provides financial assistance to some over-the-road bus carriers and, consistent with section 504 of the Rehabilitation Act of 1973 and DOT rules implementing it (49 CFR Part 27), cannot provide such assistance to carriers who are out of compliance with their ADA obligations.
- When appropriate, initiate action to amend, suspend, or revoke a carrier's new entrant registration based on willful noncompliance with DOT's ADA regulations (49 CFR Part 37, Subpart H).

K. Conforming Amendments to Part 387

The Agency adopts the December 2006 NPRM proposal to amend part 387 by requiring all non-North America-domiciled motor carriers to file evidence of financial responsibility with the Agency as a condition for registration. Sections 387.3(c)(1) and 387.9 are also revised to make a technical correction to the threshold weights pertaining to CMVs to read ''over 10,001 pounds'' and ''less than 10,001 pounds,'' as appropriate.

L. Discussion of Remaining Comments That Will Not Warrant a Regulatory Change

1. Proficiency Examination. Three commenters urged the Agency to include a proficiency examination as part of the new entrant program to ensure applicants are knowledgeable about the applicable regulatory safety requirements.

FMCSA Response: The Agency is sensitive to concerns expressed by commenters that there may be additional mechanisms of ensuring applicant knowledgeability. FMCSA will respond to these concerns by publishing a notice inviting the public to provide information to assist the Agency in evaluating the feasibility of alternative requirements or additional enhancements to the current process for ensuring applicant knowledgeability, including proficiency examinations. However, FMCSA believes this final rule fully complies with section 210(b) of MCSIA, which requires the Agency to consider a proficiency examination. The Agency has considered the option of requiring a proficiency examination and has decided not to impose such a requirement at this time. Commenters to the Agency's notice regarding the applicant knowledgeability issue will have the opportunity to address the feasibility of potential alternatives for improving applicant knowledgeability, including proficiency examinations.

2. PASA and compliance review requirement for all new entrants. Advocates believe domestic and Canada-domiciled motor carriers, like NNA-domiciled motor carriers, should be subject to a PASA to obtain new entrant registration and a compliance review to receive permanent registration.

Some comments recommended the Agency require a new entrant whose registration was revoked to successfully undergo a PASA before being re-issued new entrant registration.

FMCSA Response: The Agency's limited resources are insufficient to provide for conducting a PASA and compliance review for the 40,000–50,000 new entrants annually that obtain USDOT Numbers. Section 210 of MCSIA does not require PASAs or compliance reviews for new entrant carriers. FMCSA disagrees with the Advocates' and other commenters' statements about the necessity of conducting PASAs on all new motor carriers. The Agency continues to believe that its safety monitoring program and the safety audit, accompanied by expedited actions, will help to ensure safety given current resources.

Today's final rule does not require reapplying new entrants to successfully complete a PASA as a condition of obtaining new entrant registration. If the carrier's new entrant registration was revoked because the carrier refused to submit to a safety audit, it would be re-prioritized for an expedited safety audit as soon as practicable upon reentering the new entrant program. A reapplying carrier is prohibited from operating in interstate commerce until its new application is approved. A new 18-month monitoring period would start upon approval of the new application.

A carrier whose new entrant registration was revoked for failing the safety audit would have to submit an updated Form MCS–150 application and provide evidence that it has corrected the deficiencies that resulted in revocation of its registration. The Agency will not grant new entrant registration, and a carrier may not conduct interstate operations, unless FMCSA approves the new application and corrective action plan. Additionally, the carrier will be subject to a new 18-month safety monitoring period.

To retain historical information on a revoked new entrant's past performance, FMCSA will require the new entrant to retain the same USDOT Number when reapplying for registration. This is consistent with what FMCSA has done in the past and is currently doing whenever a carrier is placed out-of-service and subsequently remedies whatever deficiencies resulted in the out-of-service order.

3. Impact of rule on Federal/State resources. Several State enforcement agencies requested that FMCSA disclose who would be responsible for handling the increased number of corrective

actions anticipated due to the higher failure rate likely to occur as a result of modifications to the new entrant program.

FMCSA Response: States are not responsible for managing corrective action procedures and administrative review requests. FMCSA handles these actions, and the Agency will continue to manage these due process provisions in the new entrant program at this time.

4. Implementation issues/questions. The Public Utilities Commission of Ohio (PUCO) requested that the Agency address its concerns regarding implementation of the new entrant program:

• *Reclassified motor carriers and the new entrant safety monitoring system.* According to PUCO, some motor carriers enter the new entrant program and later reclassify to an operational status not subject to new entrant program requirements (such as a PRISM registrant [an entity that is required by the State but not FMCSA to obtain a USDOT Number under the Performance and Registration Information System Management (PRISM) program] or intrastate motor carrier). If the carrier later reclassifies as a new entrant, PUCO believes the Agency should disregard time operating outside of the new entrant program when computing the new entrant's 18-month safety monitoring period.

• *Treatment of relocated new entrant motor carriers.* PUCO asks the Agency to ensure, in instances where a new entrant transfers its operations to a new State, there is sufficient time provided to the new jurisdiction to be able to schedule and conduct the safety audit prior to the end of the 18-month period.

• *Treatment of new entrant motor carriers that change operational status to evade the safety audit.* PUCO recommends the Agency track motor carriers that continually change their status in an effort to avoid a safety audit to ensure that they undergo a safety audit or compliance review within a specified time period.

• *Implementation date for the new entrant rule.* PUCO requests the Agency provide sufficient time for it to make staffing changes and conduct training when establishing the final rule compliance date.

FMCSA Response:

Reclassified motor carriers and the new entrant safety monitoring system. The Agency agrees that time spent operating as a motor carrier outside of FMCSA jurisdiction should not count toward completion of the 18-month new entrant safety monitoring process. For example, if a motor carrier completes 6 months of the safety monitoring period before converting to a status that is not subject to the new entrant program then upon re-entering the new entrant program the clock would resume from 6 months onward. Time operating as a non-new entrant would not be credited toward the new entrant safety monitoring period.

Treatment of relocated new entrant motor carriers. Existing regulations under § 385.333(d) permit a carrier to continue operations as a new entrant if a safety audit or compliance review has not been performed by the end of the 18-month monitoring period through no fault of the motor carrier. The carrier may continue operating until FMCSA conducts a safety audit or compliance review and makes a final determination regarding the adequacy of its safety management controls. This provision gives FMCSA the flexibility to extend the safety monitoring period for any new entrant that relocates from one State to another before completion of the safety audit. A new entrant motor carrier that relocates would continue to be subject to the new entrant program. FMCSA information systems would continue to monitor the new entrant's status through completion of the safety audit and the 18-month safety-monitoring period.

Treatment of new entrant motor carriers that change operational status to evade the safety audit. A motor carrier may voluntarily revoke its new entrant registration at any time. Nonetheless, the Agency is aware that there may be instances in which a motor carrier may use this option to evade the new entrant safety audit. Because MCMIS reveals that an extremely small number of motor carriers may be manipulating operational status in this way, the Agency does not believe a regulatory change is warranted. The Agency analyzed data from MCMIS regarding changes in status for the period from January 2003 through October 2007. MCMIS records the initial issuance of new entrant registration as the first change and subsequent changes are tracked as change 2, 3, etc. For example, a carrier that receives new entrant registration in May 2007, changes its operations solely to intrastate nonhazardous materials transportation in May 2008, and then resumes interstate operations and re-enters the new entrant program in August 2008, is considered as having three changes. For purposes of the report, the Agency considered four or more changes as frequent and found that of 200,000 new entrants, only 130 indicated frequent changes. Instead of a regulatory change, the Agency will address this issue operationally by altering the audit prioritization formula.

Besides the prioritization algorithm under the Safety Status Measurement System (SAFESTAT), several means exist to trigger a compliance review of a motor carrier. The Agency will consider the frequency of changes in operating status as a reason for conducting a compliance review on a motor carrier. There may be instances where a motor carrier may legitimately request frequent changes in operational status. However, the Agency believes it is appropriate to prioritize carriers for a compliance review if there are frequent changes in status. Existing §§ 385.333 and 385.335 indicate that a new entrant may be subject to a compliance review during the 18-month safety-monitoring period and that the Agency may take such action at its discretion.

Implementation date for the new entrant rule. In establishing a 1-year compliance date for this final rule, the Agency has taken into consideration and provided time for staffing changes, information system modifications, and training.

5. New entrant related notifications to other jurisdictions. Missouri DOT claimed that a more aggressive new entrant program will cause a dramatic increase in the failure rate of motor carriers. It recommended development of a real-time database for notification of State enforcement personnel. CVSA also recommended that the notification take place in several different media types and formats, both electronic and print. This issue was not directly addressed in the 2002 IFR or the 2006 NPRM.

FMCSA Response: The Agency already provides the States with Web-based access to information about motor carriers, including new entrants. If an enforcement officer has Web access, the officer can check new entrant status in ''real-time'' through FMCSA's enforcement query system designed to dramatically increase access to motor carrier safety information for State and Federal law enforcement personnel.

6. Reciprocity agreement with Canada concerning provincial audits. CTA requested FMCSA exempt Canada-domiciled new entrants that had undergone a provincial facility audit during the 18-month monitoring period from the requirement to pass a safety audit under the New Entrant Safety Assurance Process. CTA reiterated that provincial audits suffice for purposes of FMCSA's New Entrant Safety Assurance Process. CVSA recommended developing reciprocity agreements for safety audits with Canada and Mexico.

FMCSA Response: The Agency acknowledges CTA's concerns but the

Agency cannot exempt Canada-based carriers from the new entrant program required by 49 U.S.C. 31144(g)(1). Section 31144(g)(1) does not provide FMCSA authority to exempt new entrants from the safety audit requirement. FMCSA is currently working with Canadian officials to examine the feasibility of establishing a reciprocity agreement concerning compliance reviews conducted on motor carriers in their respective country of domicile. The Agency will consider working with Canadian officials on reciprocity of new entrant safety audits.

7. Group audits and audits conducted at alternate locations. In comments to the NPRM, CVSA questioned whether group audits provide a proper environment for the safety audits.

FMCSA Response: The Agency will continue conducting group audits and conducting audits at alternate locations, as appropriate. Congress directed the Agency under section 210(a) of MCSIA to consider alternate locations where safety audits may be conducted for the convenience of small businesses. We believe conducting audits at alternate locations can be beneficial for both motor carriers and the Agency. Group audits can be an efficient means of simultaneously educating and auditing larger groups of motor carriers than are covered during single-carrier audits. Typically, Federal or State enforcement personnel determine a date to convene the group audit and contact several new entrants by telephone to schedule them to attend. After all carriers are scheduled by phone, the enforcement official sends a confirmation letter with the appointment date, time and location and instructions on specific records and information to bring to the audit.

Group audits take place away from the respective carriers' principal places of business, generally in a large conference room either at the State agency or at a local hotel. The audit commences with an educational presentation for the entire group, including a question-and-answer period and educational materials. After the presentation, several individual safety audits are conducted simultaneously throughout the room. The room is configured with tables spaced sufficiently to provide adequate privacy for the carrier official and safety auditor. A safety auditor conducts a one-on-one interview with the carrier official and examines the carrier's safety records. In some instances, enforcement personnel have been able to conduct multiple sessions, auditing as many as 48 carriers in a single day. At the conclusion of the audit, the carrier is provided with a written notice of determination and information on corrective actions for any detected deficiencies. A carrier that fails the safety audit is subject to revocation of registration if corrective action is not completed.

Nonetheless, we recognize that group audits only are beneficial in select situations, depending on many factors including, but not limited to, the number of new entrants within the given geographical area. For this reason, the Agency conducts group audits only in those areas where practicable. Safety auditors are also careful to judiciously separate the educational and auditing functions in such a way as to maintain carrier privacy.

8. Program assessment. CVSA recommends that FMCSA conduct a thorough program assessment to examine the impact of the safety audit.

FMCSA Response: We agree, but will defer until the enhancements made by this final rule have been fully implemented and sufficient time has elapsed to enable evaluation of program changes.

9. Comments beyond the scope of the rule. Advocates criticized the Agency for what it calls use of SafeStat and the roster of acute and critical regulations as the guideposts for determining which carriers pose increased safety risks. OOIDA stated it believes the report titled ''Analysis of New Entrant Motor Carrier Safety Performance and Compliance Using SafeStat'' is ''scientifically challenged'' and should not be the basis for FMCSA to impute an increase in the safety risks associated with new entrant motor carriers. The report is in the docket for this rule.

FMCSA Response: Discussions of SafeStat for identifying at-risk carriers and prioritizing them for compliance reviews are beyond the scope of the New Entrant Safety Assurance Process final rule. Moreover, SafeStat itself has no bearing on the implementation of the new entrant program since Congress has mandated that all new entrants submit to the safety audit before receiving permanent registration, nor does it have any bearing on the analysis of its effectiveness.

IV. Rulemaking Analyses

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA has determined that this final rule is a significant regulatory action within the meaning of Executive Order 12866 and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979). FMCSA has analyzed the costs and benefits, as discussed below, and has determined this rule will be economically significant. The benefits of this rule will exceed the $100 million annual threshold as defined in Executive Order 12866. A full Regulatory Evaluation is included in the docket for this rule. This rule has been reviewed by the Office of Management and Budget (OMB).

Overview of Analysis

This rule imposes costs on all new entrants. Although the costs associated with existing regulations were counted when these measures were first promulgated, OMB guidance on regulatory analysis suggests that unless full compliance with these rules and regulations was already being achieved, the compliance costs associated with this rule should be counted.[2] All new entrants will face costs associated with the time their staff spends reviewing ETA materials and participating in the safety audit. These would be the only costs borne by new entrants that are found to comply with the applicable FMCSRs and HMRs. New entrants not in compliance with safety regulations will have additional costs associated with actions taken by them to achieve higher levels of compliance to pass the safety audit or to properly correct deficiencies after failing it. FMCSA will place out-of-service any new entrant that opts not to incur the higher compliance costs implicit with this more rigid enforcement scheme. The discussion of costs is followed by a discussion of safety benefits.

OMB guidance also states that an Agency's analyses should ''focus on benefits and costs that accrue to citizens and residents of the United States.''[3] The Agency estimates that only about 3.5 percent of new entrants are based outside of the U.S.[4] This analysis reports the total costs to all new entrants and separately the small fraction of costs borne by non-U.S. entities. However, the estimates of benefits include all carriers because all safety benefits from this rule occur within the United States.

Number of New Entrants

FMCSA estimates that this final rule will affect about 40,000 motor carriers

[2] Circular A–4 (September 2003).

[3] Ibid.

[4] Derived using data from 1995 through 2002 contained in the Motor Carrier Management Information System (MCMIS). Approximately 96.5 percent of new entrants are based in the U.S., 3.3 percent are based in Canada, 0.2 percent are based in Mexico, and a minor fraction are based in other countries.

annually. Although about 68,700 MCS–150A forms are filed each year, data on the number of safety audits that have been performed each year indicate that about 40 percent of these carriers do not remain in the new entrant program through the safety audit phase. Because this final rule imposes new criteria for passing the safety audit, the number of new entrant carriers actually audited is most relevant for the economic analysis of this rule.

Costs

New entrants will bear costs for time spent reviewing ETA materials, time spent with a safety auditor during the safety audit, and compliance costs to rectify any deficiencies found during the safety audit. FMCSA also assumes that some new entrants, when confronted with a safety audit failure, will choose to end interstate operations. The Agency assumes that these exiting firms will leave a gap to be filled by replacement new entrants, and that these replacement firms will bear some costs to setting up operations and acquiring the equipment of exiting firms. All of these costs are discussed in detail below.

Paperwork Costs

All new entrants will bear a cost of reviewing the ETA materials. FMCSA assumed that it would take 3 hours for the chief safety officer of each new carrier to study the new materials. In the NPRM, the Agency assumed that reading this material would take just 1 hour, but after having reconsidered the content of the ETA package, FMCSA reasoned that carriers would be better served by spending considerably more time studying it.

Labor costs should account for both average hourly wages and average benefits of motor carrier employees. The Bureau of Labor Statistics' (BLS) National Compensation Survey (NCS) provides estimates of wages, salaries, and benefits for several industries. According to the December 2006 NCS, employer hourly costs for benefits are equal to 52.9 percent of hourly wages in the transportation and warehousing industries.[5] May 2006 wage data from the BLS Occupational Employment Statistics (OES) survey indicate that the median hourly wage for managers in the trucking industry was $34.35.[6] Adding benefits equal to 52.9 percent of that wage yields compensation of $52.52 per hour. The total cost to all new entrants is approximately $6.3 million annually ($52.52 per hour × 3 hours × 40,000 new entrants).

This rule eliminates the Form MCS–150A, Safety Certification for Applications for USDOT Number, which was implemented in the IFR. This form takes 9 minutes to complete. According to May 2006 OES data, the base hourly general clerical wage for the trucking industry[7] is $11.12, and adding benefits equal to 52.9 percent of that wage yields $17 per hour. Although about 40,000 new entrants continue interstate operations through the safety audit, about 68,700 file this form annually. Eliminating this form avoids a $0.2 million annual cost to all new entrants.

Costs of Safety Audit

In 2007, FMCSA commissioned a study on the cost to the Agency and carriers of conducting safety audits.[8] This study estimated that the cost to motor carriers consists entirely of the cost of employee time spent with the auditor during the safety audit. A motor carrier manager[9] is assumed to be involved in the safety audit for 4 hours, 1 hour during the pre-visit telephone interview and 3 hours during the onsite portion of the safety audit. Based on May 2005 wages estimates, the total cost is estimated to be $216.68; using May 2006 wages, the Agency estimates the cost to be $220.60. FMCSA and its State partners conduct on average about 40,000 safety audits per year, at a total annual cost to new entrants of $8.8 million dollars.

Compliance and Out-of-Service (OOS) Costs

This final rule imposes additional costs on those new entrants who will fail the stricter safety audits established by this rule. FMCSA divides these carriers into two categories, those that take required action and come into compliance, and those that do not and are placed out of service. Although the normal costs of remedial action for an individual carrier are likely to be small and would seemingly not discourage compliance, the Agency assumes that there will be a substantial number of carriers in both categories.

FMCSA calculated the safety audit failure rate under the provisions of this final rule over a period running from January 2003 through September 2007 and estimated that 69,551 of the 145,246 safety audits performed over this period would have been failures. This translates into a failure rate of 47.9 percent, and applying this failure rate to the 40,000 safety audits conducted each year, the Agency estimates that 19,154 new entrants will fail safety audits annually. These carriers will be required to take the appropriate actions to come into compliance with the applicable regulations and to demonstrate to the Agency that they have remedied deficiencies by submitting corrective action plans.

One would not necessarily expect such a high failure rate to persist after the rule is implemented. Upon implementation of this rule, many carriers will take the appropriate action to pass the stricter new entrant safety audit, and the actual failure rate will be significantly lower than 47.9 percent.[10] Nevertheless, this high failure rate will be used in this analysis because it represents that fraction of carriers who will have to bear additional costs to come into compliance with the rule, whether they do so before or after their safety audit occurs.

New entrants may also be subject to expedited actions in addition to safety audits that would require them to take steps to demonstrate that they have taken appropriate actions to come into compliance with applicable FMCSRs. Based on FMCSA's experience with Mexico-domiciled border zone carriers subject to similar expedited action procedures, the Agency estimates that 15 percent of new entrants will incur costs in responding to expedited action requests that are similar to those they would incur to remedy deficiencies found during a safety audit.

The cost of coming into compliance would vary according to many factors. These include the size of the new entrant, the specific violations, and the severity of the violation. For example, provided that all vehicle repairs are undertaken eventually, the remedial action for a one-time violation of § 396.9(c), ''operating a CMV after it has been declared out of service, and before repairs have been made,'' aside from any business exigency that might

[5] *http://stats.bls.gov/ncs/ebs/home.htm.*

[6] *http://www.bls.gov/oes/oes_dl.htm.* Standard Occupational Classification (SOC) 11–0000, North American Industry Classification System (NAICS) 48400, Truck Transportation. Because, passenger carriers (NAICS 485200, Interurban Bus Transportation) account for just 1.5 percent of new entrants, and managers for these entities earn similar wages, including them had essentially no effect on our wage assumption.

[7] SOC 43–9061, NAICS 484000.

[8] ''Safety Audit Cost Estimation''. *http://www.fmcsa.dot.gov/facts-research/research-technology/report/Safety-Audit-Cost-Estimation-Oct2007.pdf.*

[9] NAICS 484000, 11–1021 General and Operations Managers in the Truck Transportation Industry.

[10] In ''Crime and Punishment: An Economic Approach'' (1968), economist Gary Becker showed that raising the expected value of punishments serves as a deterrent to potential offenders. The expected value includes both the likelihood of being caught and the severity of the punishment.

motivate non-compliance, has very little cost; a carrier would simply be required to undertake repairs in a timely manner rather than put them off. A small new entrant without a drug and alcohol testing program could join a testing consortium for no more than $1,000 annually. However, a large carrier could spend several thousand dollars to establish a system to periodically inspect its CMVs. After considering the small size of most new entrants and the low cost of complying with most of these violations, the Agency assumes that, if all corrective action scenarios were ranked by cost, the example of the small new entrant joining a drug testing program would be representative of the median cost incurred to correct a deficiency that resulted in a safety audit failure. FMCSA estimated in the NPRM a $1,000 cost for compliance costs and, after having received no comment on it, continues to believe that it is a reasonable estimate on which to base its cost calculations.

In addition to compliance costs, a motor carrier will bear some small costs for preparing and submitting to FMCSA a corrective action plan that shows that the motor carrier has remedied deficiencies that were found during the safety audit. Although some carriers will come into compliance before the safety audit occurs, for simplicity the Agency calculated these notification costs for all carriers that will face additional compliance costs. Notifying FMCSA that the appropriate actions have been taken will use about $2.00 in materials (*e.g.*, an envelope, postage, and copies of documents that show what actions the carrier has taken). Assembling this information should take little time, but the motor carrier may have additional contact with FMCSA, so the Agency has assumed that on average a manager at the motor carrier will spend no more than an hour preparing and submitting the corrective action plan. The manager's wage calculated above shows a cost of about $53 per hour of this employee's time. The total cost of submitting a corrective action plan will be $55 per carrier. Total compliance costs are $1,055 per carrier.

Although compliance costs are low, many new entrants may nevertheless not take the steps to avoid being placed out of service. These carriers would be able to recover the costs of their equipment and facilities by selling them to new owners, but some other smaller costs, listed in Table 4 of the regulatory evaluation, are unrecoverable, or ''sunk,'' regardless of whether or not the carrier continues operations. Although exit from the industry is economically costless to an individual carrier, these sunk costs would be borne by the new entrants that replace exiting motor carriers. In this way, carriers placed out of service will increase costs borne by the motor carrier industry as a whole.

Carriers entering the interstate trucking business to replace exiting new entrants will bear several costs. These include application, licensing, and registration fees; and advertising, training, and asset transfer costs. Several third-party firms offer to complete all the administrative requirements for a fee of $500, and the market price for these services is used in this analysis. Advertising costs vary widely among motor carriers, depending upon their location, market, personal taste, and other factors. According to the Census Bureau's Business Expense Survey, an average of $3,900 was spent on advertising in 2002 per trucking establishment.[11] Many new entrants may rely on freight brokers, and therefore spend little or nothing on advertising. Rather than attempt to calculate a precise average based on the composition of the new entrant group, the Agency chose an estimate for advertising in the middle of the range, $2,000. Average transactions cost for transferring assets are assumed to be about $200 each. Costs for training are highly variable and depend on many factors, such as the size and type of the motor carrier and the experience of its staff. FMCSA assumes that this will on average take 40 labor-hours to accomplish. The median wage in the trucking industry for all employees was $16.95 per hour, and adding 52.9 percent for benefits yields about $26 per hour. This labor rate multiplied by 40 hours yields an estimate of learning costs that is slightly over $1,000 dollars. Included is another $300 to account for any other small start-up costs. Total costs are $4,000 per replacement carrier, and are presented in Table 4 of the regulatory evaluation, which is reproduced here. The assumption of $4,000 was presented in the NPRM and, after having received no comment on it, the Agency continues to believe that it is a reasonable estimate on which to base cost calculations.

TABLE 4—ESTIMATED INDUSTRY ENTRY COSTS PER NEW ENTRANT

Application Fee, License Fee, Registration Fee License Fee	$500
Advertising	2,000
Transactions Cost to Transfer Assets	200
Training and Other Costs	1,300
Total	4,000

For the sake of simplicity, the Agency has assumed that every new entrant that ceases interstate operations will be replaced by another (albeit safer) new entrant. Obviously, the dynamics of entry into and exit from the interstate motor carrier industry are more complex. Many new entrants are not wholly new entities, but carriers who were engaged in intrastate operations; these carriers, upon surrendering interstate authority, may return to intrastate-only operations. Some existing firms will absorb firms placed out of service, and will bear only a portion of these costs. Consequently, the total cost estimated to replace an exiting new entrant likely represents an upper bound.

The estimates of total costs require assumptions on the number of carriers that will remedy deficiencies after having failed a safety audit or received an expedited action letter, and the number that will exit the industry to avoid compliance costs. Fifteen percent of carriers (6,000) will be required to take the appropriate actions to achieve compliance after receiving an expedited action letter. FMCSA assumes that 50 percent (9,577) of the carriers that would fail the stricter safety audits will take the appropriate actions to achieve compliance, and that the other 50 percent of carriers (9,577) will exit the industry. According to Agency research, the normal motor carrier attrition rate is around 5 percent per year, so this analysis accounts for this fraction of motor carriers that would have exited the industry regardless of whether or not they were placed out of service after failing a safety audit.[12] Reducing the estimated number of OOS carriers by 5 percent left 9,098 new entrants that would be replaced as a result of the final rule. Annual costs to complying carriers are estimated to be $16.4 million ((6,000 + 9,577) × $1,055), and annual costs associated with new entrants exiting the

[11] *http://www.census.gov/csd/bes/07/part3.htm.* Advertising costs were $437 million for the 112,642 trucking establishments (NAICS code 484000) included in the 2002 Economic Census. *See http://www.census.gov/econ/census02/* for Economic Census data.

[12] FMCSA calculated the average annual attrition rate using MCMIS and SafeStat data on the numbers of new entrants and active motor carriers over sample periods from five to ten years. The results fell into a range of 3 to 6 percent.

industry are estimated to be $36.4 million (9,098 × $4,000).

Summary of Costs

Costs are summarized in Table 5 of the regulatory evaluation, which is reproduced here. Total annual costs are estimated to be $67.9 million, and are identical in all years. Costs discounted over 10 years at a 7 percent rate will be $477.2 million. The 3.5 percent of carriers not based in the U.S. would bear just $16.7 million of these costs; because this small amount does not materially impact the results, it will not be discussed further.

TABLE 5—SUMMARY OF ESTIMATED COSTS

[Millions]

Annual Costs	$67.9
Paperwork	6.3
Safety Audits	8.8
Compliance Costs	16.4
OOS Costs	36.4
Costs over 10 Years, Discounted at 7%	477.2
Paperwork	44.3
Safety Audits	62.0
Compliance Costs	115.3
OOS Costs	255.6

Safety Benefits

FMCSA expects substantial safety benefits from stricter enforcement of FMCSRs during new entrant safety audits. Research from the Volpe National Transportation Systems Center (Volpe Center) demonstrates that new entrant driver and carrier violations of regulations are positively correlated with crash rates.[13] As noted earlier, the Agency believes that safety audits could be more effective in identifying motor carriers that are noncompliant with the FMCSRs. The implementation of this rule will allow safety auditors to better flag noncompliant new entrants, and, because the ultimate goal of this rule is to improve motor carrier safety, the Agency believes that reducing violations of the FMCSRs will consequently lead to reductions in crash rates.

The motor carrier crash rate from MCMIS is 0.75 crashes per million vehicle miles traveled (MVMT), and the new entrant crash rate is 25 percent higher, 0.94 per MVMT.[14] FMCSA assumes that the new entrants placed out of service are less-safe than typical new entrants and crash 1.13 times per MVMT, a 50 percent higher rate than that of established motor carriers. This distribution of crash rates is consistent with recent MCMIS data: For all motor carriers, the crash rate of the worst 25th percentile is 50 to 70 percent higher than the overall rate. According to MCMIS, new entrants average 0.4

Safety Benefits of the Safety Audit

The effectiveness of stricter safety audits in reducing crash rates cannot be determined until several years after this rule goes into effect. However, one can make inferences from studies that demonstrate the effectiveness of compliance reviews (CRs) at reducing crash rates. The ''Compliance Review Effectiveness Model'' (June 2006),[15] created by the Volpe Center, compared the crash rates of motor carriers before and after CRs conducted in years 2000 through 2003. The model shows that motor carriers subject to compliance reviews in 2003 experienced a 17.5 percent reduction in their crash rates relative to the rate from an un-reviewed control group one year after the review, and projects extended benefits averaging about 17.5 percent below the control group's crash rate for the subsequent three years.

Safety audits are less comprehensive than CRs, and safety issues that may be found during a CR might not be observed in a safety audit. Safety audits may be less successful than CRs at discovering, and mandating corrections to, behavior that leads to crashes. The effectiveness of the safety audit at improving carrier safety will also be enhanced by improved compliance in response to expedited action letters. The Agency cannot predict whether all carriers subject to expedited actions would have failed the safety audit, but it assumes this to be the case. Consequently, the Agency did not separately estimate safety improvements from expedited actions, but assumed that these effects will be contained within the impact of the overall safety audit. Bounded by no effect and the effectiveness of a CR, the Agency assumes that the safety audits implemented under this rule fall in the middle, and will be half as effective as CRs, that is, they hold crash rates 8.75 percent below the baseline rate for 4 years after they have been conducted. An 8.75 percent reduction of the crash rate from the 0.94 rate, multiplied by the number of new entrants that take remedial actions to comply with the FMCSRs, multiplied by the annual new entrant MVMT (0.082 × 9,577 × 0.4) results in the rule having avoided 316 crashes each year in year one. In years two through four, the baseline crash rate will fall slightly as accumulated experience ''teaches'' new entrants to be safer carriers, so the crash reduction attributed to the safety audit is reduced somewhat. New entrants entering in the second year will experience the same reductions, which will overlap the crash reductions from the first year carriers. About 619 crashes will be avoided in the second year, 928 crashes in the third, and 1,238 crashes the fourth through tenth years. Cumulative over 10 years, 10,529 crashes will have been avoided.

Safety Benefits From Exiting Carriers

FMCSA assumes new entrants that replace exiting carriers will have an overall crash rate that is the same as the average rate for all new entrants, 0.94 crashes per MVMT. There would be no characteristics of these replacement carriers that would cause them to have an overall crash rate on average any better or worse than that of the new entrant population as a whole. As research presented in the Volpe Center's ''Background to New Entrant Safety Fitness Assurance Process'' (March 2000) shows, carriers improve their safety performance as they gain more years of experience. The worst carriers would be improving their safety performance at approximately the same rate as average new entrants. Nevertheless, the difference in the crash rates of these two groups will decline over time: Poor-performing carriers will experience larger declines in their crash rates by virtue of their crash rates having started at a higher level. Over 10 years, the average difference in crash rates would be about 0.17 crashes per MVMT.

As the worst-performing new entrants continually terminate interstate operations, the number of crashes avoided by their exiting the industry will accumulate. As stated, the carriers that replace them will have on average 0.17 fewer crashes per MVMT, and multiplying that difference times the number of replaced carriers and overall new entrant MVMT (0.17 × 9,098 × 0.4) yields 619 crashes in the first year. This group of new entrants will be pared down by 5 percent due to normal attrition in each subsequent year, as would the number of crashes avoided that can be attributed to their exit. New entrants arriving in subsequent years will repeat this pattern for crashes avoided, and these patterns will overlap those of all preceding years. Over 10 years, about 29,400 crashes will be avoided.

Summary of Safety Benefits

[13] Volpe Center (April 1998). ''New Entrant Safety Research, Final Report.''

[14] All crash rates are average crash rates weighted by MVMT.

[15] *http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/ProgramEffectiveness/CREM_O6.pdf.*

Table 6 of the regulatory evaluation, which is reproduced here, highlights estimates of the number of crashes avoided in several example years.

TABLE 6—CRASHES AVOIDED IN INDIVIDUAL YEARS

	Year 1	Year 2	Year 5	Year 10	10-Year total
Continuing Carriers	316	619	1,238	1,238	10,529
Closed Carriers	619	1,206	2,799	4,965	29,400
Total	935	1,826	4,037	6,203	39,929

FMCSA estimates that about 39,929 crashes will be avoided over 10 years. The average cost of a motor-carrier-involved crash is $146,410.[16] This includes both direct costs such as medical, emergency services, and property damage, and indirect costs such as lost productivity and diminished quality of life. By deterring 39,929 crashes, this rule will yield a 10-year benefit, discounted at a 7 percent rate, of $3,778.0 million.

Summary of Costs and Benefits

This rule ensures better compliance with FMCSRs. The costs and benefits over 10 years, discounted at a 7 percent rate, will be $477.2 million and $3,778.0 million, respectively. Net benefits will be $3,300.8 million, and the benefit/cost ratio will be 7.9. FMCSA estimates that 39,929 crashes will be avoided over 10 years. Eliminating these crashes will avoid 487 fatalities.[17] The 10-year discounted cost per life saved will be $1.0 million.

Alternative Assumptions on Improvements in Carrier Safety

Benefits estimates are sensitive to assumptions about the reduction in the crash rates that the implementation of this final rule will achieve. The above estimates indicate that 464 crashes would have to be avoided each year for this rule to yield positive net benefits. Even if safety audits do nothing to improve safety and decrease crash rates, some risky carriers will still end interstate operations as a result of the rule. Positive net benefits would still occur if this rule did nothing but prompt the worst 5.7 percent (about 2,300 carriers per year) of new entrants to exit the industry. Conversely, if all new entrants remained in the industry and took the appropriate corrective actions, safety audits would need to be just 7.1 percent as effective as compliance reviews in reducing crash rates for the rule to yield positive net benefits. The reduction in crash rates needed to produce positive net benefits would be just 1.3 percent of the average new entrant crash rate of 0.94 per MVMT; the safety audit would have to prevent about 0.01 crashes per MVMT.

Alternate Discount Rate and Crash Costs

The Agency also computed costs and benefits using a 3 percent discount rate over a 10-year horizon. Because costs are constant and benefits increase over the time, the ratio of benefits to costs improves as a result of using this lower discount rate. Using a 7 percent discount rate, FMCSA computed benefits using alternate values of a large truck crash cost which incorporate different economic values of statistical life (VSL). The baseline VSL was $5.8 million; here values of $3.2 million and $8.4 million are also used. Even the lowest VSL still results in strong positive net benefits. Table 7 of the regulatory evaluation, which is reproduced here, shows the results of these analyses.

TABLE 7—ALTERNATE DISCOUNT RATE AND CRASH COSTS

Discount rate	Value of statistical life (millions)	Average crash cost	Costs (millions)	Safety benefits (millions)	B/C ratio
3%	$5.8	$146,410	$579.6	$4,813.0	8.3
	5.8	46,410	.....	3,778.0	7.9
7%	3.2	91,582	477.2	2,363.2	5.0
	8.4	201,237	.....	5,192.8	10.9

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined there are three currently approved information collections that will be affected by this final rule: (1) OMB Control No. 2126–0013 titled ''Motor Carrier Identification Report'' (FMCSA Forms MCS–150, MCS–150A, and MCS–150B), approved at 119,270 burden hours through March 31, 2011; (2) OMB Control No. 2126–0015 titled ''Designation of Agents, Motor Carriers, Brokers and Freight Forwarders (FMCSA Form BOC–3) approved at 14,833 burden hours through June 30, 2011; and (3) OMB Control No. 2126–0016 titled ''Licensing Applications for Motor Carrier Operating Authority'' (FMCSA Forms OP–1, OP–1 (FF), OP–

[16] Zaloshnja, Eduard and Ted Miller (December 2006). ''Unit Costs of Medium and Heavy Truck Crashes.'' Figures in this report are for 2005: We adjusted the $91,112 cost for a large truck crash and the $3,604,518 cost for a fatal crash to 2006 dollars using the annual percent change in the gross domestic product deflator (*http://www.bea.gov/national/index.htm#gdp*). Zaloshnja and Miller use a $3.0 million value of a statistical life (VSL) for their estimates; the Agency has recomputed these figures using a $5.8 million VSL, in accordance with DOT guidance on the treatment of the economic value of a statistical life in Departmental analyses issued February 5, 2008 (*http://ostpxweb.dot.gov/policy/reports/080205.htm*).

[17] FMCSA's *Large Truck Crash Facts, 2005* indicates that 1 percent of crashes involve fatalities, claiming 1.15 lives per fatal crash.

1 (MX), and OP–1 (P), approved at 55,738 burden hours through August 31, 2008, (pending revision at OMB). The table below depicts the current and future burden hours associated with the information collections.

TABLE—CURRENT AND FUTURE INFORMATION COLLECTION BURDENS

OMB approval No.	Annual burden hours currently approved	Future annual burden hours	Change
2126–0013	119,270	108,969	−10,301
13 MCS—150	108,825	108,829	4
13 MCS—150A	10,305	0	−10,305
13 MCS—150B	140	140	0
2126–0015	14,833	14,835	2
2126–0016	55,738	55,786	48
Net Change			−10,251

The following is an explanation of how each of the information collections shown above will be affected by this final rule.

OMB Control No. 2126–0013. This final rule will eliminate the requirement for new entrants to complete the Form MCS–150A (Safety Certification for Applications for USDOT Number) because it does not provide the results intended. Amendments to 49 CFR part 385, subpart E–Hazardous Materials Safety Permits will remove references to the MCS–150A and will not impact the MCS–150B in any way. The estimated annual paperwork burden for this information collection will be 108,969 hours [119,270 currently approved annual burden hours − 10,305 (68,700 respondents × 9 minutes/60 minutes to complete the MCS–150A form) + 4 (12 non-North America-domiciled motor carriers × 20 minutes/60 minutes to complete the Form MCS–150) = 108,969].

OMB Control No. 2126–0015. Non-North America-domiciled motor carriers will also be required to notify the Agency regarding designation of process agents by either: (1) Submission in the application package of Form BOC–3 (Designation of Agents, Motor Carriers, Brokers and Freight Forwarders), or (2) a letter stating that the applicant will use a process agent that will submit the Form BOC–3 electronically. The estimated annual paperwork burden for this information collection will be 14,835 hours [14,833 currently approved annual burden hours + 2 hours (12 new entrant non-North America-domiciled motor carriers × 10 minutes/60 minutes to complete Form BOC–3) = 14,835 hours].

OMB Control No. 2126–0016. The final rule will create a new Form OP–1 (NNA) titled ''Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers.'' A non-North America-domiciled motor carrier is one whose principal place of business is located in a country other than the United States, Canada or Mexico. These entities would use the OP–1 (NNA) when requesting either a USDOT new entrant registration as a private or exempt for-hire carrier or operating authority as a non-exempt for-hire carrier. The estimated annual paperwork burden for this information collection would be 55,786 hours [55,738 currently approved annual burden hours + 48 hours (12 new entrant non-North America-domiciled motor carriers × 4 hours to complete Form OP–1 (NNA)) = 55,786 hours].

The changes in this final rule, affecting three currently-approved information collections, would result in a net decrease of 10,251 burden hours in the Agency's information collection budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) (the Act) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden. To achieve this, the Act requires that agencies describe how they have addressed these concerns by including a Final Regulatory Flexibility Analysis (FRFA) with each final rule. The Agency has prepared the FRFA set forth below. The full version of this FRFA is included in the Regulatory Evaluation that has been placed in the docket for this rule.

(1) *Objectives of, and need for, the final rule.* The objective of this final rule is to improve the compliance of new interstate carriers (known in this rule as new entrants) with the existing FMCSRs and HMRs and thereby reduce the number and severity of crashes in which these carriers are involved. In response to concerns about the safety of new entrant motor carriers, Congress enacted section 210 of MCSIA. Section 210(a) directed the Secretary to require that each motor carrier granted operating authority undergo a safety audit within the first 18 months of operation. Section 210(b) required the Secretary to establish regulations specifying minimum knowledgeability requirements for motor carriers applying to obtain interstate operating authority. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators.

To implement this mandate, FMCSA published an IFR on May 13, 2002 (67 FR 31978), which became effective January 1, 2003 titled ''*New Entrant Safety Assurance Process.*'' New entrants are granted provisional operating authority and subjected to an 18-month safety monitoring period. When a new entrant registers for a USDOT Number, it must complete Form MCS–150A—Safety Certification for Applications for USDOT Number to certify understanding of applicable safety regulations and receives ETA materials, upon request. Additionally, during the initial 18-month period of operations, FMCSA evaluates the new entrant's safety management practices by monitoring the carrier's on-road performance prior to granting the carrier permanent registration and by conducting an on-site review of its operations called a safety audit.

In response to comments on the IFR indicating new entrants lacking basic safety management controls were passing the safety audit, and after having collected additional data, FMCSA published an NPRM titled ''*New Entrant Safety Assurance Process*'' on December 21, 2006 (71 FR 76730). The NPRM proposed enhancements to strengthen and clarify the new entrant program. Notably, the Agency proposed eliminating Form MCS–150A because this form was deemed ineffective at assessing carrier familiarity with safety regulations. To

meet the requirements of section 210(b), the Agency will continue to rely on ETA materials to provide an effective foundation for knowledge of safety regulations, and has enhanced the currency and availability of these materials to further their support of the knowledgeability provision. In addition, the Agency will confirm knowledge of applicable regulations during the safety audit. The NPRM also proposed to revise the grading criteria for the safety audit so carriers would automatically fail if a violation was found in any one of 11 regulations.

This final rule adopts the following NPRM proposals with consideration to additional public comments. The final rule:

- Eliminates Form MCS–150A. To promote carrier knowledgeability of safety regulations, the Agency has enhanced the currency of ETA materials, provides online access to these materials, and distributes paper copies to motor carriers.
- Adds new § 385.308 to identify violations that will result in expedited action.
- Revises § 385.327 to clarify the process for administrative review.
- Revises § 385.329(b) to clarify how a new entrant whose authority has been revoked can reapply.
- Revises § 385.337(a) to clarify that refusal to submit to a safety audit may subject a new entrant to civil penalties.
- Revises § 385.306 to clarify actions that may be taken against a carrier who provides incomplete or untruthful information on the Form MCS–150.
- Establishes a new safety monitoring system and application process for NNA-domiciled motor carriers, who were not covered by the IFR.
- Establishes a list of 16 regulatory violations that would result in automatic failure of the safety audit, five more than were proposed by the NPRM. Many of the originally-proposed provisions were clarified, and two of them were adjusted to require a pattern of violations rather than a single occurrence of non-compliance to result in automatic failure of the safety audit.

(2) *Summary of the public comments on the initial RFA (IRFA), and Agency response.* The comment period for the NPRM ended on February 20, 2007. FMCSA received a total of 17 comments in response to the NPRM, representing 21 entities. No comments addressed the IRFA directly. However, one commenter, OOIDA, submitted a comment relevant to the FRFA. Specifically, OOIDA stated that the FMCSA proposal will increase the small business failure rate and is ''reactive'' and ''punitive'' to small businesses.

FMCSA is mandated under section 210 of MCSIA to establish regulations specifying minimum knowledgeability requirements for motor carriers applying to obtain interstate operating authority, and furthermore to require new entrants to undergo a safety audit within the first 18 months of operation. Failure of the safety audit will occur when a carrier fails to comply with safety regulations that the Agency has determined to be essential in demonstrating effective safety management controls.

It is worth noting that no matter how the new entrant program could have been structured, for it to be effective as envisioned by Congress some new entrants would have to change their behavior to come into compliance with existing FMCSRs. The Agency's analysis of past safety audits indicates that the majority of new entrants already demonstrate adequate safety management controls, even under the more stringent safety audit standards imposed by this rule. New entrants have many opportunities to educate themselves on and come into compliance with the existing FMCSRs. Nevertheless, FMCSA expects that some new entrants will still surrender interstate operating authority rather than comply with the safety regulations (although they would not necessarily be precluded from engaging in intrastate-only operations). The only way for the Agency to eliminate all adverse business impacts on small carriers would be to allow non-compliance by a small subset of carriers. This is not in the public's interest and the interest of other motor carriers, small and large.

(3) *Description and an estimate of the number of small entities to which the rule will apply.* New entrants tend to be the smallest firms in the industry. FMCSA estimates that on average 68,700 motor carriers apply for interstate authority each year, as evidenced by a count of filings of Form MCS–150A. About 40,000 of these carriers remain in the new entrant program through the safety audit phase. The Small Business Administration (SBA) regulations (13 CFR Part 121) specify the small business size standard for the motor carrier industry as not more than $23.5 million in average annual receipts per firm. Revenue data for most carriers are not available, but motor carriers are required to report to the Agency on Form MCS–150 the number of power units they own. A survey by OOIDA indicates that revenue per tractor is about $120,539,[18] and using this amount, FMCSA assumes that firms possessing fewer than 195 power units would fall below the $23.5 million revenue threshold for small business designation. Data from MCMIS indicate that about 99.8 percent of new entrants—effectively all of them—are small businesses.

(4) *Projected reporting, recordkeeping, and other compliance requirements of the final rule.* This rule improves the efficacy of the new entrant safety audits in identifying instances of poor compliance and directing new entrants to correct their business practices. Although FMCSA estimates that non-compliant carriers could spend on average $1,000 to come into compliance with safety regulations, these costs are associated with requirements of existing regulations, and are borne by the majority of motor carriers who already comply with the FMCSRs. This rule imposes no new substantive requirements on any motor carrier. It is also important to note that the safety audit is not a compliance intervention, *i.e.*, no civil penalties for non-compliance are imposed.

The rule does impose some small administrative and paperwork requirements. FMCSA will continue to provide online access to and distribute hard copies of ETA materials, which all new entrants should spend time reviewing. The Agency estimates that a manager or company official at each carrier will spend about 3 hours with the enhanced materials, at a labor cost of about $157. The cost of a carrier's time spent during the safety audit is estimated to be $220.60. In total, the new entrant program imposes total one-time expense of $377.60 on each new entrant. A new entrant that fails its safety audit or receives an expedited action demand letter will also be required to submit a corrective action plan, proof that it has remedied deficiencies in key areas of regulatory compliance. This will also be handled by a manager or company official, and FMCSA estimates that the total cost of submitting a corrective action plan is $55, including materials and labor. With average revenue per tractor estimated to be $120,539, the maximum cost the smallest new entrant, a carrier with just one power unit, would incur costs equal to about 0.3 percent of a single year's revenue. In most cases, these new costs would be borne only once. Consequently, FMCSA does not judge the cost of this rule to be significant.

(5) *Steps the Agency has taken to minimize the significant adverse*

[18] OOIDA 2003 Cost of Operations Survey. *http://www.ooida.com/Documents/2003_Cost_Ops.pdf.* Survey is $110,527 per tractor; FMCSA adjusted this to 2006 prices using the GDP deflator.

economic impact on small entities. Because an interim final rule has been in effect for several years before this final rule, FMCSA has been able to implement the best policies based on several years of experience.

The safety audit received perhaps the greatest amount of consideration. The purpose of the safety audit is to educate the carrier about the applicable safety regulations and to assess the adequacy of its basic safety management controls. If a carrier's safety management controls are deemed inadequate, the Agency also requires corrective actions by the carrier before granting permanent operating authority. When the new entrant program was implemented in 2003, FMCSA established a safety audit that, while educational, had such lenient assessment criteria—the pass rate was greater than 99 percent—that it did very little to compel carriers who lacked basic safety management controls to improve. The Agency did not believe that education alone was enough to encourage voluntary compliance. Analysis of recent crash data indicates that the crash rate of new entrants is still significantly higher than that of the overall carrier population. Because improved safety is the ultimate goal of the new entrant program, a stricter safety audit seemed absolutely necessary. However, in adopting 16 automatic failure criteria, FMCSA has been careful to implement standards that are designed to flag substantial deficiencies in the new entrant's basic safety management controls. Even then, FMCSA will provide guidance to carriers as they make the required corrective actions.

FMCSA has also made other changes to better educate carriers on safety regulations before their safety audits. To enhance the content and availability of the ETA materials, FMCSA has improved the information content. In addition, the Agency has published the ETA materials online and will also mail ETA materials to new entrants. FMCSA will keep the ETA materials up to date. FMCSA is eliminating the requirement to self-certify knowledge of Federal safety requirements during the application process (Form MCS–150A—Safety Certification for Applications for USDOT Number) because the Agency believes it fails to demonstrate that carriers have the requisite familiarity with motor carrier safety regulations. The Agency anticipates that the educational focus at the beginning of the new entrant program resulting from the improved, updated, and more accessible ETA materials will increase the likelihood that carriers will begin their operations with adequate safety management controls, which, in addition to reducing safety audit failures, could also help avert costly mistakes later, such as crashes and violations caught at roadside inspections.

Pursuant to section 210(a) of MCSIA, FMCSA considered alternate locations where safety audits may be conducted (other than on-site at the carrier's principle place of business) for the convenience of small businesses. FMCSA will conduct group audits in areas where practicable, while being careful to maintain carrier privacy. FCMSA believes conducting audits at alternate locations is beneficial, practical, and cost effective for both the Federal Government and the carriers, given the right circumstances.

Privacy Impact Analysis

FMCSA conducted a privacy impact assessment of this rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Public Law 108–447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. This rule would neither enlarge the scope of personally identifiable information collected nor change the sharing of that information. The entire privacy impact assessment is available in the docket for this rule.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare analyses of rules that would result in the expenditure by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Department of Transportation guidance requires the use of a revised threshold figure of $136.1 million, which is the value of $100 million in 2008 after adjusting for inflation. FMCSA has determined that the impact of this rulemaking will not be that large in any projected year.

National Environmental Policy Act

FMCSA has analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined under the Agency's National Environmental Policy Act Implementing Procedures, FMCSA Order 5610.1C (published at 69 FR 9680, March 1, 2004, with an effective date of March 30, 2004) this action is categorically excluded under Appendix 2, paragraph 6.f of the Order from further environmental documentation. That categorical exclusion relates to establishing regulations implementing the following activities, whether performed by FMCSA or by States pursuant to the Motor Carrier Safety Assistance Program (MCSAP), which provides financial assistance to States to reduce the number and severity of crashes and hazardous materials incidents involving commercial motor vehicles: (1) Driver/vehicle inspections; (2) traffic enforcement; (3) safety audits; (4) compliance reviews; (5) public education and awareness; and (6) data collection; and provides reimbursement for the expenses listed under paragraphs 6.f.(6)(C)(i) through 6.f.(6)(C)(v). This action amends the New Entrant Safety Assurance Process for carriers newly registering to operate in interstate commerce. The Agency believes this action will include no extraordinary circumstances having any effect on the quality of the environment.

FMCSA has also analyzed this action under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. We performed a conformity analysis of the CAA according to the procedures outlined in Appendix 14 of FMCSA Order 5610.C. This rule will not result in any emissions increase, nor would it have any potential to result in emissions above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable the proposed rule change would not increase total CMV mileage, change the routing of CMVs, change how CMVs operate, or change the CMV fleet-mix of motor carriers. This action will revise the program for assuring the safety of new entrant motor carriers.

Executive Order 12898 (Environmental Justice)

FMCSA will evaluate the environmental effects of any action implemented in subsequent phases of this proceeding in according with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice in Minority Populations and Low-Income Populations (published at 62 FR 18377, April 15, 1997) to determine if there are environmental justice issues associated with its provisions or any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks.'' This rule does not concern a risk to environmental health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined this action will not have a substantial direct effect or sufficient federalism implications on States by limiting the policymaking discretion of the States. Nothing in this document will directly preempt any State law or regulation. It will not impose additional costs or burdens on the States. This action will not have a significant effect on the States' ability to execute traditional State governmental functions. To the extent that States incur costs for conducting these safety audits, they will be reimbursed 100 percent with Federal funds under MCSAP.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Executive Order 13211 (Energy Supply, Distribution, or Use)

This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because it is not economically significant and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 365

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

49 CFR Part 385

Administrative practices and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 387

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, reporting and recordkeeping requirements.

■ In consideration of the foregoing, FMCSA amends parts 365, 385, 387, and 390 of title 49, Code of Federal Regulations as follows:

PART 365—RULE GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

■ 1. The authority citation for part 365 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 13101, 13301, 13901–13906, 14708, 31138, and 31144; 49 CFR 1.73.

■ 2. Amend § 365.101 by adding a new paragraph (i) to read as follows:

§ 365.101 Applications governed by these rules.

* * * * *

(i) Applications for non-North America-domiciled motor carriers to operate in foreign commerce as for-hire motor carriers of property and passengers within the United States.

■ 3. Amend § 365.105 by revising paragraph (a) to read as follows:

§ 365.105 Starting the application process: Form OP–1.

(a) Each applicant must file the appropriate form in the OP–1 series. Form OP–1 must be filed when requesting authority to operate as a motor property carrier, a broker of general freight, or a broker of household goods; Form OP–1(P) must be filed when requesting authority to operate as a motor passenger carrier; Form OP–1(FF) must be filed when requesting authority to operate as a freight forwarder; Form OP–1(MX) must be filed by a Mexico-domiciled motor property, including household goods, carrier, or a motor passenger carrier requesting authority to operate within the United States; and effective December 16, 2009.

Form OP–1(NNA) must be filed by a non-North America-domiciled motor property, including household goods, carrier or a motor passenger carrier requesting authority to operate within the United States. A separate filing fee in the amount set forth at 49 CFR 360.3(f)(1) is required for each type of authority sought.

* * * * *

PART 385—SAFETY FITNESS PROCEDURES

■ 4. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, and 31502; sec. 350 of Public Law 107–87; and 49 CFR 1.73.

§ 385.305 [Amended]

■ 5. Amend § 385.305 to remove paragraph (b)(3) and to redesignate paragraph (b)(4) as (b)(3).

■ 6. Add § 385.306 to subpart D to read as follows:

§ 385.306 What are the consequences of furnishing misleading information or making a false statement in connection with the registration process?

A carrier that furnishes false or misleading information, or conceals material information in connection with the registration process, is subject to the following actions:

(a) Revocation of registration.

(b) Assessment of the civil and/or criminal penalties prescribed in 49 U.S.C. 521 and 49 U.S.C. chapter 149.

■ 7. Amend § 385.307 to revise paragraph (a) to read as follows:

§ 385.307 What happens after a motor carrier begins operations as a new entrant?

* * * * *

(a) The new entrant's roadside safety performance will be closely monitored to ensure the new entrant has basic safety management controls that are operating effectively.

* * * * *

■ 8. Add § 385. 308 to subpart D to read as follows:

§ 385.308 What may cause an expedited action?

(a) A new entrant that commits any of the following actions, identified through

roadside inspections or by any other means, may be subjected to an expedited safety audit or a compliance review or may be required to submit a written response demonstrating corrective action:

(1) Using a driver not possessing a valid commercial driver's license to operate a commercial vehicle as defined under § 383.5 of this chapter. An invalid commercial driver's license includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating a vehicle placed out of service for violations of the Federal Motor Carrier Safety Regulations or compatible State laws and regulations without taking necessary corrective action.

(3) Being involved in, through action or omission, a hazardous materials reportable incident, as described under 49 CFR 171.15 or 171.16, involving—

(i) A highway route controlled quantity of certain radioactive materials (Class 7).

(ii) Any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3).

(iii) Any quantity of certain poison inhalation hazard materials (Zone A or B).

(4) Being involved in, through action or omission, two or more hazardous materials reportable incidents as described under 49 CFR 171.15 or 171.16, involving hazardous materials other than those listed above.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating a commercial motor vehicle without the levels of financial responsibility required under part 387 of this subchapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) If a new entrant that commits any of the actions listed in paragraph (a) of this section:

(1) Has not had a safety audit or compliance review, FMCSA will schedule the new entrant for a safety audit as soon as practicable.

(2) Has had a safety audit or compliance review, FMCSA will send the new entrant a notice advising it to submit evidence of corrective action within 30 days of the service date of the notice.

(c) FMCSA may schedule a compliance review of a new entrant that commits any of the actions listed in paragraph (a) of this section at any time if it determines the violation warrants a thorough review of the new entrant's operation.

(d) Failure to respond within 30 days of the notice to an Agency demand for a written response demonstrating corrective action will result in the revocation of the new entrant's registration.

■ 9. Revise § 385.319 to read as follows:

§ 385.319 What happens after completion of the safety audit?

(a) Upon completion of the safety audit, the auditor will review the findings with the new entrant.

(b) *Pass.* If FMCSA determines the safety audit discloses the new entrant has adequate basic safety management controls, the Agency will provide the new entrant written notice as soon as practicable, but not later than 45 days after completion of the safety audit, that it has adequate basic safety management controls. The new entrant's safety performance will continue to be closely monitored for the remainder of the 18-month period of new entrant registration.

(c) *Fail.* If FMCSA determines the safety audit discloses the new entrant's basic safety management controls are inadequate, the Agency will provide the new entrant written notice, as soon as practicable, but not later than 45 days after the completion of the safety audit, that its USDOT new entrant registration will be revoked and its operations placed out-of-service unless it takes the actions specified in the notice to remedy its safety management practices.

(1) *60-day corrective action requirement.* All new entrants, except those specified in paragraph (c)(2) of this section, must take the specified actions to remedy inadequate safety management practices within 60 days of the date of the notice.

(2) *45-day corrective action requirement.* The new entrants listed below must take the specified actions to remedy inadequate safety management practices within 45 days of the date of the notice:

(i) A new entrant that transports passengers in a CMV designed or used to transport between 9 and 15 passengers (including the driver) for direct compensation.

(ii) A new entrant that transports passengers in a CMV designed or used to transport more than 15 passengers (including the driver).

(iii) A new entrant that transports hazardous materials in a CMV as defined in paragraph (4) of the definition of a ''Commercial Motor Vehicle'' in § 390.5 of this subchapter.

■ 10. Revise § 385.321 to read as follows:

§ 385.321 What failures of safety management practices disclosed by the safety audit will result in a notice to a new entrant that its USDOT new entrant registration will be revoked?

(a) *General.* The failures of safety management practices consist of a lack of basic safety management controls as described in Appendix A of this part or failure to comply with one or more of the regulations set forth in paragraph (b) of this section and will result in a notice to a new entrant that its USDOT new entrant registration will be revoked.

(b) *Automatic failure of the audit.* A new entrant will automatically fail a safety audit if found in violation of any one of the following 16 regulations:

TABLE TO § 385.321—VIOLATIONS THAT WILL RESULT IN AUTOMATIC FAILURE OF THE NEW ENTRANT SAFETY AUDIT

Violation	Guidelines for determining automatic failure of the safety audit
1. § 382.115(a)/§ 382.115(b)—Failing to implement an alcohol and/or controlled substances testing program (domestic and foreign motor carriers, respectively).	Single occurrence.
2. § 382.201—Using a driver known to have an alcohol content of 0.04 or greater to perform a safety-sensitive function.	Single occurrence.
3. § 382.211—Using a driver who has refused to submit to an alcohol or controlled substances test required under part 382.	Single occurrence.
4. § 382.215—Using a driver known to have tested positive for a controlled substance.	Single occurrence.
5. § 382.305—Failing to implement a random controlled substances and/or alcohol testing program.	Single occurrence.
6. § 383.3(a)/§ 383.23(a)—Knowingly using a driver who does not possess a valid CDL.	Single occurrence.

TABLE TO § 385.321—VIOLATIONS THAT WILL RESULT IN AUTOMATIC FAILURE OF THE NEW ENTRANT SAFETY AUDIT—Continued

Violation	Guidelines for determining automatic failure of the safety audit
7. § 383.37(a)—Knowingly allowing, requiring, permitting, or authorizing an employee with a commercial driver's license which is suspended, revoked, or canceled by a State or who is disqualified to operate a commercial motor vehicle.	Single occurrence.
8. § 383.51(a)—Knowingly allowing, requiring, permitting, or authorizing a driver to drive who is disqualified to drive a commercial motor vehicle.	Single occurrence. This violation refers to a driver operating a CMV as defined under § 383.5.
9. § 387.7(a)—Operating a motor vehicle without having in effect the required minimum levels of financial responsibility coverage.	Single occurrence.
10. § 387.31(a)—Operating a passenger carrying vehicle without having in effect the required minimum levels of financial responsibility.	Single occurrence.
11. § 391.15(a)—Knowingly using a disqualified driver	Single occurrence.
12. § 391.11(b)(4)—Knowingly using a physically unqualified driver	Single occurrence. This violation refers to a driver operating a CMV as defined under § 390.5.
13. § 395.8(a)—Failing to require a driver to make a record of duty status	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.
14. § 396.9(c)(2)—Requiring or permitting the operation of a commercial motor vehicle declared "out-of-service" before repairs are made.	Single occurrence.
15. § 396.11(c)—Failing to correct out-of-service defects listed by driver in a driver vehicle inspection report before the vehicle is operated again.	Single occurrence.
16. § 396.17(a)—Using a commercial motor vehicle not periodically inspected	Requires a violation threshold (51% or more of examined records) to trigger automatic failure.

■ 11. Revise § 385.323 to read as follows:

§ 385.323 May FMCSA extend the period under § 385.319(c) for a new entrant to take corrective action to remedy its safety management practices?

(a) FMCSA may extend the 60-day period in § 385.319(c)(1) for up to an additional 60 days provided FMCSA determines the new entrant is making a good faith effort to remedy its safety management practices.

(b) FMCSA may extend the 45-day period in § 385.319(c)(2) for up to an additional 10 days if the new entrant has submitted evidence that corrective actions have been taken pursuant to § 385.319(c) and the Agency needs additional time to determine the adequacy of the corrective action.

■ 12. Amend § 385.325 to revise paragraph (b) to read as follows:

§ 385.325 What happens after a new entrant has been notified under § 385.319(c) to take corrective action to remedy its safety management practices?

* * * * *

(b) If a new entrant, after being notified that it is required to take corrective action to improve its safety management practices, fails to submit a written response demonstrating corrective action acceptable to FMCSA within the time specified in § 385.319, and any extension of that period authorized under § 385.323, FMCSA will revoke its new entrant registration and issue an out-of-service order effective on:

(1) Day 61 from the notice date for new entrants subject to § 385.319(c)(1).

(2) Day 46 from the notice date for new entrants subject to § 385.319(c)(2).

(3) If an extension has been granted under § 385.323, the day following the expiration of the extension date.

* * * * *

■ 13. Revise § 385.327 to read as follows:

§ 385.327 May a new entrant request an administrative review of a determination of a failed safety audit?

(a) If a new entrant receives a notice under § 385.319(c) that its new entrant registration will be revoked, it may request FMCSA to conduct an administrative review if it believes FMCSA has committed an error in determining that its basic safety management controls are inadequate. The request must:

(1) Be made to the Field Administrator of the appropriate FMCSA Service Center.

(2) Explain the error the new entrant believes FMCSA committed in its determination.

(3) Include a list of all factual and procedural issues in dispute and any information or documents that support the new entrant's argument.

(b) FMCSA may request that the new entrant submit additional data and attend a conference to discuss the issues(s) in dispute. If the new entrant does not attend the conference or does not submit the requested data, FMCSA may dismiss the new entrant's request for review.

(c) A new entrant must submit a request for an administrative review within one of the following time periods:

(1) If it does not submit evidence of corrective action under § 385.319(c), within 90 days after the date it is notified that its basic safety management controls are inadequate.

(2) If it submits evidence of corrective action under § 385.319(c), within 90 days after the date it is notified that its corrective action is insufficient and its basic safety management controls remain inadequate.

(d) If a new entrant wants to assure that FMCSA will be able to issue a final written decision before the prohibitions outlined in § 385.325(c) take effect, the new entrant must submit its request no later than 15 days from the date of the notice that its basic safety management controls are inadequate. Failure to submit the request within this 15-day period may result in revocation of new entrant registration and issuance of an out-of-service order before completion of administrative review.

(e) FMCSA will complete its review and notify the new entrant in writing of its decision within:

(1) 45 days after receiving a request for review from a new entrant that is subject to § 385.319(c)(1).

(2) 30 days after receiving a request for review from a new entrant that is subject to § 385.319(c)(2).

(f) The Field Administrator's decision constitutes the final Agency action.

(g) Notwithstanding this subpart, a new entrant is subject to the suspension and revocation provisions of 49 U.S.C. 13905 for violations of DOT regulations governing motor carrier operations.

■ 14. Revise § 385.329 to read as follows:

§ 385.329 May a new entrant that has had its USDOT new entrant registration revoked and its operations placed out of service reapply?

(a) A new entrant whose USDOT new entrant registration has been revoked, and whose operations have been placed out of service by FMCSA, may reapply for new entrant registration no sooner than 30 days after the date of revocation.

(b) If the USDOT new entrant registration was revoked because of a failed safety audit, the new entrant must do all of the following:

(1) Submit an updated MCS–150.

(2) Submit evidence that it has corrected the deficiencies that resulted in revocation of its registration and will otherwise ensure that it will have basic safety management controls in effect.

(3) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(c) If the USDOT new entrant registration was revoked because FMCSA found that the new entrant had failed to submit to a safety audit, it must do all of the following:

(1) Submit an updated MCS–150.

(2) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(3) Submit to a safety audit.

(d) If the new entrant is a for-hire carrier subject to the registration provisions under 49 U.S.C. 13901 and also has had its operating authority revoked, it must re-apply for operating authority as set forth in part 365 of this chapter.

■ 15. Revise § 385.331 to read as follows:

§ 385.331 What happens if a new entrant operates a CMV after having been issued an order placing its interstate operations out of service?

A new entrant that operates a CMV in violation of an out-of-service order is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A) for each offense as adjusted for inflation by 49 CFR part 386, Appendix B.

■ 16. Amend § 385.337 to revise paragraph (a) to read as follows:

§ 385.337 What happens if a new entrant refuses to permit a safety audit to be performed on its operations?

(a) If a new entrant refuses to permit a safety audit to be performed on its operations, FMCSA will provide the carrier with written notice that its registration will be revoked and its operations placed out of service unless the new entrant agrees in writing, within 10 days from the service date of the notice, to permit the safety audit to be performed. The refusal to permit a safety audit to be performed may subject the new entrant to the penalty provisions of 49 U.S.C. 521(b)(2)(A), as adjusted for inflation by 49 CFR part 386, Appendix B.

* * * * *

■ 17. Amend § 385.405 to revise paragraph (a) to read as follows:

§ 385.405 How does a motor carrier apply for a safety permit?

(a) *Application form(s).* (1) To apply for a new safety permit or renewal of the safety permit, a motor carrier must complete and submit Form MCS–150B, Combined Motor Carrier Identification Report and HM Permit Application.

(2) The Form MCS–150B will also satisfy the requirements for obtaining and renewing a USDOT Number; there is no need to complete Form MCS–150, Motor Carrier Identification Report.

* * * * *

■ 18. Amend § 385.421 by revising paragraph (a)(2) to read as follows:

§ 385.421 Under what circumstances will a safety permit be subject to revocation or suspension by FMCSA?

(a) * * *

(2) A motor carrier provides any false or misleading information on its application (Form MCS–150B) or as part of updated information it is providing on Form MCS–150B (see § 385.405(d)).

* * * * *

■ 19. Amend part 385 by adding and reserving subparts F and G, and by adding a new subpart H consisting of new §§ 385.601 through 385.609 and an Appendix to subpart H to read as follows:

Subpart H—Special Rules for New Entrant Non-North America-Domiciled Carriers

Sec.
385.601 Scope of rules.
385.603 Application.
385.605 New entrant registration driver's license and drug and alcohol testing requirements.
385.607 FMCSA action on the application.
385.609 Requirement to notify FMCSA of change in applicant information.
Appendix to Subpart H of Part 385—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Non-North America-Domiciled Motor Carriers

Subpart H—Special Rules for New Entrant Non-North America-Domiciled Carriers

§ 385.601 Scope of rules.

The rules in this subpart govern the application by a non-North America-domiciled motor carrier to provide transportation of property and passengers in interstate commerce in the United States.

§ 385.603 Application.

(a) Each applicant applying under this subpart must submit an application that consists of:

(1) Form OP–1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers;

(2) Form MCS–150—Motor Carrier Identification Report; and

(3) A notification of the means used to designate process agents, either by submission in the application package of Form BOC–3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders or a letter stating that the applicant will use a process agent service that will submit the Form BOC–3 electronically.

(b) FMCSA will only process an application if it meets the following conditions:

(1) The application must be completed in English;

(2) The information supplied must be accurate, complete, and include all required supporting documents and applicable certifications in accordance with the instructions to Form OP–1(NNA), Form MCS–150 and Form BOC–3;

(3) The application must include the filing fee payable to the FMCSA in the amount set forth at 49 CFR 360.3(f)(1); and

(4) The application must be signed by the applicant.

(c) An applicant must submit the application to the address provided in Form OP–1(NNA).

(d) An applicant may obtain the application forms from any FMCSA Division Office or download them from the FMCSA Web site at: *http://www.fmcsa.dot.gov/forms/forms.htm*.

§ 385.605 New entrant registration driver's license and drug and alcohol testing requirements.

(a) A non-North America-domiciled motor carrier must use only drivers who possess a valid commercial driver's license—a CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor—to operate its vehicles in the United States.

(b) A non-North America-domiciled motor carrier must subject each of the drivers described in paragraph (a) of this section to drug and alcohol testing as prescribed under part 382 of this subchapter.

§ 385.607 FMCSA action on the application.

(a) FMCSA will review and act on each application submitted under this subpart in accordance with the procedures set out in this part.

(b) FMCSA will validate the accuracy of information and certifications provided in the application by checking, to the extent available, data maintained in databases of the governments of the country where the carrier's principal place of business is located and the United States.

(c) *Pre-authorization safety audit.* Every non-North America-domiciled motor carrier that applies under this part must satisfactorily complete an FMCSA-administered safety audit before FMCSA will grant new entrant registration to operate in the United States. The safety audit is a review by FMCSA of the carrier's written procedures and records to validate the accuracy of information and certifications provided in the application and determine whether the carrier has established or exercises the basic safety management controls necessary to ensure safe operations. FMCSA will evaluate the results of the safety audit using the criteria in the Appendix to this subpart.

(d) An application of a non-North America-domiciled motor carrier requesting for-hire operating authority under part 365 of this subchapter may be protested under § 365.109(b). Such a carrier will be granted new entrant registration after successful completion of the pre-authorization safety audit and the expiration of the protest period, provided the application is not protested. If a protest to the application is filed with FMCSA, new entrant registration will be granted only if FMCSA denies or rejects the protest.

(e) If FMCSA grants new entrant registration to the applicant, it will assign a distinctive USDOT Number that identifies the motor carrier as authorized to operate in the United States. In order to initiate operations in the United States, a non-North America-domiciled motor carrier with new entrant registration must:

(1) Have its surety or insurance provider file proof of financial responsibility in the form of certificates of insurance, surety bonds, and endorsements, as required by § 387.7(e)(2), § 387.31(e)(2), and § 387.301 of this subchapter, as applicable; and

(2) File a hard copy of, or have its process agent(s) electronically submit, Form BOC–3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders, as required by part 366 of this subchapter.

(f) A non-North America-domiciled motor carrier must comply with all provisions of the safety monitoring system in part 385, subpart I of this subchapter, including successfully passing North American Standard commercial motor vehicle inspections at least every 90 days and having safety decals affixed to each commercial motor vehicle operated in the United States as required by § 385.703(c) of this subchapter.

(g) FMCSA may not re-designate a non-North America-domiciled carrier's registration from new entrant to permanent prior to 18 months after the date its USDOT Number is issued and subject to successful completion of the safety monitoring system for non-North America-domiciled carriers set out in part 385, subpart I of this subchapter. Successful completion includes obtaining a Satisfactory safety rating as the result of a compliance review.

§ 385.609 Requirement to notify FMCSA of change in applicant information.

(a)(1) A motor carrier subject to this subpart must notify FMCSA of any changes or corrections to the information the Form BOC–3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders that occur during the application process or after having been granted new entrant registration.

(2) A motor carrier subject to this subpart must notify FMCSA of any changes or corrections to the information in Section I, IA or II of Form OP–1(NNA)—Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers that occurs during the application process or after having been granted new entrant registration.

(3) A motor carrier must notify FMCSA in writing within 45 days of the change or correction to information under paragraphs (a)(1) or (a)(2) of this section.

(b) If a motor carrier fails to comply with paragraph (a) of this section, FMCSA may suspend or revoke its new entrant registration until it meets those requirements.

Appendix to Subpart H of Part 385—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Non-North America-Domiciled Motor Carriers

I. General

(a) FMCSA will perform a safety audit of each non-North America-domiciled motor carrier before granting the carrier new entrant registration to operate within the United States.

(b) FMCSA will conduct the safety audit at a location specified by the FMCSA. All records and documents must be made available for examination within 48 hours after a request is made. Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period.

(c) The safety audit will include:

(1) Verification of available performance data and safety management programs;

(2) Verification of a controlled substances and alcohol testing program consistent with part 40 of this title;

(3) Verification of the carrier's system of compliance with hours-of-service rules in part 395 of this subchapter, including recordkeeping and retention;

(4) Verification of proof of financial responsibility;

(5) Review of available data concerning the carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with the Federal Motor Carrier Safety Regulations, parts 382 through 399 of this subchapter, and the Federal Hazardous Material Regulations, parts 171 through 180 of this title;

(6) Inspection of available commercial motor vehicles to be used under new entrant registration, if any of these vehicles have not received a decal required by § 385.703(c) of this subchapter;

(7) Evaluation of the carrier's safety inspection, maintenance, and repair facilities or management systems, including verification of records of periodic vehicle inspections;

(8) Verification of drivers' qualifications, including confirmation of the validity of the CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor, as applicable, of each driver the carrier intends to assign to operate under its new entrant registration; and

(9) An interview of carrier officials to review safety management controls and evaluate any written safety oversight policies and practices.

(d) To successfully complete the safety audit, a non-North America-domiciled motor carrier must demonstrate to FMCSA that it has the required elements in paragraphs I (c)(2), (3), (4), (7), and (8) of this appendix and other basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. FMCSA developed ''safety audit evaluation criteria,'' which uses data from the safety audit and roadside inspections to determine that each applicant for new entrant registration has basic safety management controls in place.

(e) The safety audit evaluation process developed by FMCSA is used to:

(1) Evaluate basic safety management controls and determine if each non-North America-domiciled carrier and each driver is able to operate safely in the United States; and

(2) Identify motor carriers and drivers who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before FMCSA issues new entrant registration to operate within the United States.

II. Source of the Data for the Safety Audit Evaluation Criteria

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. FMCSA developed this tool to assist auditors, inspectors, and investigators in assessing the adequacy of a non-North

America-domiciled carrier's basic safety management controls.

(b) The safety audit is a review of a non-North America-domiciled motor carrier's operation and is used to:

(1) Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144; and

(2) In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in driver qualification files, records of duty status, vehicle maintenance records, drug and alcohol testing records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

III. Overall Determination of the Carrier's Basic Safety Management Controls

(a) The carrier will not receive new entrant registration if FMCSA cannot:

(1) Verify a controlled substances and alcohol testing program consistent with part 40 of this title;

(2) Verify a system of compliance with the hours-of-service rules of this subchapter, including recordkeeping and retention;

(3) Verify proof of financial responsibility;

(4) Verify records of periodic vehicle inspections; and

(5) Verify the qualifications of each driver the carrier intends to assign to operate commercial motor vehicles in the United States, as required by parts 383 and 391 of this subchapter, including confirming the validity of each driver's CDL, Canadian Commercial Driver's License, or Mexican Licencia de Federal de Conductor, as appropriate.

(b) If FMCSA confirms each item under paragraphs III (a)(1) through (5) of this appendix, the carrier will receive new entrant registration, unless FMCSA finds the carrier has inadequate basic safety management controls in at least three separate factors described in part IV of this appendix. If FMCSA makes such a determination, the carrier's application for new entrant registration will be denied.

IV. Evaluation of Regulatory Compliance

(a) During the safety audit, FMCSA gathers information by reviewing a motor carrier's compliance with ''acute'' and ''critical'' regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII, List of Acute and Critical Regulations to part 385 of this subchapter.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called ''factors.'' The regulatory factors, evaluated on the adequacy of the carrier's safety management controls, are:

(1) Factor 1—General: Parts 387 and 390;

(2) Factor 2—Driver: Parts 382, 383, and 391;

(3) Factor 3—Operational: Parts 392 and 395;

(4) Factor 4—Vehicle; Parts 393, 396 and inspection data for the last 12 months;

(5) Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

(6) Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

(i) Vehicle Factor. (1) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

(i) If the motor carrier has had at least three roadside inspections in the twelve months before the safety audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 of this chapter to determine the carrier's level of safety management control for that factor.

(ii) If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396 of this chapter.

(2) Roadside inspection information is retained in the MCMIS and is integral to evaluating a motor carrier's ability to successfully maintain its vehicles, thus preventing being placed OOS during a roadside inspection. Each safety audit will continue to have the requirements of part 396 of this chapter, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

(j) Accident Factor. (1) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(2) [Reserved]

(3) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the United States national average accident rate in Fiscal Years 1994, 1995, and 1996.

(4) FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: ''If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.''

(k) Factor Ratings. (1) The following table shows the five regulatory factors, parts of the FMCSRs and HMRs associated with each factor, and the accident factor. Each carrier's level of basic safety management controls with each factor is determined as follows:

(i) Factor 1—General: Parts 390 and 387;

(ii) Factor 2—Driver: Parts 382, 383, and 391;

(iii) Factor 3—Operational: Parts 392 and 395;

(iv) Factor 4—Vehicle: Parts 393, 396 and the Out of Service Rate;

(v) Factor 5—Hazardous Materials: Part 171, 177, 180 and 397; and

(vi) Factor 6—Accident: Recordable Accident Rate per Million Miles;

(2) For paragraphs IV (k)(1)(i) through (v) of this appendix (Factors 1 through 5), if the combined violations of acute and/or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

(3) For paragraph IV (k)(1)(vi) of this appendix, if the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

(l) Notwithstanding FMCSA verification of the items listed in paragraphs III (a)(1)

through (5) of this appendix, if the safety audit determines the carrier has inadequate basic safety management controls in at least three separate factors described in paragraph III of this appendix, the carrier's application for new entrant registration will be denied. For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical regulation in part 387 scoring one point for Factor 1;

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

Under this example, the carrier will not receive new entrant registration because it scored three or more points for Factors 2, 4, and 5 and FMCSA determined the carrier had inadequate basic safety management controls in at least three separate factors.

■ 20. Amend part 385 by adding a new Subpart I consisting of new §§ 385.701 through 385.717 to read as follows:

Subpart I—Safety Monitoring System for Non-North America-Domiciled Carriers

Sec.
385.701 Definitions.
385.703 Safety monitoring system.
385.705 Expedited action.
385.707 The compliance review.
385.709 Suspension and revocation of non-North America-domiciled carrier registration.
385.711 Administrative review.
385.713 Reapplying for new entrant registration.
385.715 Duration of safety monitoring system.
385.717 Applicability of safety fitness and enforcement procedures.

Subpart I—Safety Monitoring System for Non-North American Carriers

§ 385.701 Definitions.

The following definitions apply to this subpart:

Compliance review means a compliance review as defined in § 385.3 of this part.

New entrant registration means the provisional registration under subpart H of this part that FMCSA grants to a non-North America-domiciled motor carrier to provide interstate transportation within the United States. It will be revoked if the registrant is not assigned a Satisfactory safety rating following a compliance review conducted during the safety monitoring period established in this subpart.

Non-North America-domiciled motor carrier means a motor carrier of property or passengers whose principal place of business is located in a country other than the United States, Canada or Mexico.

§ 385.703 Safety monitoring system.

(a) *General.* Each non-North America-domiciled carrier new entrant will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards (FMVSSs), and Hazardous Materials Regulations (HMRs).

(b) *Roadside monitoring.* Each non-North America-domiciled carrier new entrant will be subject to intensified monitoring through frequent roadside inspections.

(c) *Safety decal.* Each non-North America-domiciled carrier must have on every commercial motor vehicle it operates in the United States a current decal attesting to a satisfactory North American Standard Commercial Vehicle inspection by a certified FMCSA or State inspector pursuant to 49 CFR 350.201(k). This requirement applies during the new entrant operating period and for three years after the carrier's registration becomes permanent following removal of its new entrant designation.

(d) *Compliance review.* FMCSA will conduct a compliance review on a non-North America-domiciled carrier within 18 months after FMCSA issues the carrier a USDOT Number.

§ 385.705 Expedited action.

(a) A non-North America-domiciled motor carrier committing any of the following actions identified through roadside inspections, or by any other means, may be subjected to an expedited compliance review, or may be required to submit a written response demonstrating corrective action:

(1) Using a driver not possessing, or operating without, a valid CDL, Canadian Commercial Driver's License, or Mexican Licencia Federal de Conductor. An invalid commercial driver's license includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating a vehicle placed out of service for violations of the Federal Motor Carrier Safety Regulations without taking the necessary corrective action.

(3) Being involved in, through action or omission, a hazardous materials reportable incident, as described under 49 CFR 171.15 or 171.16, within the United States involving—

(i) A highway route controlled quantity of certain radioactive materials (Class 7).

(ii) Any quantity of certain explosives (Class 1, Division 1.1, 1.2, or 1.3).

(iii) Any quantity of certain poison inhalation hazard materials (Zone A or B).

(4) Being involved in, through action or omission, two or more hazardous materials reportable incidents, as described under 49 CFR 171.15 or 171.16, occurring within the United States and involving any hazardous material not listed in paragraph (a)(3) of this section.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating within the United States a commercial motor vehicle without the levels of financial responsibility required under part 387 of this subchapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) Failure to respond to an Agency demand for a written response demonstrating corrective action within 30 days will result in the suspension of the carrier's new entrant registration until the required showing of corrective action is submitted to the FMCSA.

(c) A satisfactory response to a written demand for corrective action does not excuse a carrier from the requirement that it undergo a compliance review during the new entrant registration period.

§ 385.707 The compliance review.

(a) The criteria used in a compliance review to determine whether a non-North America-domiciled new entrant exercises the necessary basic safety management controls are specified in Appendix B to this part.

(b) *Satisfactory Rating.* If FMCSA assigns a non-North America-domiciled carrier a Satisfactory rating following a compliance review conducted under this subpart, FMCSA will provide the carrier written notice as soon as practicable, but not later than 45 days after the completion of the compliance review. The carrier's registration will remain in provisional status and its on-highway performance will continue to be closely monitored for the remainder of the 18-month new entrant registration period.

(c) *Conditional Rating.* If FMCSA assigns a non-North America-domiciled carrier a Conditional rating following a compliance review conducted under this subpart, it will initiate a revocation proceeding in accordance with § 385.709 of this subpart. The carrier's

new entrant registration will not be suspended prior to the conclusion of the revocation proceeding.

(d) *Unsatisfactory Rating.* If FMCSA assigns a non-North America-domiciled carrier an Unsatisfactory rating following a compliance review conducted under this subpart, it will initiate a suspension and revocation proceeding in accordance with § 385.709 of this subpart.

§ 385.709 Suspension and revocation of non-North America-domiciled carrier registration.

(a) If a carrier is assigned an ''Unsatisfactory'' safety rating following a compliance review conducted under this subpart, FMCSA will provide the carrier written notice, as soon as practicable, that its registration will be suspended effective 15 days from the service date of the notice unless the carrier demonstrates, within 10 days of the service date of the notice, that the compliance review contains material error.

(b) For purposes of this section, material error is a mistake or series of mistakes that resulted in an erroneous safety rating.

(c) If the carrier demonstrates that the compliance review contained material error, its new entrant registration will not be suspended. If the carrier fails to show a material error in the compliance review, FMCSA will issue an Order:

(1) Suspending the carrier's new entrant registration and requiring it to immediately cease all further operations in the United States; and

(2) Notifying the carrier that its new entrant registration will be revoked unless it presents evidence of necessary corrective action within 30 days from the service date of the Order.

(d) If a carrier is assigned a ''Conditional'' rating following a compliance review conducted under this subpart, the provisions of paragraphs (a) through (c) of this section will apply, except that its new entrant registration will not be suspended under paragraph (c)(1) of this section.

(e) If a carrier subject to this subpart fails to provide the necessary documents for a compliance review upon reasonable request, or fails to submit evidence of the necessary corrective action as required by § 385.705 of this subpart, FMCSA will provide the carrier with written notice, as soon as practicable, that its new entrant registration will be suspended 15 days from the service date of the notice unless it provides all necessary documents or information. This suspension will remain in effect until the necessary documents or information is produced and:

(1) The carrier is rated Satisfactory after a compliance review; or

(2) FMCSA determines, following review of the carrier's response to a demand for corrective action under § 385.705, that the carrier has taken the necessary corrective action.

(f) If a carrier commits any of the actions specified in § 385.705(a) of this subpart after the removal of a suspension issued under this section, the suspension will be automatically reinstated. FMCSA will issue an Order requiring the carrier to cease further operations in the United States and demonstrate, within 15 days from the service date of the Order, that it did not commit the alleged action(s). If the carrier fails to demonstrate that it did not commit the action(s), FMCSA will issue an Order revoking its new entrant registration.

(g) If FMCSA receives credible evidence that a carrier has operated in violation of a suspension order issued under this section, it will issue an Order requiring the carrier to show cause, within 10 days of the service date of the Order, why its new entrant registration should not be revoked. If the carrier fails to make the necessary showing, FMCSA will revoke its registration.

(h) If a non-North America-domiciled motor carrier operates a commercial motor vehicle in violation of a suspension or out-of-service order, it is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A), as adjusted by inflation, not to exceed amounts for each offense under part 386, Appendix B of this subchapter.

(i) Notwithstanding any provision of this subpart, a carrier subject to this subpart is also subject to the suspension and revocation provisions of 49 U.S.C. 13905 for repeated violations of DOT regulations governing its motor carrier operations.

§ 385.711 Administrative review.

(a) A non-North America-domiciled motor carrier may request FMCSA to conduct an administrative review if it believes FMCSA has committed an error in assigning a safety rating or suspending or revoking the carrier's new entrant registration under this subpart.

(b) The carrier must submit its request in writing, in English, to the Associate Administrator for Enforcement and Program Delivery, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington DC 20590.

(c) The carrier's request must explain the error it believes FMCSA committed in assigning the safety rating or suspending or revoking the carrier's new entrant registration and include any information or documents that support its argument.

(d) FMCSA will complete its administrative review no later than 10 days after the carrier submits its request for review. The Associate Administrator's decision will constitute the final Agency action.

§ 385.713 Reapplying for new entrant registration.

(a) A non-North America-domiciled motor carrier whose provisional new entrant registration has been revoked may reapply for new entrant registration no sooner than 30 days after the date of revocation.

(b) If the provisional new entrant registration was revoked because the new entrant failed to receive a Satisfactory rating after undergoing a compliance review, the new entrant must do all of the following:

(1) Submit an updated MCS–150.

(2) Submit evidence that it has corrected the deficiencies that resulted in revocation of its registration and will otherwise ensure that it will have basic safety management controls in effect.

(3) Successfully complete a pre-authorization safety audit in accordance with § 385.607(c) of this part.

(4) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(c) If the provisional new entrant registration was revoked because FMCSA found that the new entrant had failed to submit to a compliance review, it must do all of the following:

(1) Submit an updated MCS–150.

(2) Successfully complete a pre-authorization safety audit in accordance with § 385.607(c) of this Part.

(3) Begin the 18-month new entrant monitoring cycle again as of the date the re-filed application is approved.

(4) Submit to a compliance review upon request.

(d) If the new entrant is a for-hire carrier subject to the registration provisions under 49 U.S.C. 13901 and also has had its operating authority revoked, it must re-apply for operating authority as set forth in part 365 of this subchapter.

§ 385.715 Duration of safety monitoring system.

(a) Each non-North America-domiciled carrier subject to this subpart will remain in the safety monitoring system for at least 18 months from the date FMCSA issues its new entrant registration, except as provided in paragraphs (c) and (d) of this section.

(b) If, at the end of this 18-month period, the carrier's most recent safety

rating was Satisfactory and no additional enforcement or safety improvement actions are pending under this subpart, the non-North America-domiciled carrier's new entrant registration will become permanent.

(c) If, at the end of this 18-month period, FMCSA has not been able to conduct a compliance review, the carrier will remain in the safety monitoring system until a compliance review is conducted. If the results of the compliance review are satisfactory, the carrier's new entrant registration will become permanent.

(d) If, at the end of this 18-month period, the carrier's new entrant registration is suspended under § 385.709(a) of this subpart, the carrier will remain in the safety monitoring system until FMCSA either:

(1) Determines that the carrier has taken corrective action; or

(2) Completes measures to revoke the carrier's new entrant registration under § 385.709(c) of this subpart.

§ 385.717 Applicability of safety fitness and enforcement procedures.

At all times during which a non-North America-domiciled motor carrier is subject to the safety monitoring system in this subpart, it is also subject to the general safety fitness procedures established in subpart A of this part and to compliance and enforcement procedures applicable to all carriers regulated by the FMCSA.

■ 21. Amend Appendix A to part 385, section III to add new paragraph (i) to read as follows:

Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria

* * * * *

III. Determining if the Carrier Has Basic Safety Management Controls

* * * * *

(i) FMCSA also gathers information on compliance with applicable household goods and Americans with Disabilities Act of 1990 requirements, but failure to comply with these requirements does not affect the determination of the adequacy of basic safety management controls.

* * * * *

PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

■ 22. The authority citation for part 387 is revised to read as follows:

Authority: 49 U.S.C. 13101, 13301, 13906, 14701, 31138, 31139, and 31144; and 49 CFR 1.73.

■ 23. Amend § 387.3 by revising paragraph (c)(1) to read as follows:

§ 387.3 Applicability.

* * * * *

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,001 pounds. This exception does not apply if the vehicle is used to transport any quantity of a Division 1.1, 1.2, or 1.3 material, any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A, or to a highway route controlled quantity of a Class 7 material as it is defined in 49 CFR 173.403, in interstate or foreign commerce.

* * * * *

■ 24. Amend § 387.7 by revising paragraph (e) to read as follows:

§ 387.7 Financial responsibility required.

* * * * *

(e)(1) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(2) In addition to maintaining proof of financial responsibility as required by paragraph (d) of this section, non-North America-domiciled private and for-hire motor carriers shall file evidence of financial responsibility with FMCSA in accordance with the requirements of subpart C of this part.

* * * * *

■ 25. Revise § 387.9 to read as follows:

§ 387.9 Financial responsibility, minimum levels.

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Property (nonhazardous)	$750,000
(2) For-hire and Private (In interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2 and 1.3 materials. Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	5,000,000
(3) For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,001 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,001 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	5,000,000

■ 26. Amend § 387.31 by revising paragraph (e) to read as follows:

§ 387.31 Financial responsibility required.

* * * * *

(e)(1) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(2) In addition to maintaining proof of financial responsibility as required by paragraph (d) of this section, non-North America-domiciled private and for-hire motor carriers shall file evidence of financial responsibility with FMCSA in

accordance with the requirements of subpart C of this part.

* * * * *

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 27. The authority citation for part 390 is revised to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31502, 31504, and sec. 204, Public Law 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Public Law 103–311, 108 Stat. 1673, 1677; sec. 217, Public Law 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 28. Revise § 390.19 to read as follows:

§ 390.19 Motor carrier identification report.

(a) *Applicability.* Each motor carrier must file the Form MCS–150 or Form MCS–150B with FMCSA as follows:

(1) A U.S., Canada-, Mexico-, or non-North America-domiciled motor carrier conducting operations in interstate commerce must file a Motor Carrier Identification Report, Form MCS–150.

(2) A motor carrier conducting operations in intrastate commerce and requiring a Safety Permit under 49 CFR part 385, subpart E of this chapter must file the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B.

(b) *Filing schedule.* Each motor carrier must file the appropriate form under paragraph (a) of this section at the following times:

(1) Before it begins operations; and

(2) Every 24 months, according to the following schedule:

USDOT No. ending in	Must file by last day of
1	January.
2	February.
3	March.
4	April.
5	May.
6	June.
7	July.
8	August.
9	September.
0	October.

(3) If the next-to-last digit of its USDOT Number is odd, the motor carrier shall file its update in every odd-numbered calendar year. If the next-to-last digit of the USDOT Number is even, the motor carrier shall file its update in every even-numbered calendar year.

(c) *Availability of forms.* The forms described under paragraph (a) of this section and complete instructions are available from the FMCSA Web site at *http://www.fmcsa.dot.gov* (Keyword ''MCS–150,'' or ''MCS–150B''); from all FMCSA Service Centers and Division offices nationwide; or by calling 1–800–832–5660.

(d) *Where to file.* The required form under paragraph (a) of this section must be filed with FMCSA Office of Information Management. The form may be filed electronically according to the instructions at the Agency's Web site, or it may be sent to Federal Motor Carrier Safety Administration, Office of Information Management, MC–RIO, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) *Special instructions for for-hire motor carriers.* A for-hire motor carrier should submit the Form MCS–150, or Form MCS–150B, along with its application for operating authority (Form OP–1, OP–1(MX), OP–1(NNA) or OP–2), to the appropriate address referenced on that form, or may submit it electronically or by mail separately to the address mentioned in paragraph (d) of this section.

(f) Only the legal name or a single trade name of the motor carrier may be used on the forms under paragraph (a) of this section (Form MCS–150 or MCS–150B).

(g) A motor carrier that fails to file the form required under paragraph (a) of this section, or furnishes misleading information or makes false statements upon the form, is subject to the penalties prescribed in 49 U.S.C. 521(b)(2)(B).

(h)(1) Upon receipt and processing of the form described in paragraph (a) of this section, FMCSA will issue the motor carrier an identification number (USDOT Number).

(2) The following applicants must additionally pass a pre-authorization safety audit as described below before being issued a USDOT Number:

(i) A Mexico-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce between Mexico and points in the United States beyond the municipalities and commercial zones along the United States-Mexico international border must pass the pre-authorization safety audit under § 365.507 of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received—after FMCSA denies or rejects the protest.

(ii) A non-North America-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce within the United States must pass the pre-authorization safety audit under § 385.607(c) of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received—after FMCSA denies or rejects the protest.

(3) The motor carrier must display the number on each self-propelled CMV, as defined in § 390.5, along with the additional information required by § 390.21.

(i) A motor carrier that registers its vehicles in a State that participates in the Performance and Registration Information Systems Management (PRISM) program (authorized under section 4004 of the Transportation Equity Act for the 21st Century [(Public Law 105–178, 112 Stat. 107]) is exempt from the requirements of this section, provided it files all the required information with the appropriate State office.

Issued on: December 4, 2008.

John H. Hill,

Administrator.

[FR Doc. E8–29253 Filed 12–15–08; 8:45 am]

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Federal Register

Tuesday,
December 16, 2008

Part IV

The President

Executive Order 13482—Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2008

Federal Register
Vol. 73, No. 242
Tuesday, December 16, 2008

Presidential Documents

Title 3—

The President

Executive Order 13482 of December 12, 2008

Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2008

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. All executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Friday, December 26, 2008, the day after Christmas Day, except as provided in section 2 of this order.

Sec. 2. The heads of executive branch departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 26, 2008, for reasons of national security or defense or other public need.

Sec. 3. Friday, December 26, 2008, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

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

THE WHITE HOUSE,
December 12, 2008.

[FR Doc. E8–30042
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Soybean Promotion, Research, and Information Program: Amend Procedures to Request a Referendum; comments due by 12-22-08; published 12-5-08 [FR E8-28674]

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Endangered and Threatened Wildlife and Plants:

Proposed Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon; comments due by 12-22-08; published 11-3-08 [FR E8-26155]

Fisheries in the Western Pacific:

Bottomfish and Seamount Groundfish Fisheries; 2008-09 Main Hawaiian Islands Bottomfish Total Allowable Catch; comments due by 12-26-08; published 12-10-08 [FR E8-29205]

Fisheries of the Exclusive Economic Zone Off Alaska:

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Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments; comments due by 12-26-08; published 12-1-08 [FR E8-28457]

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Electric Reliability Organization Interpretations of Specific Requirements of Frequency Response, Bias, Voltage, and Reactive Control Reliability Standards; comments due by 12-26-08; published 11-26-08 [FR E8-28087]

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Ocean Dumping; Designation of Ocean Dredged Material Disposal Sites Offshore of the Umpqua River, OR; comments due by 12-26-08; published 11-25-08 [FR E8-27967]

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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*.

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H.R. 2040/P.L. 110–451

Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

S. 602/P.L. 110–452

Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

S. 1193/P.L. 110–453

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

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