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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Doc. No. AMS–FV–13–0074; FV13–905–3 FR]

Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the Citrus Administrative Committee (Committee) for the 2013–14 and subsequent fiscal periods from $0.008 to $0.009 per 4/5 bushel carton of Florida citrus handled. The Committee locally administers the Federal marketing order, which regulates the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida. Assessments upon Florida citrus handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective January 31, 2014.

FOR FURTHER INFORMATION CONTACT: Corey E. Elliott, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or Email: *Corey.Elliott@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Jeffrey.Smutny@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 905, as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Florida citrus handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable Florida citrus beginning on August 1, 2013, and continue until amended, suspended, or terminated.

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. Such 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 increases the assessment rate established for the Committee for the 2013–14 and subsequent fiscal periods from $0.008 to $0.009 per 4/5 bushel carton of citrus.

The Florida citrus marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Florida citrus. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are therefore in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2012–13 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate of $0.008 per 4/5 bushel carton of citrus that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on July 16, 2013, and unanimously recommended 2013–14 expenditures of $190,000 and an assessment rate of $0.009 per 4/5 bushel carton of citrus. In comparison, last year's budgeted expenditures were $223,500. The assessment rate of $0.009 is $0.001 higher than the rate currently in effect. Over the past few years, the Committee's reserve has been depleted as the Committee has used reserve funds to help meet its annual expenditures. Therefore, the Committee recommended increasing the assessment rate to generate additional funds to increase the Committee's reserve balance.

The major expenditures recommended by the Committee for the 2013–14 year include $92,400 for salaries; $25,000 for Florida Department of Agriculture and Consumer Services (FDACS) manifesting reports and statistics; and $13,000 for a retirement plan. Budgeted expenses for these items in 2012–13 were $116,200, $25,000, and $18,250, respectively.

The assessment rate recommended by the Committee was derived by reviewing anticipated expenses, expected shipments of Florida citrus, interest income, and the need to add additional funds to the reserve. Florida citrus shipments for the year are estimated at 23.8 million 4/5 bushel cartons, which should provide $214,200 in assessment income. Income derived from handler assessments and interest

income should be adequate to cover budgeted expenses. Funds in the reserve (projected at approximately $40,000) will be kept within the maximum permitted by the order of not to exceed one half of one fiscal period's expenses as stated in § 905.42.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations to modify the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2013–14 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses 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 44 Florida citrus handlers subject to regulation under the marketing order and approximately 8,000 producers of citrus in the production area. Small agricultural service firms are defined by the Small Business Administration (SBA) as those whose annual receipts are less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000 (13 CFR 121.201).

Based on industry and Committee data, the average annual f.o.b. price for fresh Florida citrus during the 2011–12 season was approximately $11.79 per 4/5 bushel carton, and total fresh shipments were approximately 29.5 million cartons. Using the average f.o.b. price and shipment data, about 48 percent of the Florida citrus 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 citrus growers, the average annual grower revenue is below $750,000. Thus, assuming a normal distribution, the majority of handlers of Florida citrus may be classified as large entities and the majority of producers of Florida citrus may be classified as small entities.

This rule increases the assessment rate for the 2013–14 and subsequent fiscal periods from the current rate of $0.008 to $0.009 per 4/5 bushel carton of citrus. The Committee unanimously recommended the increased assessment rate, and 2013–14 expenditures of $190,000. The increase was recommended to generate additional funds to add to the Committee's reserve. As previously stated, income derived from handler assessments and interest should be adequate to meet this year's anticipated expenses.

A review of historical information and preliminary information pertaining to the upcoming season indicates that the grower price for the 2013–14 season should average around $5.05 per 4/5 bushel carton of citrus. Utilizing this estimate and the assessment rate of $0.009, estimated assessment revenue as a percentage of total grower revenue should be approximately 0.18 percent for the season.

Alternative expenditure and assessment levels were discussed prior to arriving at this budget. However, the Committee agreed on $190,000 in expenditures, reviewed the quantity of assessable citrus and the need to add additional funds to the reserve, and recommended an assessment rate of $0.009 per 4/5 bushel carton of citrus.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. These costs are offset by the benefits derived from the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the Florida citrus industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 16, 2013, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189 (Generic OMB Fruit Crops). No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Florida citrus 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. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

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 citizens to access Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on November 13, 2013 (78 FR 67977). Copies of the proposed rule were mailed or sent via facsimile to all Florida citrus handlers. Finally, the proposal was made available through the internet by USDA and the Office of the Federal Register. A 15-day comment period ending November 29, 2013, was provided for interested persons to respond to the proposal. No comments were received.

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/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause

exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because the crop year began August 1, 2013, and handlers are already receiving 2013–14 citrus from growers. The order requires that the rate of assessment apply to all assessable citrus handled during such fiscal period. In addition, the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule, and no comments were received.

List of Subjects in 7 CFR Part 905

Grapefruit, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, 7 CFR part 905 is amended as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

■ 1. The authority citation for 7 CFR part 905 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 905.235 is revised to read as follows:

§ 905.235 Assessment rate.

On and after August 1, 2013, an assessment rate of $0.009 per 4/5 bushel carton or equivalent is established for Florida citrus covered under the order.

Dated: January 24, 2014.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2014–01763 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Doc. No. AMS–FV–13–0053; FV13–987–1 FIR]

Domestic Dates Produced or Packed in Riverside County, California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule that decreased the assessment rate established for the California Date Administrative Committee (committee) for the 2013–2014 and subsequent fiscal periods from $0.90 to $0.40 per hundredweight of dates handled. The committee locally administers the marketing order for dates grown or packed in Riverside County, California. The interim rule was necessary to allow the committee to reduce its operating expenses while still providing adequate funding to meet program expenses.

DATES: Effective January 31, 2014.

FOR FURTHER INFORMATION CONTACT: Terry Vawter, Senior Marketing Specialist, or Martin Engeler, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: *Terry.Vawter@ams.usda.gov* or *Martin.Engeler@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide;* or by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Jeffrey.Smutny@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 987, as amended (7 CFR part 987), regulating the handling of dates grown or packed in Riverside County, California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563.

Under the order, California date handlers are subject to assessments, which provide funds to administer the order. Assessment rates issued under the order are intended to be applicable to all assessable dates for the entire fiscal period, and continue indefinitely until amended, suspended, or terminated. The committee's fiscal period begins on October 1 and ends on September 30.

In an interim rule published in the **Federal Register** on September 3, 2013, and effective on October 1, 2013, (78 FR 54147, Doc. No. AMS–FV–13–0053; FV13–987–1 IR), § 987.339, was amended by decreasing the assessment rate established for California dates for the 2013–2014 and subsequent fiscal periods from $0.90 to $0.40 per hundredweight. The reduction in operating expenses allows the committee to decrease the per hundredweight assessment rate, while still providing adequate funding to meet program expenses.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses 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 70 producers of dates in the production area and 11 handlers subject to regulation under the marketing order. The Small Business Administration defines small agricultural producers as those having annual receipts of less than $750,000, and small agricultural service firms as those whose annual receipts are less than $7,000,000. (13 CFR 121.201)

According to the National Agricultural Statistics Service (NASS), data for the most-recently completed and reported crop year (2011) shows that about 4.04 tons, or 8,080 pounds, of dates were produced per acre. The 2012 grower price published by NASS was $1,340 per ton, or $0.67 per pound. Thus, the value of date production per acre in 2011–12 averaged about $5,414 (8,080 pounds times $0.67 per pound). At that average price, a producer would have to farm over 138 acres to receive an annual income from dates of $750,000 ($750,000 divided by $5,414 per acre equals 138.53 acres). According to committee staff, the majority of California date producers farm less than 138 acres. Thus, it can be concluded that the majority of date producers could be considered small entities. In addition, according to data from the committee staff, the majority of handlers of California dates have receipts of less than $7,000,000, and may also be considered small entities.

This rule continues in effect the action that decreased the assessment

rate established for the committee and collected from handlers for the 2013–14 and subsequent crop years from $0.90 to $0.40 per hundredweight of dates handled. The committee unanimously recommended 2013–14 expenditures of $97,700 and an assessment rate of $0.40 per hundredweight of dates, which is $0.50 lower than the 2012–13 rate. The quantity of assessable dates for the 2013–14 crop year is estimated at 26,500,000 pounds (265,000 hundredweight). Thus, the $0.40 rate should provide $106,000 in assessment income. Income derived from handler's assessments should be adequate to meet 2013–14 crop year expenses.

This rule continues in effect the action that decreased the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the committee's meeting was widely publicized throughout the California date industry and all interested persons were invited to attend the meeting and encouraged to participate in committee deliberations on all issues. Like all committee meetings, the June 20, 2013, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements as a result of this action are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large California date handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

Comments on the interim rule were required to be received on or before November 4, 2013. No comments were received. Therefore, for reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *http://www.regulations.gov/#!documentDetail;D=AMS–FV-13-0053-0001.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866, 12988, and 13563; the Paperwork Reduction Act (44 U.S.C. Chapter 35); and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (78 FR 54147, September 3, 2013) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

PART 987—DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

Accordingly, the interim rule amending 7 CFR part 987, which was published at 78 FR 54147 on September 3, 2013, is adopted as a final rule, without change.

Dated: January 24, 2014.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2014–01747 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0141; 9905–88–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Attainment Plan for the Philadelphia-Wilmington, Pennsylvania-New Jersey-Delaware Nonattainment Area for the 1997 Annual Fine Particulate Matter Standard; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: This document corrects an error in the preamble language of a final rule pertaining to EPA's approval of Delaware's state implementation plan (SIP) revision demonstrating Delaware's attainment of the 1997 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS) for the Philadelphia-Wilmington, Pennsylvania-New Jersey-Delaware (PA–NJ–DE) nonattainment area (Philadelphia Area) submitted by the Delaware Department of Natural Resources and Environmental Control.

DATES: This final rule is effective on January 30, 2014, and is applicable beginning January 16, 2014.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182 or by email at *quinto.rose@.epa.gov.*

SUPPLEMENTARY INFORMATION: EPA inadvertently printed an incorrect column title on a table entitled, Delaware's Motor Vehicle Budgets for the 1997 Annual $PM_{2.5}$ NAAQS. This action corrects the table in rule document [FR document No. 2013–29803] published in the **Federal Register** on December 17, 2013 (78 FR 76209). The table is corrected as follows: On page 76212 on the third column of the table, correct the title which now reads volatile organic compound (VOC), to read $PM_{2.5}$.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

Statutory and Executive Order Reviews

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)). Because EPA has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not

significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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 governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1998) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq).

The Congressional Review Act (5 U.S.C. 801 et seq.), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of January 16, 2014. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This correction to 40 CFR 52.427(c) for Delaware is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Dated: January 8, 2014.

W.C. Early,

Acting Regional Administrator, EPA Region III.

[FR Doc. 2014–01722 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0725; FRL–9904–02–Region 9]

Revisions to the California State Implementation Plan, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from solvent cleaning machines and operations, coating of metal parts and products and polyester resin operations. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on March 31, 2014 without further notice, unless EPA receives adverse comments by March 3, 2014. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0725, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *Email: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Adrianne Borgia, EPA Region IX, (415) 972–3576, *borgia.adrianne@epa.gov* or Nancy Levin, EPA Region IX, (415) 972–3848, *levin.nancy@epa.gov.*

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by SBCAPCD and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Revised	Submitted
SBCAPCD	321	Solvent Cleaning Machines and Solvent Cleaning	6/21/12	09/21/12
SBCAPCD	330	Surface Coating of Metal Parts and Products	06/21/12	09/21/12
SBCAPCD	349	Polyester Resin Operations	06/21/12	09/21/12

B. Are there other versions of these rules?

We approved an earlier version of SBCAPCD Rule 321 into the SIP on September 29, 2011 (76 FR 60376). A previous version of SBCAPCD 330 was approved into the SIP on June 8, 2000 (65 FR 36349). The most recent version of SBCAPCD Rule 349 was approved into the SIP on January 6, 1995 (60 FR 2025).

C. What is the purpose of the submitted rules?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions by limiting VOC content in solvents and coatings. EPA's technical support documents (TSDs) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), and must not relax existing requirements (see sections 110(1) and 193). In addition, SIP rules must implement Reasonably Available Control Measures (RACM), including Reasonably Available Control Technology (RACT), in moderate and above ozone nonattainment areas. Guidance and policy documents that we use to evaluate enforceability and RACT requirements consistently include the following:

1. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations'' EPA, May 25, 1988 (the Bluebook),
2. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies'' EPA, Region 9, August 21, 2001 (the Little Bluebook),
3. ''Control Techniques Guidelines for Control Techniques Guidelines for Miscellaneous Industrial Adhesives'' EPA, December 1977 (EPA–453/R–08–005),
4. ''Control Techniques Guidelines for Control of Volatile Organic Compound Emissions from Industrial Cleaning Solvents'', EPA, September 2006 (EPA–453/R–06–001)

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT and SIP relaxations. The TSDs have more information on our evaluation.

C. EPA Recommendations To Further Improve the Rules

The TSDs describe additional rule revisions that we recommend for the next time the local agency modifies the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by March 3, 2014, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on March 31, 2014. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

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

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

appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 31, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 22, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(423) (i)(E)(*3*), (*4*) and (*5*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(423) * * *

(i) * * *

(E) * * *

(*3*) Rule 321, ''Solvent Cleaning Machines and Solvent Cleaning,'' revised on June 21, 2012.

(*4*) Rule 330, ''Surface Coating of Metal Parts and Products,'' revised on June 21, 2012.

(*5*) Rule 349, ''Polyester Resin Operations,'' revised on June 21, 2012.

* * * * *

[FR Doc. 2014–01317 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 101206604–1758–02]

RIN 0648–XD100

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Trip Limit Increase

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

ACTION: Temporary rule; in-season trip limit increase.

SUMMARY: NMFS increases the trip limit in the commercial sector for king mackerel in the Florida east coast subzone to 75 fish per day in or from the exclusive economic zone (EEZ). This trip limit increase is necessary to maximize the socioeconomic benefits of the quota.

DATES: This rule is effective 12:01 a.m., local time, February 1, 2014, through March 31, 2014, unless changed by further notification in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, telephone: 727–824–5305, email: *Susan.Gerhart@noaa.gov.*

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, and cobia) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On January 30, 2012 (76 FR 82058, December 29, 2011), NMFS implemented a commercial quota of 1,102,896 lb (500,265 kg) for Gulf migratory group king mackerel in the Florida east coast subzone of the eastern zone (50 CFR 622.384(b)(1)(i)(A)), for the current fishing year, July 1, 2013, through June 30, 2014. From November 1 through March 31, the Florida east coast subzone encompasses an area of the EEZ south of a line extending due east of the Flagler/Volusia County, FL, boundary, and north of a line extending due east of the Miami-Dade/Monroe County, FL, boundary.

In accordance with 50 CFR 622.385(a)(2)(i)(B)(*2*), beginning on February 1, if less than 75 percent of the Florida east coast subzone king mackerel commercial quota has been harvested by that date, king mackerel in or from that subzone may be possessed on board or landed from a permitted vessel in amounts not exceeding 75 fish per day. NMFS has determined that 75 percent of the quota for Gulf group king mackerel in the Florida east coast subzone will not be reached before February 1, 2014. Accordingly, a 75-fish trip limit applies to vessels fishing for king mackerel in or from the EEZ in the Florida east coast subzone effective 12:01 a.m., local time, February 1, 2014. The 75-fish trip limit will remain in effect until the subzone closes or until the end of the current fishing year (March 31, 2014) for this subzone.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is

necessary for the conservation and management of Gulf group king mackerel and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.385(a)(2)(i)(B)(*2*) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule establishing the trip limits already has been subject to notice and comment, and all that remains is to notify the public of the trip limit increase. Allowing prior notice and opportunity for public comment for this trip limit increase is contrary to the public interest because it requires time, thus delaying fishermen's ability to catch more king mackerel than the present trip limit allows and preventing fishermen from reaping the socioeconomic benefits derived from this increase in daily catch.

As this action allows fishermen to increase their harvest of king mackerel from 50 fish to 75 fish per day in or from the EEZ of the Florida east coast subzone, the AA finds it relieves a restriction and may go into effect without a 30-day delay in effectiveness, pursuant to 5 U.S.C. 553(d)(1).

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

Dated: January 27, 2014.

Sean F. Corson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–01838 Filed 1–27–14; 11:15 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 79, No. 20
Thursday, January 30, 2014

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 40, 70, 72, 74, and 150

[NRC–2009–0096 and NRC–2013–0195]

RIN 3150–AI61

Amendments to Material Control and Accounting Regulations and Proposed Guidance for Fuel Cycle Facility Material Control

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of second public meeting on proposed rule and proposed guidance.

SUMMARY: The Nuclear Regulatory Commission (NRC) plans to hold a second public meeting on its proposed rule to amend its regulations for material control and accounting (MC&A) of special nuclear material (SNM) and the associated proposed guidance documents. This will be a continuation of the first public meeting that was held on January 9, 2014. The second public meeting will provide an additional opportunity for interested parties to improve their understanding of the NRC's proposed rule to revise and consolidate the NRC regulations for MC&A of special nuclear material (SNM) and the guidance. The public comment period for the proposed rule and the proposed guidance was previously extended in response to a request by stakeholders, and closes on March 10, 2014.

DATES: The second public meeting will be held on February 5, 2014, from 10 a.m. to 5 p.m. (Eastern Standard Time (EST)).

ADDRESSES: The public meeting will be held at the NRC's headquarters, Room 3WFN–1C05, Three White Flint North, 11601 Landsdown Street, North Bethesda, MD 20852. Members of the public may also participate in the meeting via teleconference or Webinar. Information for the teleconference and Webinar is available in the meeting notice, which can be accessed through the NRC's public Web site at: *http://meetings.nrc.gov/pmns/mtg.*

Please refer to Docket ID NRC–2009–0096 when contacting the NRC about the availability of information for the proposed rule, and refer to Docket ID: NRC–2013–0195 when contacting the NRC about the availability of information for the draft NUREGs. You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to: *http://www.regulations.gov* and search for Docket ID NRC–2009–0096 for information about the proposed rule and Docket ID: NRC–2013–0195 for information about the draft NUREGs. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at: *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at: 1–800–397–4209, 301–415–4737, or by email to: *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Thomas Young, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5795; email: *Thomas.Young@nrc.gov.*

I. Background

On November 8, 2013 (78 FR 67225; NRC–2009–0096), the NRC published for public comment a proposed rule to amend its regulations for MC&A of SNM. Also on November 8, 2013 (78 FR 67224; NRC–2013–0195), the NRC published for public comment the proposed guidance documents that discuss acceptable methods that licensees may use to prepare and implement their MC&A plans and how the NRC will review and inspect these plans. The public comment period for the proposed rule and the proposed guidance would have closed on February 18, 2014. On November 29, 2013 (78 FR 71532), the NRC published the notice for the first public meeting that would have been held on December 10, 2013, for the proposed rule and proposed guidance. Due to inclement weather, the first public meeting scheduled for December 10, 2013, was cancelled. On December 30, 2013 (78 FR 79328), the NRC published the notice rescheduling the first public meeting to January 9, 2014, and extending the public comment period until March 10, 2014. The NRC held the first public meeting on January 9, 2014, from 10 a.m. to 5 p.m. At the end of the meeting, the NRC received a request to continue the discussions at a second public meeting, and the NRC agreed.

The goal of this rulemaking is to revise and consolidate the MC&A requirements in order to update, clarify, and strengthen them. The proposed amendments add new requirements that would apply to NRC licensees who are authorized to possess SNM in a quantity greater than 350 grams.

II. Public Meeting

To facilitate the understanding of the public and other stakeholders of these issues and the submission of comments, the NRC staff plans to hold the second public meeting on February 5, 2014, from 10 a.m. to 5 p.m. (EST), in Rockville, Maryland. The meeting notice can be accessed through the NRC's public Web site at: *http://meetings.nrc.gov/pmns/mtg.* The final agenda and the meeting materials will be posted prior to the meeting at this Web site.

In addition, members of the public may also participate in the meeting via teleconference or Webinar. Information for the teleconference and Webinar is available in the meeting notice, which can be accessed through the NRC's public Web site at: *http://meetings.nrc.gov/pmns/mtg.* Participants must register at the Internet link in the meeting notice to participate in the Webinar.

Dated at Rockville, Maryland, this 24th day of January, 2014.

For the Nuclear Regulatory Commission.

Christopher G. Miller,

Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2014–01922 Filed 1–29–14; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–119305–11]

RIN 1545–BK29

Section 707 Regarding Disguised Sales, Generally

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 707 of the Internal Revenue Code (Code) relating to disguised sales of property to or by a partnership and under section 752 relating to the treatment of partnership liabilities. The proposed regulations address certain deficiencies and technical ambiguities in the section 707 regulations and certain issues in determining partners' shares of liabilities under section 752. The proposed regulations affect partnerships and their partners.

DATES: Written or electronic comments and requests for a public hearing must be received by April 30, 2014.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–119305–11), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–119305–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal site at *http://www.regulations.gov* (indicate IRS and REG–119305–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Deane M. Burke, (202) 317–5279; concerning submissions of comments and requests for a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information related to these proposed regulations under section 707 is reported on Form 8275, Disclosure Statement, and has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0889. Comments concerning the collection of information and the accuracy of estimated average annual burden and suggestions for reducing this burden should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the burden associated with this collection of information should be received by March 31, 2014.

The collection of information in these proposed regulations is in proposed §§ 1.707–5(a)(3)(ii) and 1.707–5(b)(2)(iii)(B) (regarding the reduction of a liability presumed to be anticipated) and § 1.707–5(a)(7)(ii) (regarding a liability incurred within two years prior to a transfer of property). This information is required by the IRS to ensure that sections 707(a)(2)(B) and 752 of the Code and applicable regulations are properly applied respectively either to transfers between a partner and a partnership or for allocations of partnership liabilities. The respondents will be partners and partnerships.

The collection of information in these proposed regulations under section 752 has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by March 31, 2014. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in § 1.752–2(b)(3)(iii)(C). This information is required to ensure proper allocations of partnership liabilities. This information will be used to determine the extent to which certain partners or related persons bear the economic risk of loss with respect to partnership liabilities. The collection of information is mandatory. The likely reporters are small and large businesses or organizations and trusts.

Estimated total annual reporting burden: 8 million hours.

The estimated annual burden per respondent varies from 6 minutes to 2 hours, depending on individual circumstances, with an estimated average of 1 hour.

Estimated number of respondents: 8 million.

Estimated frequency of responses: On occasion.

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

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

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 707 relating to disguised sales of property to or by a partnership and under section 752 relating to the treatment of partnership liabilities.

Section 707(a)(2)(B) of the Code generally provides that, under regulations prescribed by the Secretary, related transfers to and by a partnership that, when viewed together, are more properly characterized as a sale or exchange of property, will be treated either as a transaction between the partnership and one who is not a

partner or between two or more partners acting other than in their capacity as partners. The legislative history of section 707(a)(2)(B) indicates Congress adopted the provision to prevent parties from characterizing a sale or exchange of property as a contribution to the partnership followed by a distribution from the partnership, thereby deferring or avoiding tax on the transaction. *See* H.R. Rep. No. 432, pt. 2, 98th Cong. 2nd Sess. 1216, 1218 (1984).

On September 30, 1992, final regulations under section 707(a)(2) (TD 8439, 1992–2 CB 126) relating to disguised sales of property to and by partnerships were published in the **Federal Register** (57 FR 44974 as corrected on November 30, 1992, by 57 FR 56443) (existing regulations). Since publication of the existing regulations, the IRS and the Treasury Department have become aware of certain issues in interpreting or applying the regulations. On November 26, 2004, a notice of proposed rulemaking under section 707(a)(2)(B) (REG–149519–03, 2004–2 CB 1009) was published in the **Federal Register** (69 FR 68838) to add rules for disguised sales of partnership interests and to amend the existing regulations by revising, to a limited extent, the rules relating to disguised sales of property. The IRS and the Treasury Department noted in the preamble to those proposed regulations an awareness of certain deficiencies and technical ambiguities in the existing regulations under §§ 1.707–3, 1.707–4, and 1.707–5, and requested comments on the scope and content of revisions to the existing regulations, but received none. The notice of proposed rulemaking was subsequently withdrawn on January 21, 2009, in Announcement 2009–4, 2009–1 CB 597. The IRS and the Treasury Department have, however, continued to study these issues, and set forth in the following section is a discussion of those areas in the existing regulations that the IRS and the Treasury Department have identified as requiring clarification or revision and the proposed changes to those areas.

In addition, regulations under section 752 address the treatment of partnership recourse and nonrecourse liabilities. The IRS and the Treasury Department believe it is appropriate to reconsider the rules under section 752 regarding the payment obligations that are recognized under § 1.752–2(b)(3), the satisfaction of payment obligations under § 1.752–2(b)(6), and the methods available for allocating excess nonrecourse liabilities under § 1.752–3(a)(3). Also discussed in the following section is an explanation of those areas in the section 752 regulations that the IRS and the Treasury Department have identified as requiring revision and the proposed changes to those areas.

Explanation of Provisions

1. Debt-Financed Distributions

Section 1.707–3 of the existing regulations generally provides that a transfer of property by a partner to a partnership followed by a transfer of money or other consideration from the partnership to the partner will be treated as a sale of property by the partner to the partnership if, based on all the facts and circumstances, the transfer of money or other consideration would not have been made but for the transfer of the property and, for non-simultaneous transfers, the subsequent transfer is not dependent on the entrepreneurial risks of the partnership. Notwithstanding this general rule, the existing regulations provide several exceptions.

One such exception in § 1.707–5(b) of the existing regulations generally provides that a distribution of money to a partner is not taken into account for purposes of § 1.707–3 to the extent the distribution is traceable to a partnership borrowing and the amount of the distribution does not exceed the partner's allocable share of the liability incurred to fund the distribution (the ''debt-financed distribution exception''). Under a special rule in the existing regulations, if a partnership transfers to more than one partner pursuant to a plan all or a portion of the proceeds of one or more liabilities, the debt-financed distribution exception is applied by treating all of the liabilities incurred pursuant to the plan as one liability. Thus, partners who are allocated shares of multiple liabilities are treated as being allocated a share of a single liability, to which any distributee partner's distribution of debt proceeds relates, rather than a share of each separate liability.

To illustrate the application of this rule, the proposed regulations add an example to the existing regulations to demonstrate that if more than one partner receives all or a portion of the debt proceeds of multiple liabilities that are treated as a single liability under the special rule, the debt proceeds will not be treated as consideration in a disguised sale to the extent of the partner's allocable share of the single liability.

In addition, the IRS and the Treasury Department are aware that there is uncertainty as to whether, for purposes of § 1.707–5(b)(2), the amount of money transferred to a partner that is traceable to a partnership liability is reduced by any portion of such amount that is also excluded from disguised sale treatment under one or more of the exceptions in § 1.707–4 (for example, because the transfer of money is also properly treated as a reasonable guaranteed payment). The IRS and the Treasury Department believe that the treatment of a transfer should first be determined under the debt-financed distribution exception, and any amount not excluded from § 1.707–3 under the debt-financed distribution exception should be tested to see if such amount would be excluded from § 1.707–3 under a different exception in § 1.707–4. This ordering rule ensures that the application of one of the exceptions in § 1.707–4 does not minimize the application of the debt-financed distribution exception.

2. Preformation Expenditures

Section 1.707–4(d) of the existing regulations provides an additional exception for reimbursements of preformation expenditures to the general rule in § 1.707–3. Under § 1.707–4(d), transfers to reimburse a partner for certain capital expenditures and costs incurred are not treated as part of a sale of property under § 1.707–3 (the ''exception for preformation capital expenditures'').

The proposed regulations amend the exception for preformation capital expenditures to address three issues. First, the proposed regulations provide how the exception for preformation capital expenditures applies in the case of multiple property transfers. The exception for preformation capital expenditures generally applies only to the extent that ''the reimbursed capital expenditures do not exceed 20 percent of the fair market value of such property at the time of the contribution.'' This fair market value limitation, however, does not apply if the fair market value of the contributed property does not exceed 120 percent of the partner's adjusted basis in the contributed property at the time of the contribution. The references to ''such property'' and ''contributed property'' in § 1.707–4(d) are intended to refer to the single property for which the expenditures were made. Accordingly, in the case of multiple property contributions, the proposed regulations provide that the determination of whether the fair market value limitation and the exception to the fair market value limitation apply to reimbursements of capital expenditures is made separately for each property that qualifies for the exception.

Second, the proposed regulations clarify the scope of the term ''capital

expenditures'' for purposes of §§ 1.707–4 and 1.707–5. For purposes of §§ 1.707–4 and 1.707–5, the term ''capital expenditures'' has the same meaning as the term ''capital expenditures'' has under the Code and applicable regulations, except that it includes capital expenditures taxpayers elect to deduct, and does not include deductible expenses taxpayers elect to treat as capital expenditures. The IRS and the Treasury Department are aware that taxpayers are uncertain whether the term capital expenditures includes only expenditures that are required to be capitalized under the Code. The purpose of the exception for preformation capital expenditures is to permit a partnership to reimburse a contributing partner for expenditures incurred with respect to contributed property. The IRS and the Treasury Department considered whether a contributing partner's capital expenditures for this purpose should be reduced by the benefit of the tax deduction the contributing partner received prior to contribution of the property either because the capital expenditure was currently deductible by the contributing partner or recovered through amortization or depreciation deductions. The proposed regulations, however, do not adopt such an approach because the approach would be too burdensome to administer.

Finally, the proposed regulations provide a rule coordinating the exception for preformation capital expenditures and the rules regarding liabilities traceable to capital expenditures. Section 1.707–5 provides special rules for disguised sales relating to liabilities assumed or taken subject to by a partnership. Under § 1.707–5(a)(1) of the existing regulations, a partnership's assumption of or taking property subject to a qualified liability in connection with a partner's transfer of property to the partnership is treated as a transfer of consideration to the partner only if the property transfer is otherwise treated as part of a sale. A liability constitutes a qualified liability of the partner to the extent the liability meets one of the four definitions of qualified liabilities under § 1.707–5(a)(6). One of the enumerated qualified liabilities is a liability that is allocable under the rules of § 1.163–8T to capital expenditures with respect to the property transferred to the partnership (the ''capital expenditure qualified liability'').

The IRS and the Treasury Department are aware that taxpayers are uncertain about whether a partner may qualify under the exception for preformation capital expenditures if those expenditures were funded with a capital expenditure qualified liability. For example, taxpayers are uncertain about whether a partner can finance its capital expenditures through a borrowing that is exempted as a qualified liability and can also be reimbursed for those expenditures without triggering sale treatment. The IRS and the Treasury Department believe that the exception for preformation capital expenditures applies only to the extent the distribution is in reimbursement of such expenditures. Thus, the proposed regulations provide that to the extent a partner funded a capital expenditure through a borrowing and economic responsibility for that borrowing has shifted to another partner, the exception for preformation capital expenditures should not apply because there is no outlay by the partner to reimburse.

3. Qualified Liabilities in a Trade or Business

As previously mentioned, the existing regulations generally exclude qualified liabilities from disguised sale treatment. The legislative history of section 707(a)(2)(B) with respect to liabilities provides that Congress was ''concerned with transactions that attempt to disguise a sale of property and not with non-abusive transactions that reflect the various economic contributions of the partners. . . . For example . . . the transaction will be treated as a sale or exchange of property . . . to the extent the partner has received a loan related to the property in anticipation of the transaction and responsibility for repayment of the loan is transferred to the other partners.'' *See* H.R. Rep. No. 432, pt. 2, 98th Cong. 2nd Sess. 1216, 1220–1221 (1984).

The existing regulations under § 1.707–5(a)(6) provide four types of liabilities that are qualified liabilities. In addition to the capital expenditure qualified liabilities discussed previously, the existing regulations include as a qualified liability a liability incurred in the ordinary course of the trade or business in which property transferred to the partnership was used or held, but only if all of the assets that are material to that trade or business are transferred to the partnership (''ordinary course qualified liability''). There is no requirement that these two types of liabilities encumber the transferred property to be treated as qualified liabilities.

The remaining two types of qualified liabilities are liabilities incurred more than two years before the transfer (or written agreement to transfer), and liabilities incurred within two years of the transfer (or written agreement to transfer) but not in anticipation of the transfer. Liabilities incurred by a partner within two years of the transfer, other than capital expenditure and ordinary course qualified liabilities, are presumed to be incurred in anticipation of the transfer unless the facts and circumstances clearly establish otherwise. With respect to both of these types of qualified liabilities, there is a requirement that the liability encumber the transferred property.

The IRS and the Treasury Department believe the requirement that the liability encumber the transferred property is not necessary to carry out the purposes of section 707(a)(2)(B) when a liability was incurred in connection with the conduct of a trade or business, provided the liability was not incurred in anticipation of the transfer and all of the assets material to that trade or business are transferred to the partnership. Accordingly, the proposed regulations add an additional definition of qualified liability to account for this type of liability. As under the existing regulations regarding liabilities other than capital expenditure and ordinary course qualified liabilities, if the partner incurred the liability within two years of the transfer of assets to the partnership, (i) the liability is presumed under § 1.707–5(a)(7)(i) to have been incurred in anticipation of the transfer unless the facts and circumstances clearly establish that the liability was not incurred in anticipation of the transfer, and (ii) the treatment of the liability as a qualified liability under the new definition must be disclosed to the IRS under § 1.707–8.

4. Anticipated Reduction

Under the existing regulations, for purposes of the rules under section 707, a partner's share of a liability assumed or taken subject to by a partnership is determined by taking into account certain subsequent reductions in the partner's share of the liability. Specifically, a subsequent reduction in a partner's share of a liability is taken into account if (i) at the time that the partnership incurs, assumes, or takes property subject to the liability, it is anticipated that the partner's share of the liability will be subsequently reduced; and (ii) the reduction is part of a plan that has as one of its principal purposes minimizing the extent to which the distribution or assumption of, or taking property subject to, the liability is treated as part of a sale (the ''anticipated reduction rule''). The IRS and the Treasury Department are aware that there is uncertainty as to when a reduction is anticipatory because it is generally anticipated that all liabilities

will be repaid. Consistent with the overall approach of the existing regulations under section 707, the IRS and the Treasury Department believe that a reduction that is subject to the entrepreneurial risks of partnership operations is not an anticipated reduction, and the proposed regulations adopt this approach.

In addition, the proposed regulations provide that if within two years of the partnership incurring, assuming, or taking property subject to the liability, a partner's share of the liability is reduced due to a decrease in the partner's or a related person's net value (as described in Part 8.a of the Explanation of Provisions section of this preamble), then the reduction will be presumed to be anticipated, unless the facts and circumstances clearly establish that the decrease in the net value was not anticipated. Any such reduction must be disclosed in accordance with § 1.707–8.

5. Tiered Partnerships

The existing regulations in § 1.707–5(e), and § 1.707–6(b) by applying rules similar to § 1.707–5(e), currently provide only a limited tiered-partnership rule for cases in which a partnership succeeds to a liability of another partnership. Under those rules, if a lower-tier partnership succeeds to a liability of an upper-tier partnership, the liability in the lower-tier partnership retains the same characterization as either a qualified or a nonqualified liability that it had as a liability of the upper-tier partnership. Similarly, if an upper-tier partnership succeeds to a liability of a lower-tier partnership, the liability in the upper-tier partnership retains the same characterization as either a qualified or a nonqualified liability that it had as a liability of the lower-tier partnership that incurred the liability. Moreover, the existing regulations provide that a similar rule applies to other related party transactions involving liabilities to the extent provided by guidance in the Internal Revenue Bulletin. *See,* for example, Rev. Rul. 2000–44, 2000–2 CB 336.

The proposed regulations add additional rules regarding tiered partnerships. First, the proposed regulations clarify that the debt-financed distribution exception applies in a tiered partnership setting. Second, the proposed regulations provide rules regarding the characterization of liabilities attributable to a contributed partnership interest. Section 752(d) provides that in the case of a sale or exchange of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships. Accordingly, a partner that contributes an interest in a partnership (lower-tier partnership) to another partnership (upper-tier partnership) must take into account its share of liabilities from the lower-tier partnership in applying the rules under § 1.707–5. The IRS and the Treasury Department believe it is appropriate to treat the lower-tier partnership as an aggregate for purposes of determining whether the upper-tier partnership's share of the liabilities of the lower-tier partnership are qualified liabilities. Thus, these proposed regulations provide that a contributing partner's share of liabilities from a lower-tier partnership are treated as qualified liabilities to the extent the liability would be a qualified liability had the liability been assumed or taken subject to by the upper-tier partnership in connection with a transfer of all of the lower-tier partnership's property to the upper-tier partnership by the lower-tier partnership.

6. Treatment of Liabilities in Assets-Over Merger

Section 1.752–1(f) provides for netting of increases and decreases in a partner's share of liabilities resulting from a single transaction. Under that rule, increases and decreases in partnership liabilities associated with a merger or consolidation are netted by the partners in the terminating partnership and the resulting partnership to determine the effect of a merger under section 752. The IRS and the Treasury Department believe that similar netting rules should apply with respect to the disguised sale rules and, accordingly, the proposed regulations extend the principles of § 1.752–1(f) to determine the effect of the merger under the disguised sale rules.

7. Disguised Sales of Property by a Partnership to a Partner

For disguised sales of property by a partnership to a partner, the existing regulations under § 1.707–6 provide that rules similar to those in § 1.707–5 (for disguised sales of property by a partner to a partnership) apply to determine the extent to which an assumption of or taking property subject to a liability by a partner, in connection with a transfer of property by a partnership, is considered part of a sale. More specifically, the existing regulations provide that if the partner assumes or takes property subject to a liability that is not a qualified liability, the amount treated as consideration transferred to the partnership is the amount that the liability assumed or taken subject to by the partner exceeds the partner's share of that liability immediately before the transfer. Thus, if a transferee partner had a 100 percent share of a liability immediately before a transfer in which the transferee partner assumed the liability, then no sale is treated as occurring between the partnership and the partner with respect to the liability assumption, irrespective of the period of time during which the partnership liability is outstanding and the period of time in which the partnership liability is allocated to the partner.

The IRS and the Treasury Department are studying these rules and believe it may be inappropriate to take into account a transferee partner's share of a partnership liability immediately prior to a distribution if the transferee partner did not have economic exposure with respect to the partnership liability for a meaningful period of time before appreciated property is distributed to that partner subject to the liability. Thus, the IRS and the Treasury Department are considering, and request comments on, whether the rules under § 1.707–6 should be amended to provide that a transferee partner's share of an assumed liability immediately before a distribution is taken into account for purposes of determining the consideration transferred to the partnership only to the extent of the partner's lowest share of the liability within some meaningful period of time, for example, 12 months.

8. Partner's Share of Partnership Liabilities

A. Recourse Liabilities

The existing regulations under section 1.752–2 provide that a partner's share of a recourse partnership liability equals the portion of the liability, if any, for which the partner or related person bears the economic risk of loss. A partner generally bears the economic risk of loss for a partnership liability to the extent the partner, or a related person, would be obligated to make a payment if the partnership's assets were worthless and the liability became due and payable. Subject to an anti-abuse rule and the disregarded entity net value requirement of § 1.752–2(k), § 1.752–2(b)(6) assumes that all partners and related persons will actually satisfy their payment obligations, irrespective of their actual net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation (the ''satisfaction presumption''). Thus, for purposes of allocating partnership liabilities, § 1.752–2 adopts an ultimate liability test under a worst-case

scenario. Under this test, the regulations would generally allocate an otherwise nonrecourse liability of the partnership to a partner that guarantees the liability even if the lender and the partnership reasonably anticipate that the partnership will be able to satisfy the liability with either partnership profits or capital.

The IRS and the Treasury Department have considered whether the approach of the existing regulations under § 1.752–2 is appropriate given that, in most cases, a partnership will satisfy its liabilities with partnership profits, the partnership's assets do not become worthless, and the payment obligations of partners or related persons are not called upon. The IRS and the Treasury Department are concerned that some partners or related persons have entered into payment obligations that are not commercial solely to achieve an allocation of a partnership liability to such partner. The IRS and the Treasury Department believe that section 79 of the Tax Reform Act of 1984 (Pub. L. 98–369), which overruled the decision in *Raphan* v. *United States,* 3 Cl. Ct. 457 (1983) (holding that a guarantee by a general partner of an otherwise nonrecourse liability of the partnership did not require the partner to be treated as personally liable for that debt), and directed the Treasury Department to prescribe regulations under section 752 relating to the treatment of guarantees and other payment obligations, was intended to ensure that bona fide, commercial payment obligations would be given effect under section 752.

Accordingly, the proposed regulations provide a rule that obligations to make a payment with respect to a partnership liability (excluding those imposed by state law) will not be recognized for purposes of section 752 unless certain factors are present. These factors, if satisfied, are intended to establish that the terms of the payment obligation are commercially reasonable and are not designed solely to obtain tax benefits. Specifically, the rule requires a partner or related person to maintain a commercially reasonable net worth during the term of the payment obligation or be subject to commercially reasonable restrictions on asset transfers for inadequate consideration. In addition, the partner or related person must provide commercially reasonable documentation regarding its financial condition and receive arm's length consideration for assuming the payment obligation. The rule also requires that the payment obligation's term must not end prior to the term of the partnership liability and that the primary obligor or any other obligor must not be required to hold money or other liquid assets in an amount that exceeds the reasonable needs of such obligor. The rule would also prevent certain so-called ''bottom-dollar'' guarantees from being recognized for purposes of section 752.

Moreover, the IRS and the Treasury Department are concerned that some partners or related persons might attempt to use certain structures or arrangements to circumvent the rules included in these proposed regulations with respect to bottom-dollar guarantees. For example, a financial intermediary might artificially convert a single mortgage loan into senior and junior tranches using a wrap-around mortgage or other device with a principal purpose of creating tranches for partners to guarantee that result in exposure tantamount to a bottom-dollar guarantee. Accordingly, the proposed regulations revise the anti-abuse rule under § 1.752–2(j) to address the use of intermediaries, tiered partnerships, or similar arrangements to avoid the bottom-dollar guarantee rules. The IRS and the Treasury Department request comments on whether other structures or arrangements might be used to circumvent the rules regarding bottom-dollar guarantees, and whether the final regulations should broaden the anti-abuse rule further to address any such structures or arrangements.

The IRS and the Treasury Department also acknowledge that the proposed regulations relating to guarantees and indemnities draw lines that, among other things, preclude recognition of a payment obligation for a portion, rather than 100 percent, of each dollar of a partnership liability to which the payment obligation relates (a so-called vertical slice of the partnership liability) (see § 1.752–2(f) *Example 12* in the proposed regulations). The IRS and the Treasury Department request comments on whether, and under what circumstances, the final regulations should permit recognition of such a payment obligation. In addition, the IRS and the Treasury Department request comments on whether the special rule under § 1.752–2(e) (and related § 1.752–2(f) *Example 7*) should be removed from the final regulations or revised to require that 100 percent of the total interest that will accrue on a partnership nonrecourse liability be guaranteed.

As was previously noted, the satisfaction presumption assumes that all partners and related persons will actually satisfy their payment obligations, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation. The satisfaction presumption does not apply, however, to the payment obligations of disregarded entities. Instead, the payment obligation of a disregarded entity for which a partner is treated as bearing the economic risk of loss is taken into account only to the extent of the net value of the disregarded entity, as determined under § 1.752–2(k). The preamble to the proposed regulations under § 1.752–2(k) requested comments regarding whether the rules for disregarded entities should be extended to the payment obligations of other entities. Some commenters opposed extending the rules to other entities, while other commenters suggested that the anti-abuse rule in § 1.752–2(j) could be expanded to cover certain situations involving thinly capitalized entities. One commenter suggested that the anti-abuse rule should apply if a substantially undercapitalized subsidiary of a consolidated group of corporations or a substantially undercapitalized passthrough entity (other than a disregarded entity) is utilized as the partner (or related obligor) for a principal purpose of limiting its owner's risk of loss in respect of existing partnership liabilities, and obtaining tax benefits for its owners (or other members of the consolidated group) that would not be available but for the additional tax basis in the partnership interest that results from the satisfaction presumption. Although the final regulations under § 1.752–2(k) did not extend the rules for disregarded entities to other entities, the IRS and the Treasury Department indicated that they would continue to study the issue of extending the net value approach for disregarded entities to other entities.

After further consideration, the IRS and the Treasury Department believe that there are circumstances in addition to those involving disregarded entities under which the satisfaction presumption is not appropriate. Thus, the proposed regulations turn off the satisfaction presumption by extending the net value requirement of § 1.752–2(k) to all partners or related persons, including grantor trusts, other than individuals and decedent's estates for payment obligations associated with liabilities that are not trade payables. In situations in which the satisfaction presumption is turned off, the proposed regulations provide that the partner's or related person's payment obligation is recognized only to the extent of the partner's or related person's net value as of the allocation date. A partner or related person that is not a disregarded entity is treated as a disregarded entity for purposes of determining net value

under § 1.752–2(k). The IRS and the Treasury Department request comments on whether it would be clearer if all the net value requirement rules were consolidated in § 1.752–2(k).

The IRS and the Treasury Department considered further extending the net value requirement of § 1.752–2(k) to partners and related persons that are individuals and decedent's estates, but decided not to require such persons to comply with the net value requirement of § 1.752–2(k) because of the nature of personal guarantees. However, applying this less restrictive standard to individuals and decedent's estates may disadvantage other entities that enter into partnerships with individuals or decedent's estates. Thus, the IRS and the Treasury Department request comments on whether the final regulations should extend the net value requirement of § 1.752–2(k) to all partners and related persons. The IRS and the Treasury Department also request comments on the application of the net value requirement of § 1.752–2(k) to tiered partnerships.

Finally, in determining the amount of any obligation of a partner to make a payment to a creditor or a contribution to the partnership with respect to a partnership liability, § 1.752–2(b)(1) reduces the partner's payment obligation by the amount of any reimbursement that the partner would be entitled to receive from another partner, a person related to another partner, or the partnership. The IRS and the Treasury Department have considered whether a right to be reimbursed for a payment or contribution by an unrelated person (for example, pursuant to an indemnification agreement from a third party) should be taken into account in the same manner and have concluded that any source of reimbursement that effectively eliminates the partner's payment risk should cause a payment obligation to be disregarded. Therefore, the proposed regulations change the rule in § 1.752–2(b)(1) to reduce the partner's payment obligation by the amount of any right to reimbursement from any person.

B. Nonrecourse Liabilities

The existing regulations under § 1.752–3 contain rules for determining a partner's share of a nonrecourse liability of a partnership, including the partner's share of excess nonrecourse liabilities under § 1.752–3(a)(3). Section 1.752–3(a)(3) provides various methods to determine a partner's share of the excess nonrecourse liabilities. Under one method, a partner's share of excess nonrecourse liabilities is determined in accordance with the partner's share of partnership profits. For this purpose, the partnership agreement may specify the partners' interests in partnership profits so long as the interests so specified are reasonably consistent with allocations (that have substantial economic effect under the section 704(b) regulations) of some other significant item of partnership income or gain (the ''significant item method''). Alternatively, excess nonrecourse liabilities may be allocated among the partners in the manner that deductions attributable to those liabilities are reasonably expected to be allocated (the ''alternative method''). Similar to the significant item method, under § 1.704–2(e)(2), the partnership agreement may allocate nonrecourse deductions in a manner that is reasonably consistent with allocations that have substantial economic effect of some other significant partnership item attributable to the property securing the nonrecourse liability.

The IRS and the Treasury Department believe that the allocation of excess nonrecourse liabilities in accordance with the significant item method and the alternative method may not properly reflect a partner's share of partnership profits that are generally used to repay such liabilities because the allocation of the significant item may not necessarily reflect the overall economic arrangement of the partners. Therefore, the proposed regulations remove the significant item method and the alternative method from § 1.752–3(a)(3).

The IRS and the Treasury Department, however, are aware of the difficulty in determining a partner's interest in partnership profits in other than very simple partnerships and, therefore, recognize the need to have a bright-line measure of a partner's interest in partnership profits. The IRS and the Treasury Department considered several alternatives and believe that, for this purpose, an appropriate proxy of a partner's interest in partnership profits, and one that can provide the needed certainty, is a partner's liquidation value percentage, determined upon formation of the partnership and redetermined upon the most recent occurrence of an event described in § 1.704–1(b)(2)(iv)(f)(*5*), whether or not the capital accounts of the partners are adjusted under § 1.704–1(b)(2)(iv)(f) in connection with such event. A partner's liquidation value percentage is the ratio (expressed as a percentage) of the liquidation value of the partner's interest in the partnership to the liquidation value of all of the partners' interests in the partnership. The proposed regulations adopt the liquidation value percentage approach.

For purposes of the proposed rule, the liquidation value of a partner's interest in a partnership is the amount of cash the partner would receive with respect to the interest if, immediately after formation of the partnership or the occurrence of the event described in § 1.704–1(b)(2)(iv)(f)(*5*), as the case may be, the partnership sold all of its assets for cash equal to the fair market value of such property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then liquidated. The proposed regulations also provide an example illustrating the new liquidation value approach in place of *Example 2* in § 1.752–3(c) illustrating the alternative method. As the proposed example illustrates, a change in the partners' shares of partnership liabilities as a result of an event described in § 1.704–1(b)(2)(iv)(f)(*5*) is taken into account in determining the tax consequences of the event that gave rise to such change.

The IRS and the Treasury Department are aware that the liquidation value approach may not precisely measure a partner's interest in partnership profits but believe that the approach is a better proxy than the significant item and alternative methods and is still administrable. The IRS and the Treasury Department request comments on other methods that reasonably measure a partner's interest in partnership profits that are not overly burdensome. In addition, the IRS and the Treasury Department request comments on whether exceptions should be provided to exclude certain events from triggering a redetermination of the partners' liquidation values.

Proposed Applicability Dates

The regulations under section 707 are proposed to apply to transactions with respect to which all transfers occur on or after the date these regulations are published as final regulations in the **Federal Register**. The regulations under § 1.752–2 are proposed to apply to liabilities incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after the date these regulations are published as final regulations in the **Federal Register**. The regulations under § 1.752–3 are proposed to apply to liabilities incurred or assumed by a partnership on or after the date these regulations are published as final regulations in the **Federal Register**. The IRS and the Treasury

Department anticipate that the final regulations under section 752 will permit a partnership to apply the provisions contained in the final regulations to all of its liabilities as of the beginning of the first taxable year of the partnership ending on or after the date these regulations are published as final regulations in the **Federal Register**.

The proposed regulations also provide transitional relief for any partner whose allocable share of partnership liabilities under § 1.752–2 exceeds its adjusted basis in its partnership interest on the date the proposed regulations are finalized. Under this transitional relief, the partner can continue to apply the existing regulations under § 1.752–2 for a seven-year period to the extent that the partner's allocable share of partnership liabilities exceeds the partner's adjusted basis in its partnership interest on the date the proposed regulations are finalized. The amount of partnership liabilities subject to transitional relief will be reduced for certain reductions in the amount of liabilities allocated to that partner under the transition rules and, upon the sale of any partnership property, for any excess of tax gain (including section 704(c) gain) allocated to the partner less the partner's share of amount realized.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. 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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information will be minimal in that it requires partners that are business entities and trusts to provide information they already maintain or can easily obtain to their respective partnership. Moreover, it should take a partner no more than 2 hours to satisfy the information requirement in these regulations. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by a person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Deane M. Burke of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Sections 1.707–2 through 1.707–9 also issued under 26 U.S.C. 707(a)(2)(B).

§ 1.704–2 [Amended]

■ **Par. 2.** Section 1.704–2 is amended by:

■ a. Removing the language ''and (vii)'' in paragraph (d)(2)(ii).

■ b. Removing the language ''*Example* (1)(viii) and (ix)'' in paragraph (i)(2) and adding the language ''*Example* (1)(vii) and (viii)'' in its place.

■ c. Removing the language ''*Example* (1)(viii)'' in paragraph (i)(5) and adding the language ''*Example* (1)(vii)'' in its place.

■ d. Removing *Example* 1(vii) in paragraph (m) and redesignating *Examples* 1(viii) and (ix) as *Examples* 1(vii) and (viii) respectively.

■ e. Removing the language ''*Example* (1)(viii)'' in newly redesignated *Example* (1)(viii) in paragraph (m) and adding the language ''*Example* (1)(vii)'' in its place.

■ **Par. 3.** Section 1.707–0 is amended by:

■ a. Adding entries for §§ 1.707–4(d)(1), (d)(2), (d)(3), and (f).

■ b. Adding an entry for § 1.707–5(b)(3).

■ c. Redesignating the entry for § 1.707–5(f) as § 1.707–5(g) and adding a new entry for § 1.707–5(f).

The additions read as follows:

§ 1.707–0 Table of contents.

* * * * *

§ 1.707–4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

* * * * *

(d) * * *

(1) In general.

(2) Special rule for certain qualified liabilities.

(3) Scope of capital expenditures.

* * * * *

(f) Ordering rule cross reference.

* * * * *

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

* * * * *

(b) * * *

(3) Ordering rule.

* * * * *

(f) Netting liabilities in assets-over merger or consolidation.

* * * * *

■ **Par. 4.** Section 1.707–4 is amended by:

■ a. Adding the language ''(1) *In general.*'' after the heading for paragraph (d).

■ b. Redesignating paragraph (d)(1) as paragraph (d)(1)(i).

■ c. Redesignating paragraph (d)(2) as paragraph (d)(1)(ii).

■ d. Redesignating paragraph (d)(2)(i) as paragraph (d)(1)(ii)(A).

■ e. Redesignating paragraph (d)(2)(ii) as paragraph (d)(1)(ii)(B).

■ f. Revising the second sentence in newly redesignated paragraph (d)(1)(ii)(B) and adding a new sentence at the end of newly redesignated paragraph (d)(1)(ii)(B).

■ g. Adding new paragraphs (d)(2), (d)(3), and (f).

The additions and revisions read as follows:

§ 1.707–4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

* * * * *

(d) * * *

(1) *In general.* * * *

(ii) * * *

(B) * * * However, the 20 percent of fair market value limitation of this paragraph (d)(1)(ii)(B) does not apply if the fair market value of the contributed property does not exceed 120 percent of the partner's adjusted basis in the contributed property at the time of the contribution. This paragraph (d)(1)(ii)(B) shall be applied on a property-by-property basis.

(2) *Special rule for certain qualified liabilities.* For purposes of paragraph (d)(1) of this section, if the capital expenditures were funded by a liability defined in § 1.707–5(a)(6)(i)(C) that is assumed or taken subject to by the partnership in connection with a transfer of property to the partnership by a partner, a transfer of money or other consideration by the partnership to the partner is not treated as made to reimburse the partner for such capital expenditures to the extent the transfer of money or other consideration by the partnership to the partner exceeds the partner's share of the liability (as determined under § 1.707–5(a)(2)).

(3) *Scope of capital expenditures.* For purposes of this section and § 1.707–5, the term *capital expenditures* has the same meaning as the term *capital expenditures* has under the Code and applicable regulations, except that it includes capital expenditures taxpayers elect to deduct, and does not include deductible expenses taxpayers elect to treat as capital expenditures.

* * * * *

(f) *Ordering rule cross reference.* For payments or transfers by a partnership to a partner to which the rules under this section and § 1.707–5(b) apply, see the ordering rule under § 1.707–5(b)(3).

■ **Par. 5.** Section 1.707–5 is amended by:

■ a. Removing the language ''or would be treated as a recourse liability under that section if it were treated as a partnership liability for purposes of that section'' at the end of paragraph (a)(2)(i).

■ b. Removing the language ''or would be a nonrecourse liability of the partnership under § 1.752–1(a)(2) if it were treated as a partnership liability for purposes of that section'' at the end of paragraph (a)(2)(ii).

■ c. Revising paragraph (a)(3).

■ d. Revising paragraph (a)(6)(i)(C).

■ e. Removing the language ''and'' at the end of paragraph (a)(6)(i)(D) and adding the language ''or'' in its place.

■ f. Adding paragraph (a)(6)(i)(E).

■ g. Revising paragraph (a)(7)(ii).

■ h. Adding a sentence at the end of paragraph (b)(1).

i. Removing the language ''property'' in paragraph (b)(2)(i)(A) and adding the language ''consideration'' in its place.

■ j. Revising paragraph (b)(2)(iii).

■ k. Adding paragraph (b)(3).

■ l. Designating the text of paragraph (e) after its subject heading as paragraph (e)(1).

■ m. Adding paragraph (e)(2).

■ n. Redesignating paragraph (f) as paragraph (g) and adding new paragraph (f).

■ o. Revising *Example 10* in newly redesignated paragraph (g).

■ p. Redesignating *Example 11* in newly redesignated paragraph (g) as *Example 14* and adding new *Examples 11, 12, and 13.*

The additions and revisions read as follows:

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(3) *Reduction of partner's share of liability*—(i) For purposes of this section, a partner's share of a liability, immediately after a partnership assumes or takes property subject to the liability, is determined by taking into account a subsequent reduction in the partner's share if—

(A) At the time that the partnership assumes or takes property subject to the liability, it is anticipated that the transferring partner's share of the liability will be subsequently reduced;

(B) The anticipated reduction is not subject to the entrepreneurial risks of partnership operations; and

(C) The reduction of the partner's share of the liability is part of a plan that has as one of its principal purposes minimizing the extent to which the assumption of or taking property subject to the liability is treated as part of a sale under § 1.707–3.

(ii) If within two years of the partnership assuming or taking property subject to the liability, a partner's share of the liability is reduced due to a decrease in the net value of the partner or related person for purposes of § 1.752–2(k), the reduction will be presumed to be anticipated, unless the facts and circumstances clearly establish that the decrease in the net value was not anticipated. Any such reduction must be disclosed in accordance with § 1.707–8.

* * * * *

(6) * * *

(i) * * *

(C) A liability that is allocable under the rules of § 1.163–8T to capital expenditures (as described under § 1.707–4(d)(3)) with respect to the property;

* * * * *

(E) A liability that was not incurred in anticipation of the transfer of the property to a partnership, but that was incurred in connection with a trade or business in which property transferred to the partnership was used or held but only if all the assets related to that trade or business are transferred other than assets that are not material to a continuation of the trade or business (see paragraph (a)(7) of this section for further rules regarding a liability incurred within two years of a transfer presumed to be in anticipation of the transfer); and

* * * * *

(7) * * *

(ii) *Disclosure of transfers of property subject to liabilities incurred within two years of the transfer.* A partner that treats a liability assumed or taken subject to by a partnership in connection with a transfer of property as a qualified liability under paragraph (a)(6)(i)(B) of this section or under paragraph (a)(6)(i)(E) of this section (if the liability was incurred by the partner within the two-year period prior to the earlier of the date the partner agrees in writing to transfer the property or the date the partner transfers the property to the partnership) must disclose such treatment to the Internal Revenue Service in accordance with § 1.707–8.

(b) * * *

(1) * * * For purposes of paragraph (b) of this section, an upper-tier partnership's share of the liabilities of a lower-tier partnership that are treated as a liability of the upper-tier partnership under § 1.752–4(a) shall be treated as a liability of the upper-tier partnership incurred on the same day the liability was incurred by the lower-tier partnership.

(2) * * *

(iii) *Reduction of partner's share of liability*—(A) For purposes of paragraph (b)(2) of this section, a partner's share of a liability immediately after a partnership incurs the liability is determined by taking into account a subsequent reduction in the partner's share if—

(*1*) At the time that the partnership incurs the liability, it is anticipated that the partner's share of the liability that is allocable to a transfer of money or other consideration to the partner will be reduced subsequent to the transfer;

(*2*) The anticipated reduction is not subject to the entrepreneurial risks of partnership operations; and

(*3*) The reduction of the partner's share of the liability is part of a plan that has as one of its principal purposes minimizing the extent to which the partnership's distribution of the proceeds of the borrowing is treated as part of a sale.

(B) If within two years of the partnership incurring the liability, a partner's share of the liability is reduced due to a decrease in the net value of the partner or a related person for purposes of § 1.752–2(k), the reduction will be presumed to be anticipated, unless the facts and circumstances clearly establish that the decrease in the net value was not anticipated. Any such reduction must be disclosed in accordance with § 1.707–8.

(3) *Ordering rule.* The treatment of a transfer of money or other consideration under paragraph (b) of this section is determined before applying the rules under § 1.707–4.

* * * * *

(e) * * *

(2) If an interest in a partnership that has one or more liabilities (the lower-tier partnership) is transferred to another partnership (the upper-tier partnership), the upper-tier partnership's share of any liability of the lower-tier partnership that is treated as a liability of the upper-tier partnership under § 1.752–4(a) is treated as a qualified liability under § 1.707–5(a)(6)(i) to the extent the liability would be a qualified liability under § 1.707–5(a)(6)(i) had the liability been assumed or taken subject to by the upper-tier partnership in connection with a transfer of all of the lower-tier partnership's property to the upper-tier partnership by the lower-tier partnership.

(f) *Netting liabilities in assets-over merger or consolidation.* When two or more partnerships merge or consolidate under section 708(b)(2)(A), as described in § 1.708–1(c)(3)(i), any increases or decreases in partnership liabilities associated with the merger or consolidation are netted by a partner in the terminating partnership and the resulting partnership for purposes of applying §§ 1.707–3 through 1.707–5 to transfers of money or other consideration by the terminating partnership to the partner.

(g) * * *

Example 10. Treatment of debt-financed transfers of consideration by partnership. (i) K transfers property Z to partnership KL in exchange for an interest in KL on April 9, 2014. On September 13, 2014, KL incurs a liability of $20,000. On November 17, 2014, KL transfers $20,000 to K, and $10,000 of this transfer is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on September 13, 2014. The remaining $10,000 is paid from other partnership funds. Assume that, under section 752 and the corresponding regulations, the $20,000 liability incurred on September 13, 2014, is a recourse liability of KL and K's share of that liability is $10,000 on November 17, 2014.

(ii) Because a portion of the transfer made to K on November 17, 2014, is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, K is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds K's allocable share of the liability used to fund the transfer. K's allocable share of the $20,000 liability used to fund $10,000 of the transfer to K is $5,000 (K's share of the liability ($10,000) multiplied by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to K ($10,000); by

(B) The total amount of such liability ($20,000)).

(iii) Therefore, K is required to take into account only $15,000 of the $20,000 partnership transfer to K for purposes of this section and § 1.707–3. Under these facts, assuming the within-two-year presumption is not rebutted, this $15,000 transfer will be treated under the rule in § 1.707–3 as part of a sale by K of property *Z* to KL.

Example 11. Treatment of debt-financed transfers of consideration and transfers characterized as guaranteed payments by a partnership. (i) The facts are the same as in *Example 10,* except that the entire $20,000 transfer to K is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on September 13, 2014. In addition, the partnership agreement provides that K is to receive a guaranteed payment for the use of K's capital in the amount of $10,000 in each of the three years following the transfer of property Z. Ten thousand dollars of the transfer made to K on November 17, 2014, is pursuant to this provision of the partnership agreement. Assume that the guaranteed payment to K constitutes a reasonable guaranteed payment within the meaning of § 1.707–4(a)(3).

(ii) Under these facts, the rules under both § 1.707–4(a) and § 1.707–5(b) apply to the November 17, 2014 transfer to K by the partnership. Thus, the ordering rule in § 1.707–5(b)(3) requires that the § 1.707–5(b) debt-financed distribution rules apply first to determine the treatment of the $20,000 transfer. Because the entire transfer made to K on November 17, 2014, is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, K is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds K's allocable share of the liability used to fund the transfer. K's allocable share of the $20,000 liability used to fund the transfer to K is $10,000 (K's share of the liability ($10,000) multiplied by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to K ($20,000); by

(B) The total amount of such liability ($20,000)).

(iii) The remaining $10,000 amount of the transfer to K that exceeds K's allocable share of the liability is tested to determine whether an exception under § 1.707–4 applies. Because $10,000 of the payment to K is a reasonable guaranteed payment for capital under § 1.707–4(a)(1)(ii), the $10,000 transfer will not be treated as part of a sale by K of property *Z* to the partnership under § 1.707–3, unless the facts and circumstances establish that the transfer is not a guaranteed payment for capital but is part of a sale.

Example 12. Treatment of debt-financed transfers of consideration by partnership made pursuant to plan. (i) O transfers property X, and P transfers property Y, to partnership OP in exchange for equal interests therein on June 1, 2014. On October 1, 2014, the partnership incurs two liabilities: Liability 1 of $8,000 and Liability 2 of $4,000. On December 15, 2014, the partnership transfers $2,000 to each of O and P pursuant to a plan. The transfers made to O and P on December 15, 2014 are allocable under § 1.163–8T to the proceeds of either Liability 1 or Liability 2. Assume that the liabilities incurred on October 1, 2014 are each a recourse liability of the partnership under § 1.752–2 and that O's and P's share of Liability 1 is $4,000 each and Liability 2 is $2,000 each on December 15, 2014.

(ii) Because the partnership transferred pursuant to a plan a portion of the proceeds of the two liabilities to O and P, paragraph (b)(1) of this section is applied by treating Liability 1 and Liability 2 as a single $12,000 liability. Pursuant to paragraph (b)(2)(ii)(A) of this section, each partner's allocable share of the $12,000 liability equals the amount obtained by multiplying the sum of the partner's share of Liability 1 and Liability 2 ($6,000) ($4,000 for Liability 1 plus $2,000 for Liability 2) by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to O and P pursuant to the plan ($4,000); by

(B) The total amount of such liability ($12,000).

(iii) Therefore, O's and P's allocable share of the $12,000 liability is $2,000 each. Accordingly, because a portion of the proceeds of the $12,000 liability are allocable under § 1.163–8T to the $2,000 transfer made to each of O and P within 90 days of incurring the liability, and the $2,000 transfer does not exceed O or P's $2,000 allocable share of that liability, each is required to take into account $0 of the $2,000 transfer for purposes of this section and § 1.707–3. Under these facts, no part of the transfers to O and P will be treated as part of a sale of property X by O or property Y by P.

Example 13. Treatment of debt-financed transfers of consideration by partnership with liability allocated according to partners' liquidation value percentages. (i) X transfers property A, which has a fair market value of $90,000 and an adjusted tax basis of $5,000,

to partnership XY in exchange for an interest therein on March 29, 2014. At the time of the contribution, partnership XY's only asset is property B with a fair market value of $120,000 and adjusted tax basis of $70,000. On March 30, 2014, the partnership incurs a liability of $30,000. On March 31, 2014, the partnership transfers $30,000 to X, and $30,000 of this transfer is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on March 30, 2014. Assume that, under section 752 and the corresponding regulations, the $30,000 liability incurred on March 30, 2014 is a nonrecourse liability of the partnership and that partnership XY allocates its excess nonrecourse liabilities under § 1.752–3(a)(3) in accordance with the partners' liquidation value percentages as defined in § 1.752–3(a)(3).

(ii) Under paragraph (a)(2)(ii) of this section, X's share of partnership XY's $30,000 nonrecourse liability is determined by applying the same percentages used to determine X's share of XY's excess nonrecourse liabilities under § 1.752–3(a)(3). Because the distribution to X is an event described in § 1.704–1(b)(2)(iv)(f)(*5*), X's liquidation value percentage must be redetermined under § 1.752–3(a)(3) as of March 31, 2014, irrespective of whether the capital accounts of the partners of partnership XY are adjusted under § 1.704–1(b)(2)(iv)(f). X's liquidation value percentage is 33.3% ((X's liquidation value of $60,000 immediately after the distribution) divided by (partnership XY's aggregate liquidation value of $180,000 immediately after the distribution)). Accordingly, under paragraph (a)(2)(ii) of this section, X's share of the $30,000 liability is $10,000 on March 31, 2014.

(iii) Because the transfer made to X on March 31, 2014 is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, X is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds X's allocable share of the liability used to fund the transfer. X's allocable share of the $30,000 liability used to fund the $30,000 transfer to X is $10,000 (X's share of the liability ($10,000) multiplied by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to X ($30,000); by

(B) The total amount of such liability ($30,000)).

(iv) Therefore, X is required to take into account $20,000 of the $30,000 partnership transfer to X for purposes of this section and § 1.707–3.

* * * * *

■ **Par. 6.** Section 1.707–8 is amended by revising paragraph (a) to read as follows:

§ 1.707–8 Disclosure of certain information.

(a) *In general.* The disclosure referred to in § 1.707–3(c)(2) (regarding certain transfers made within two years of each other), §§ 1.707–5(a)(3)(ii) and 1.707–5(b)(2)(iii)(B) (regarding the reduction of a liability presumed to be anticipated), § 1.707–5(a)(7)(ii) (regarding a liability incurred within two years prior to a transfer of property), and § 1.707–6(c) (relating to transfers of property from a partnership to a partner in situations analogous to those listed above) is to be made in accordance with paragraph (b) of this section.

* * * * *

Par. 7. Section 1.707–9 is amended by revising paragraphs (a)(1) and (b) to read as follows:

§ 1.707–9 Effective dates and transitional rules.

(a) * * *

(1) *In general.* Except as provided in paragraph (a)(3) of this section, §§ 1.707–3 through 1.707–5 apply to any transaction with respect to which all transfers occur on or after [effective date of final rule] and § 1.707–6 applies to any transaction with respect to which all transfers that are part of a sale of an item of property occur after April 24, 1991. For any transaction with respect to which all transfers that are part of a sale of an item of property occur after April 24, 1991, but before [effective date of final rule], §§ 1.707–3 through 1.707–5 as contained in 26 CFR edition revised April 1, 2013 (TD 8439) apply.

* * * * *

(b) *Section 1.707–8 disclosure of certain information.* The disclosure provisions described in § 1.707–8 apply to any transaction with respect to which all transfers occur on or after [effective date of final rule]. Otherwise, for any transaction with respect to which all transfers that are part of a sale of property occur after September 30, 1992, but before [effective date of final rule], § 1.707–8 as contained in 26 CFR edition revised April 1, 2013 (TD 8439) applies.

* * * * *

■ **Par. 8.** Section 1.752–0 is amended by:

■ a. Removing the entries for §§ 1.752–2(b)(5) and (b)(6).

■ b. Revising the entries for § 1.752–2(j)(3) and (j)(4).

■ c. Adding entries for § 1.752–2(k), (k)(1), (2), (3), (4), (5), and (6).

■ d. Adding an entry for § 1.752–2(l).

■ e. Redesignating the entry for § 1.752–3(b) as § 1.752–3(c) and adding a new entry for § 1.752–3(b).

■ f. Adding an entry for § 1.752–3(d).

The revisions and additions read as follows:

§ 1.752–0 Table of contents.

* * * * *

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(j) * * *

(3) Plan to circumvent or avoid the obligation.

(4) Arrangements intended to avoid certain requirements of paragraph (b).

* * * * *

(k) Effect of a disregarded entity.

(1) In general.

(2) Net value of a disregarded entity.

(3) Multiple liabilities.

(4) Reduction in net value of a disregarded entity.

(5) Information to be provided by the owner of a disregarded entity.

(6) Examples.

(l) Effective/applicability dates.

(1) In general.

(2) Transitional rules.

§ 1.752–3 Partner's share of nonrecourse liabilities.

* * * * *

(b) Allocation of a single nonrecourse liability among multiple properties.

(c) Examples.

(d) Effective/applicability dates.

* * * * *

Par. 9. Section 1.752–2 is amended by:

■ a. Revising the first sentence in paragraph (b)(1).

■ b. Revising paragraph (b)(3).

■ c. Removing paragraphs (b)(5) and (b)(6).

■ d. Adding a sentence at the end of paragraph (f), revising *Example 3,* reserving *Example 9,* and adding new *Examples 10, 11, and 12.*

■ e. Revising paragraph (j)(4).

■ f. Revising the first sentence of paragraph (k)(1).

■ g. Revising paragraphs (k)(2)(i)(A) and (l).

The revisions and additions read as follows:

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(b) * * *

(1) * * * Except as otherwise provided in this section, a partner bears the economic risk of loss for a partnership liability to the extent that, if the partnership constructively liquidated, the partner or related person would be obligated to make a payment to any person (or a contribution to the partnership) because that liability becomes due and payable and the partner or related person would not be entitled to reimbursement from another person. * * *

* * * * *

(3) *Obligations recognized*—(i) *In general.* The determination of the extent

to which a partner or related person has an obligation to make a payment under paragraph (b)(1) of this section is based on the facts and circumstances at the time of the determination. Notwithstanding the prior sentence, a payment obligation will not be recognized if it fails to satisfy paragraphs (b)(3)(ii) and (iii) of this section. All statutory and contractual obligations relating to the partnership liability are taken into account for purposes of applying this section, including:

(A) Contractual obligations outside the partnership agreement such as guarantees, indemnifications, reimbursement agreements, and other obligations running directly to creditors, to other partners, or to the partnership;

(B) Obligations to the partnership that are imposed by the partnership agreement, including the obligation to make a capital contribution and to restore a deficit capital account upon liquidation of the partnership; and

(C) Payment obligations (whether in the form of direct remittances to another partner or a contribution to the partnership) imposed by state law, including the governing state partnership statute.

(ii) *Recognition requirements.* An obligation of a partner or related person to make a payment with respect to a partnership liability described under paragraph (b)(3)(i)(A) or (B) of this section is not recognized under paragraph (b)(3) of this section unless all of the requirements of this paragraph (b)(3)(ii)(A) through (G) are satisfied. To the extent that an obligation of a partner or related person to make a payment with respect to a partnership liability is not recognized under paragraph (b)(3) of this section, paragraph (b) of this section is applied as if the obligation did not exist.

(A) The partner or related person is—

(*1*) Required to maintain a commercially reasonable net worth throughout the term of the payment obligation; or

(*2*) Subject to commercially reasonable contractual restrictions on transfers of assets for inadequate consideration.

(B) The partner or related person is required periodically to provide commercially reasonable documentation regarding the partner's or related person's financial condition.

(C) The term of the payment obligation does not end prior to the term of the partnership liability.

(D) The payment obligation does not require that the primary obligor or any other obligor with respect to the partnership liability directly or indirectly hold money or other liquid assets in an amount that exceeds the reasonable needs of such obligor.

(E) The partner or related person received arm's length consideration for assuming the payment obligation.

(F) In the case of a guarantee or similar arrangement, the partner or related person is or would be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that, any amount of the partnership liability is not otherwise satisfied. For purposes of this paragraph (b)(3)(ii)(F), the terms of a guarantee or similar arrangement will be treated as modified by any right of indemnity, reimbursement, or similar arrangement regardless of whether that arrangement would be recognized under paragraph (b)(3) of this section. However, the preceding sentence does not apply to a right of proportionate contribution running between partners or related persons who are co-obligors with respect to a payment obligation for which each of them is jointly and severally liable.

(G) In the case of an indemnity, reimbursement agreement, or similar arrangement, the partner or related person is or would be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that, any amount of the indemnitee's or other benefitted party's payment obligation is satisfied. The indemnity, reimbursement agreement, or similar arrangement only satisfies this paragraph (b)(3)(ii)(G) if, before taking into account the indemnity, reimbursement agreement, or similar arrangement, the indemnitee's or other benefitted party's payment obligation is recognized under paragraph (b)(3) of this section or would be recognized under paragraph (b)(3) of this section if such person were a partner or related person. For purposes of this paragraph (b)(3)(ii)(G), the terms of an indemnity, reimbursement agreement, or similar arrangement will be treated as modified by any further right of indemnity, reimbursement, or similar arrangement regardless of whether that further arrangement would be recognized under paragraph (b)(3) of this section. However, the preceding sentence does not apply to a right of proportionate contribution running between partners or related persons who are co-obligors with respect to a payment obligation for which each of them is jointly and severally liable.

(iii) *Satisfaction of obligation*—(A) *In general.* Except as provided in paragraph (b)(3)(iii)(B) of this section, for purposes of determining the extent to which a partner or related person has a payment obligation or bears the economic risk of loss for a partnership liability under paragraph (b)(1) of this section, it is assumed that such partner or related person who has an obligation to make a payment actually performs its obligation, irrespective of its actual net value, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation. See paragraph (j) of this section.

(B) *Net value requirement.* In determining the extent to which a partner or related person other than an individual or a decedent's estate bears the economic risk of loss under paragraph (b)(1) of this section for a partnership liability other than a trade payable, a payment obligation is recognized only to the extent of the net value of the partner or related person as of the allocation date (as defined in paragraph (k)(2)(iv) of this section) that is allocated to the partnership liability. A partner or related person's net value is determined under the rules of paragraph (k) of this section. This paragraph (b)(3)(iii)(B) applies to a payment obligation of a partner or related person that is disregarded as an entity separate from its owner under sections 856(i) or 1361(b)(3) or §§ 301.7701–1 through 301.7701–3 of this chapter or is a trust to which subpart E, part I, subchapter J, chapter 1 of the Code applies (a disregarded entity), even if the owner of the disregarded entity is an individual or a decedent's estate. A partner or related person that is not a disregarded entity is treated as a disregarded entity for purposes of determining net value of the partner or related person under paragraph (k) of this section.

(C) *Information to be provided regarding net value.* A partner that may be treated as bearing the economic risk of loss for a partnership liability based upon an obligation under paragraph (b)(1) of this section (a § 1.752–2(b)(1) payment obligation) of a person, including the partner, other than an individual or a decedent's estate, must provide information to the partnership as to that person's net value that is appropriately allocable to the partnership's liabilities on a timely basis.

* * * * *

(f) *Examples.* * * * For purposes of *Examples 1* through *7,* unless otherwise provided, assume that any obligation of a partner or related person to make a payment with respect to the partnership liability satisfies the requirements under paragraphs (b)(3)(ii), (b)(3)(iii), and (k) of this section where applicable.

* * * * *

Example 3. Guarantee by limited partner; partner satisfaction of obligation. E and F form a limited partnership. E, the general partner, contributes $2,000 and F, the limited partner, contributes $8,000 in cash to the partnership. E and F are both business entities (as defined in § 301.7701–2(a) of this chapter). The partnership agreement allocates losses 20% to E and 80% to F until F's capital account is reduced to zero, after which all losses are allocated to E. The partnership purchases depreciable property for $25,000 using its $10,000 cash and a $15,000 recourse loan from a bank. E's net value, determined under paragraphs (k)(2) through (k)(4) of this section, at all times exceeds the $15,000 loan amount, but F guarantees payment of the $15,000 loan to the extent the loan remains unpaid after the bank has exhausted its remedies against the partnership (including causing E to make any contributions required of a general partner under state law). In a constructive liquidation, the $15,000 liability becomes due and payable. All of the partnership's assets, including the depreciable property, are deemed to be worthless. The depreciable property is deemed sold for a value of zero. Capital accounts are adjusted to reflect the loss on the hypothetical disposition, as follows:

	E	*F*
Initial contribution ..	$2,000	$8,000
Loss on hypothetical sale	(17,000)	(8,000)
	($15,000)	-0-

E, as a general partner, would be obligated by operation of law to make a net contribution to the partnership of $15,000. Under paragraph (b)(3)(iii)(B) of this section, E has net value to satisfy its payment obligation as of the allocation date. Because E has net value to the extent of its obligation, it is assumed that F would not have to satisfy F's guarantee. The $15,000 mortgage is treated as a recourse liability because one or more partners bear the economic risk of loss. E's share of the liability is $15,000, and F's share is zero.

* * * * *

Example 9. [Reserved]

* * * * *

Example 10. Guarantee of first and last dollars. (i) A, B, and C are equal members of limited liability company, ABC, that is treated as a partnership for federal tax purposes. ABC borrows $1,000 from Bank. A guarantees payment of up to $300 of the ABC liability if any amount of the full $1,000 liability is not recovered by Bank. B guarantees payment of up to $200, but only if the Bank otherwise recovers less than $200. Both A and B waive their rights of contribution against each other. A's and B's guarantees satisfy the requirements set forth in paragraphs (b)(3)(ii)(A) through (E) and paragraph (b)(3)(iii) of this section.

(ii) Because A is obligated to pay up to $300 if, and to the extent that, any amount of the $1,000 partnership liability is not recovered by Bank, A's guarantee satisfies the requirement under paragraph (b)(3)(ii)(F) of this section. Therefore, A's payment obligation is recognized under paragraph (b)(3) of this section. The amount of A's economic risk of loss under paragraph (a)(1) of this section is $300. However, because B is obligated to pay up to $200 only if and to the extent that the Bank otherwise recovers less than $200 of the $1,000 partnership liability, B's guarantee does not satisfy the requirement under paragraph (b)(3)(ii)(F) of this section and B's payment obligation is not recognized. Therefore, B bears no economic risk of loss under paragraph (a)(1) of this section for ABC's liability. As a result, $300 of the liability is allocated to A under paragraph (a)(1) of this section and the remaining $700 liability is allocated to A, B, and C under § 1.752–3.

Example 11. Indemnification of guarantees. (i) The facts are the same as in *Example 10,* except that, in addition, C agrees to indemnify A up to $50 that A pays with respect to its guarantee, and agrees to indemnify B fully with respect to its guarantee. C's indemnity satisfies the requirements set forth in paragraphs (b)(3)(ii)(A) through (E) and paragraph (b)(3)(iii) of this section.

(ii) The determination of whether C's indemnity satisfies the requirement under paragraph (b)(3)(ii)(G) of this section is made without regard to whether C's indemnity itself causes A's guarantee not to be recognized. Because A's obligation would be recognized but for the effect of C's indemnity and C is obligated to pay A up to the full amount of C's indemnity if A pays any amount on its guarantee of ABC's liability, C's indemnity of A's guarantee satisfies the requirement under paragraph (b)(3)(ii)(G) of this section. The amount of C's economic risk of loss under paragraph (a)(1) of this section for its indemnity of A's guarantee is $50.

(iii) Because C's indemnity of A's guarantee satisfies the requirement under paragraph (b)(3)(ii)(G) of this section, it is treated as modifying A's guarantee such that A is treated as liable for $250 only to the extent any amount beyond $50 of the partnership liability is not satisfied. Thus, A is not liable if, and to the extent, any amount of the partnership liability is not otherwise satisfied, and, as a result, A's guarantee is not recognized under paragraph (b)(3)(ii)(F) of this section. Therefore, A bears no economic risk of loss under paragraph (a)(1) of this section for ABC's liability.

(iv) Because B's obligation is not recognized under paragraph (b)(3) of this section, C's indemnity of B's guarantee does not satisfy the requirement under paragraph (b)(3)(ii)(G) of this section, and C's payment obligation to B is not recognized. Therefore, C bears no economic risk of loss under paragraph (a)(1) of this section for its indemnity of B's guarantee. As a result, $50 of the liability is allocated to C under paragraph (a)(1) of this section and the remaining $950 liability is allocated to A, B, and C under § 1.752–3.

Example 12. Partial guarantee of partnership liability. (i) A, B, and C are equal members of limited liability company, ABC, that is treated as a partnership for federal tax purposes. ABC borrows $1,000 from Bank. A guarantees payment of 25 percent of each dollar of the $1,000 liability that is not recovered by Bank. A's guarantee satisfies the requirements set forth in paragraphs (b)(3)(ii)(A) through (E) and paragraph (b)(3)(iii) of this section.

(ii) If $250 of the $1,000 partnership liability is not recovered by Bank, A is only obligated to pay $62.50 ($250 × .25) pursuant to the terms of the guarantee. Because A is not obligated to pay up to the full amount of its payment obligation ($250) to the extent that $250 is not recovered by Bank, A's guarantee does not satisfy the requirement under paragraph (b)(3)(ii)(F) of this section, and A's payment obligation is not recognized. As a result, the ABC liability is allocated to A, B, and C under § 1.752–3.

* * * * *

(j) * * *

(4) *Arrangements intended to avoid certain requirements of paragraph (b).* An obligation of a partner or related person to make a payment with respect to a partnership liability is not recognized under paragraph (b) of this section if the facts and circumstances indicate that the partnership liability is part of a plan or arrangement involving the use of tiered partnerships, intermediaries, or similar arrangements to convert a single liability into more than one liability with a principal purpose of circumventing the rules of paragraphs (b)(3)(ii)(F) and (G) of this section.

* * * * *

(k) * * *

(1) * * * In determining the extent to which a partner bears the economic risk of loss for a partnership liability other than a trade payable, an obligation under paragraph (b)(1) of this section (§ 1.752–2(b)(1) payment obligation) of a business entity that is disregarded as an entity separate from its owner under sections 856(i) or 1361(b)(3) or §§ 301.7701–1 through §§ 301.7701–3 of this chapter or a trust to which subpart E, part I, subchapter J, chapter 1 of the Code applies (disregarded entity) is taken into account only to the extent of the net value of the disregarded entity as of the allocation date (as defined in paragraph (k)(2)(iv) of this section) that is allocated to the partnership liability as determined under the rules of this paragraph (k). * * *

(2) * * *

(i) * * *

(A) The fair market value of all assets owned by the disregarded entity that may be subject to creditors' claims under local law (including the disregarded entity's enforceable rights to contributions from its owner, and the fair market value of an interest in any partnership, but excluding the disregarded entity's direct or indirect interest in the partnership for which the net value is being determined and the

net fair market value of property pledged to secure a liability of the partnership under paragraph (h)(1) of this section); less

* * * * *

(l) *Effective/applicability dates*—(1) *In general.* Paragraph (a) and paragraphs (h)(3) and (k) of this section apply to liabilities incurred or assumed by a partnership on or after October 11, 2006, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. The rules applicable to liabilities incurred or assumed (or pursuant to a written binding contract in effect) prior to October 11, 2006, are contained in § 1.752–2 in effect prior to October 11, 2006, (see 26 CFR part 1 revised as of April 1, 2006). Paragraphs (b)(1) first sentence, (b)(3), (f), (f) *Examples 3, 10, 11,* and *12,* (j)(4), (k)(1) first sentence, and (k)(2)(i)(A) of this section apply to liabilities incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after [effective date of final rule], other than liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken pursuant to a written binding contract in effect prior to that date.

(2) *Transitional rules*—(i) *In general.* If a partner has a share of a recourse partnership liability under paragraph (b) of this section immediately prior to [effective date of final rule] (Transition Partner), the partnership (Transition Partnership) may choose not to apply paragraphs (b)(1) first sentence, (b)(3), (f), (f) *Examples 3, 10, 11,* and *12,* (j)(4), (k)(1) first sentence, and (k)(2)(i)(A) of this section to the extent the amount of the Transition Partner's share of liabilities under paragraph (b) of this section immediately prior to the effective date exceeds the amount of the Transition Partner's adjusted basis in its partnership interest as determined under § 1.705–1 at such time (Grandfathered Amount). The Transition Partnership may continue to apply the rules under § 1.752–2 in effect prior to [effective date of final rule], with respect to a Transition Partner for liabilities described in paragraph (b) of this section to the extent of the Transition Partner's adjusted Grandfathered Amount for the seven-year period beginning [effective date of final rule]. A Transition Partner's Grandfathered Amount is reduced (not below zero), but never increased, by—

(A) Upon the sale of any property by the Transition Partnership, an amount equal to the excess of any tax gain allocated to the Transition Partner by the Transition Partnership (including amounts allocated under section 704(c) and applicable regulations) over the product of the total amount realized by the Transition Partnership from the property sale multiplied by the Transition Partner's liquidation value percentage as determined under § 1.752–3(a)(3), and

(B) An amount equal to any decrease in the Transition Partner's share of liabilities to which the rules of this paragraph (l)(2)(i) apply, other than by operation of paragraph (l)(2)(i)(A) of this section.

(ii) *Special rules*—(A) *Ownership changes in Transition Partner.* A Transition Partner that is a partnership, S corporation, or disregarded entity ceases to qualify as a Transition Partner if the direct or indirect ownership of that Transition Partner changes by 50 percent or more.

(B) *Section 708(b)(1)(B) terminations.* The termination of a Transition Partnership under section 708(b)(1)(B) and applicable regulations does not affect the Grandfathered Amount of a Transition Partner that remains a partner in the new partnership (as described in § 1.708–1(b)(4)), and the new partnership is treated as a continuation of the Transition Partnership for purposes of this paragraph (l)(2).

■ **Par. 10.** Section 1.752–3 is amended by:

■ a. Removing the third and fourth sentences in paragraph (a)(3) and adding four new sentences in their place.

■ b. Revising *Example 2* in paragraph (c).

■ c. Adding paragraph (d).

The revisions and additions read as follows:

§ 1.752–3 Partner's share of nonrecourse liabilities.

(a) * * *

(3) * * * The partnership agreement may specify the partners' interests in partnership profits for purposes of allocating excess nonrecourse liabilities provided the interests so specified are in accordance with the partners' liquidation value percentages. A partner's liquidation value percentage, which is determined upon the formation of a partnership and redetermined upon any event described in § 1.704–1(b)(2)(iv)(f)(*5*), irrespective of whether the capital accounts of the partners are adjusted under § 1.704–1(b)(2)(iv)(f), is the ratio (expressed as a percentage) of the liquidation value of the partner's interest in the partnership divided by the aggregate liquidation value of all of the partners' interests in the partnership. Any change in the partners' shares of partnership liabilities as a result of an event described in § 1.704–1(b)(2)(iv)(f)(*5*) is taken into account in determining the tax consequences of the event that gave rise to such change. For purposes of this paragraph (a)(3), the liquidation value of a partner's interest in a partnership is the amount of cash the partner would receive with respect to the interest if, immediately after the formation of the partnership or the occurrence of an event described in § 1.704–1(b)(2)(iv)(f)(*5*), as the case may be, the partnership sold all of its assets for cash equal to the fair market value of such assets (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then liquidated. * * *

(c) * * *

Example 2. Excess nonrecourse liabilities allocated according to partners' liquidation value percentages. (i) On January 1, 2012, X and Y each contribute $100 to a limited liability company classified as a partnership for U.S. tax purposes (XY) in exchange for equal interests in XY. XY's organizing agreement provides that it will maintain members' capital accounts in accordance with section 704 and the regulations thereunder, and will make liquidating distributions in accordance with positive capital account balances. XY has a calendar year taxable year. On the same day, XY borrows $50 from a person unrelated to either X or Y. Under the rules of this section, the liability is a nonrecourse liability. XY purchases Land A for $50 and Land B for $200. The partners agree to allocate excess nonrecourse liabilities in accordance with the partners' liquidation value percentages as defined in paragraph (a)(3) of this section.

(ii) Under paragraph (a)(3) of this section, the liquidation value percentage for each of partners X and Y is 50% ((each partner's liquidation value immediately after the formation of $100) divided by (XY's aggregate liquidation value immediately after the formation of $200)). Therefore, X and Y each has a $25 share of the $50 liability and each is treated as contributing $25 to XY under section 752(a).

(iii) On September 1, 2015, XY owns the following assets: (1) Land A with a fair market value of $40 and an adjusted tax basis of $50; (2) Land B with a fair market value of $800 and an adjusted tax basis of $200; and (3) Land C with a fair market value of $400 and an adjusted tax basis of $390. The outstanding principal on the partnership liability is $40. Thus, X and Y each own an interest in XY with a fair market value of $600 and an adjusted tax basis of $320. The partners continue to agree to allocate excess nonrecourse liabilities in accordance with the partners' liquidation value percentages as defined in paragraph (a)(3) of this section. On September 1, 2015, XY distributes Land C to X. Assume XY has no items of income, gain,

loss, deduction, or credit in its taxable year ending December 31, 2015.

(iv) The distribution of Land C to X is an event described in § 1.704–1(b)(2)(iv)(f)(*5*) and, thus, under paragraph (a)(3) of this section, X's liquidation value percentage must be redetermined under paragraph (a)(3) of this section as of September 1, 2015, irrespective of whether the capital accounts of the partners of XY are adjusted under § 1.704–1(b)(2)(iv)(f). X's liquidation value percentage is 25% ((X's liquidation value immediately after the distribution of $200) divided by (XY's aggregate liquidation value immediately after the distribution of $800)). Accordingly, X's share of the $40 liability is reduced from $20 to $10 on September 1, 2015, while Y's share of the liability is increased from $20 to $30. Thus, X is treated as receiving a distribution of $10 from XY under section 752(b), and Y is treated as contributing $10 to XY under section 752(a). Because the distribution of $10 to X does not exceed X's $320 adjusted basis in its interest in XY, X recognizes no gain. Pursuant to section 732(a)(2), X's basis in Land C is $310.

* * * * *

(d) *Effective/applicability dates.* The third, fourth, fifth, and sixth sentences of paragraph (a)(3) of this section and paragraph (c) *Example 2* of this section apply to liabilities that are incurred or assumed by a partnership on or after [effective date of final rule], other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date.

■ **Par. 11.** Section 1.752–5 is amended by revising the second and third sentences of paragraph (a) to read as follows:

§ 1.752–5 Effective dates and transitional rules.

(a) * * * However, § 1.752–3(a)(3) seventh, eighth, and ninth sentences, (b), and (c) *Example 3,* do not apply to any liability incurred or assumed by a partnership prior to October 31, 2000. Nevertheless, § 1.752–3(a)(3) seventh, eighth, and ninth sentences, (b), and (c) *Example 3,* may be relied upon for any liability incurred or assumed by a partnership prior to October 31, 2000 for federal taxable years ending on or after October 31, 2000. * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2014–01637 Filed 1–29–14; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

28 CFR Parts 35 and 36

[CRT Docket No. 124; AG Order No. 3410–2014]

RIN 1190–AA59

Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this Notice of Proposed Rulemaking (NPRM) to amend its Americans with Disabilities Act (ADA) regulations in order to incorporate the statutory changes to the ADA set forth in the ADA Amendments Act of 2008 (ADA Amendments Act or the Act), which took effect on January 1, 2009. Congress enacted the ADA Amendments Act in order to revise the ADA definition of ''disability'' and to ensure that the definition is broadly construed and applied without extensive analysis. In this NPRM, the Department is proposing to add new sections to its title II and title III ADA regulations at 28 CFR parts 35 and 36, respectively, to provide detailed definitions of ''disability'' and to make consistent changes in other sections of the regulations. The ADA Amendments Act authorizes the Attorney General to issue regulations consistent with the Act that implement the definitions of ''disability'' in sections 3 and 4 of the Act, including the rules of construction set forth in section 3. The Department invites written comments from members of the public on this proposed rule.

DATES: All comments must be submitted on or before March 31, 2014.

ADDRESSES: You may submit comments, identified by RIN 1190–AA59 (or Docket ID No. 124), by any one of the following methods:

- *Federal eRulemaking portal: www.regulations.gov.* Follow the Web site's instructions for submitting comments.
- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031–0885.
- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Zita Johnson-Betts, Deputy Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY); this is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

You may obtain copies of this NPRM in an alternative format by calling the ADA Information Line at (800) 514–0301 (voice) and (800) 514–0383 (TTY). This NPRM is also available on the ADA Home Page at *www.ada.gov.*

SUPPLEMENTARY INFORMATION: The regulatory definitions of ''disability'' in the title II and title III regulations are identical, and the preamble will discuss the revisions to both regulations concurrently. Because the ADA Amendments Act's revisions to the ADA have been codified into the U.S. Code, the NPRM will reference the revised U.S. Code provisions except in those cases where citation to a specific ADA Amendments Act provision is necessary in order to avoid confusion on the part of the reader.

This NPRM was submitted to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for review prior to publication in the **Federal Register**.

Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to *www.regulations.gov.* When submitting comments electronically, you must include ''DOJ–CRT 2010–0112'' in the subject field and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov.* Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS

INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.*

I. Executive Summary

Purpose

This rule is necessary in order to incorporate the ADA Amendments Act's changes to titles II (nondiscrimination in state and local government services) and III (nondiscrimination by public accommodations in commercial facilities) of the ADA into the Department's ADA regulations and to provide additional guidance on how to apply those changes.

Legal Authority

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8, 122 Stat. 3553, 2559 (2008). The Act authorizes the Attorney General to issue regulations implementing the definitions of disability in sections 3 and 4 of the Act, including the rules of construction set forth in section 3, consistent with the Act as applied to title II and title III of the ADA. 42 U.S.C. 12205a.

Summary of Key Provisions of the Act and Rule

The ADA Amendments Act made important changes to the ADA's definition of the term ''disability,'' making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. *See* 42 U.S.C. 12102(1)(A)–(C). The Department proposes several major revisions to the definition of ''disability'' contained in the title II and title III ADA regulations. All of these revisions are based on specific provisions in the ADA Amendments Act or on specific language in the legislative history. These proposed revisions state that the definition of ''disability shall be interpreted broadly. The proposed revisions also make it clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their statutory obligations and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. In addition, the proposed revisions expand the definition of ''major life activities'' by providing a non-exhaustive list of major life activities and specifically including the operation of major bodily functions. The revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. The rules of construction state the following:

○ That the term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;

○ That an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;

○ That the primary issue in a case brought under the ADA should be whether the covered entity has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;

○ That in making the individualized assessment required by the ADA, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ''substantially limits'' applied prior to the ADA Amendments Act;

○ That the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

○ That mitigating measures other than ''ordinary eyeglasses or contact lenses'' shall not be considered in assessing whether an individual has a ''disability'';

○ That an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

○ That an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

The NPRM also proposes language that states that the definition of ''regarded as'' does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity and provides that individuals covered only under the ''regarded as'' prong are not entitled to reasonable modifications.

The ADA Amendments Act's revisions to the ADA apply to title I (employment), title II (State and local governments), and title III (public accommodations) of the ADA. Accordingly, consistent with Executive Order 13563's instruction to agencies to coordinate rules across agencies and harmonize regulatory requirements where appropriate, the Department is proposing, wherever possible, to adopt regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission's (EEOC) title I regulations implementing the ADA Amendments Act. *See* 76 FR 16978 (Mar. 25, 2011). This will promote consistency in the application of the ADA and prevent confusion among entities subject to both titles I and II, as well as those subject to both titles I and III.

Summary of Benefits and Costs

This proposed rule would incorporate into the Department's regulations the changes made by the ADA Amendments Act to titles II and III of the ADA. In accordance with OMB Circular A–4, the Department estimates the benefits and costs of this proposed rule using a pre-ADA Amendments Act baseline. Thus, the effects that are estimated in this analysis are due to statutory mandates that are not under the Department's discretion.

Congress enacted the ADA Amendments Act to ensure that persons with disabilities who were refused access to programs and services would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law has nonquantifiable but nonetheless important benefits for many Americans. The Department determined, however, that there was a specific group of individuals with disabilities who would be able to receive quantifiable benefits. With the enactment of the ADA Amendments Act, additional post-secondary students and national examination test takers (e.g., CPA, LSAT, and other professional examinations) with attention deficit disorder (ADD) or learning disabilities are now able to receive additional time to complete tests. Before the enactment of the ADA Amendments Act, some of these students may have had their requests for additional time denied by testing entities because such entities believed the disability in question did not meet the ADA's definition of ''disability.''

In the first year after this rule goes into effect, our analysis estimates that

approximately 142,000 students will take advantage of additional testing accommodations that otherwise would not have been available but for the ADA Amendments Act. Over eleven years, approximately 1.6 million full-time equivalent students would benefit, or, assuming an average 4-year course of study, more than 400,000 individual students.[1] An additional 800,000 national examination test takers would benefit over that same eleven years (assuming that each test taker only takes an exam once). Providing these individuals additional time is consistent with our national values of fairness, equity, and human dignity—values that Executive Order 13563 permits agencies to consider, where appropriate, when analyzing the proposed rule's costs and benefits. *See* E.O. 13563, 76 FR 3821 (Jan. 18, 2011).

With respect to the costs of the changes under titles II and III made by the ADA Amendments Act, in the first year (the year with the highest costs), we estimate that the total undiscounted costs will range between $36.2 and $61.8 million. The changes made by the ADA Amendments Act are expected to cost $382 million in present value terms over 11 years and discounted at 7 percent. Our cost estimates include the value of time, represented by wages, for proctors to provide additional time to post-secondary students with ADD or learning disabilities to complete tests, and for proctors to provide additional time to individuals with ADD or learning disabilities to complete national examinations.

SUMMARY OF DISCOUNTED COSTS AND BENEFITS, 11 YEAR TOTAL AND ANNUALIZED

	Estimates		Units		
	Total discounted value	Annualized estimate	Year dollar	Discount rate	Period covered
Benefits	Multiple un-quantified benefits for some unknown portion of those persons with learning disabilities and society as a whole, including: —Some persons with learning disabilities will earn a degree faster than they otherwise would have, and some students might even earn a degree or certification who otherwise would not been able to do so; —Some persons with learning disabilities will earn a degree or certification for a higher paying field/job; —Some persons with learning disabilities will experience a positive impact on overall independence and lifetime income; —Some persons with learning disabilities will experience increased sense of personal dignity and self-worth; —Some persons with learning disabilities will experience greater personal satisfaction from ability to pursue a favored career path or educational pursuit; —Some communities may see a decreased direct financial support for persons with disabilities or other programs or services; and —Greater equity in access to education.				
Costs	$381.7 $451.2	$50.9 $48.8	2013 2013	7% 3%	2013–2023 2013–2023

II. Background

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8. The ADA Amendments Act made important changes to the ADA's definition of the term ''disability,'' making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. The ADA Amendments Act did this by explicitly rejecting the holdings in several Supreme Court decisions that had significantly limited the definition of ''disability.'' As amended by the ADA Amendments Act, the definition of ''disability'' under the ADA, 42 U.S.C. 12101, *et seq.,* is to be construed broadly, to the maximum extent permitted by the terms of the ADA, and the determination of whether an individual has a disability should not demand extensive analysis. Public Law 110–325, sec. 2(b)(5); *see also* 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110–730, pt. 1, at 6 (2008); H.R. Rep. No. 110–730, pt. 2, at 5 (2008).

The ADA Amendments Act retains the ADA's basic definition of ''disability'' as: (1) A physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12102(1)(A)–(C). However, it provides rules of construction necessary to ensure that the definition is construed broadly and without extensive analysis. *Id.* at 12102(4). The Department, therefore, drafted this rule to more fully align the Department's title II and title III regulations with the Act.

Congress enacted the ADA Amendments Act in response to a series of Supreme Court decisions in which the Court interpreted the definition of ''disability'' narrowly, thus eliminating protection for many individuals that Congress intended to protect when it first enacted the ADA. Public Law 110–325, sec. 2. For example, in *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. *Id.* at 482. In *Sutton,* the Court also adopted a restrictive reading of the meaning of being ''regarded as'' disabled under the ADA's definition of disability, holding that the plaintiff could not prevail under this prong of the definition of disability without first demonstrating that the employer believed the plaintiff's impairment to be substantially limiting. *Id.* at 490. Subsequently, in *Toyota Motor Manufacturing, Kentucky, Inc.,* v. *Williams,* 534 U.S. 184 (2002), the Court held that the terms ''substantially'' and ''major'' in the definition of disability ''need to be interpreted strictly to create a demanding standard for qualifying as disabled'' under the ADA, and that to be substantially limited in performing a major life activity under the ADA, ''an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'' *Id.* at 197–98.

[1] The number of individual students who would be impacted is a high-level estimate based on the assumption that students would average 4 years of post-secondary study; therefore 4 full-time equivalent enrollees per year is approximately one student, and then rounded to the nearest hundred thousand.

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities and thus not protected by the ADA. *See* 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.'').

While the vast majority of these court decisions arose in the area of employment, the narrowing of the definition of disability had an adverse impact on individuals seeking the protection of the ADA in circumstances involving entities covered by titles II and III, particularly individuals seeking reasonable modifications for learning disabilities in education programs at colleges and universities and in licensing and testing situations. *See, e.g., Gonzales* v. *National Board of Medical Examiners,* 60 F. Supp. 2d 703 (E.D. Mich. 1999); and *Wong* v. *Regents of University of California,* 410 F.3d 1052 (9th Cir. 2005).

Congress concluded that *Sutton, Toyota,* and their progeny interpreted the definition of disability more narrowly than what Congress had originally intended. Congress determined that these decisions, coupled with the EEOC's 1991 ADA regulation, which had defined the term ''substantially limits'' as meaning ''significantly restricted,'' unduly precluded many individuals from being covered under the ADA. *See* Public Law 110–325, sec. 2; *see also* 154 Cong. Rec. S8840–41 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard'' and ''[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.''). For that reason, Congress passed the ADA Amendments Act of 2008.

III. Summary of the ADA Amendments Act of 2008

The ADA Amendments Act of 2008 restores the broad application of the ADA by revising the ADA's ''Findings and Purposes'' section, expanding the statutory language defining disability, providing specific rules of construction for that definition, and expressly rejecting the holdings of the Supreme Court in *Sutton, Toyota* and their progeny.

First, the ADA Amendments Act deletes two findings that were in the ADA: (1) That ''some 43,000,000 Americans have one or more physical or mental disabilities,'' and (2) that ''individuals with disabilities are a discrete and insular minority.'' 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* Public Law 110–325, sec. 3. The 2008 Senate Statement of the Managers stated, ''[t]he [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.'' 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Second, the ADA Amendments Act clarifies Congress's intent that the definition of ''disability'' ''shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.'' 42 U.S.C. 12102(4)(A). Although the ADA Amendments Act retains the term ''substantially limits'' from the original ADA definition, the language of the rules of construction and the statement of ''Findings and Purposes'' contained in the ADA Amendments Act make it clear that this language is required to be interpreted far more broadly than it had been interpreted in *Toyota.* Congress was specifically concerned that the lower courts had applied *Toyota* in a way that ''created an inappropriately high level of limitation necessary to obtain coverage under the ADA.'' Public Law 110–325, sec. 2(b)(5). Congress sought to convey that ''the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.'' *Id.*

Third, the ADA Amendments Act prohibits consideration of mitigating measures such as medication, assistive technology, and reasonable accommodations or modifications when determining whether an impairment constitutes a disability. 42 U.S.C. 12102(4)(E)(i). Congress added this provision and the applicable purpose language in the ADA Amendments Act to ensure that the ADA was interpreted and applied without reliance on the Supreme Court's holdings that mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. Public Law 110–325, sec. 2(b). The statute also provides that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. 12102(4)(D).

Fourth, the ADA Amendments Act provides new instructions on what may constitute ''major life activities'' within the meaning of the ADA. 42 U.S.C. 12102(2). It provides a non-exhaustive list of major life activities and specifically expands the category of major life activities to include the operation of major bodily functions. *Id.*

Fifth, the ADA Amendments Act makes it clear that, contrary to court decisions interpreting the ADA, the ''regarded as'' prong of the disability definition does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. 42 U.S.C. 12102(3). With this clarifying language, an individual can once again establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. The ADA Amendments Act also provides that entities covered by the ADA will not be required to provide reasonable accommodations or modifications to policies, practices, and procedures for individuals who fall solely under this prong. 42 U.S.C. 12201(h).

Finally, the ADA Amendments Act makes it clear that the Attorney General has explicit authority to issue regulations implementing the definitions of disability contained in sections 3 and 4 (including rules of construction) of the ADA. 42 U.S.C. 12205a.

IV. Relationship of this Regulation to Revisions to the Equal Employment Opportunity Commission's ADA Title I Regulation Implementing the ADA Amendments Act of 2008

The Equal Employment Opportunity Commission (EEOC) is responsible for regulations implementing title I of the ADA addressing employment discrimination based upon disability. On March 25, 2011, the EEOC published its final rule revising its title I regulation to implement the revisions to the ADA contained in the ADA Amendments Act. 76 FR 16978.[2]

Because the ADA Amendments Act's revised definition of ''disability'' applies to title I as well as titles II and III of the ADA, the Department has made every effort to ensure that its proposed revisions to its title II and III regulations are consistent with, if not always identical to, the provisions of the EEOC final rule. Consistency among the title I, title II, and title III rules will ensure consistent application of the requirements of the ADA Amendments Act, regardless of the Federal agency responsible for enforcement, or the ADA title that is enforced. This consistency is also important because most entities subject to either title II or title III are also subject to title I with respect to employment, and should already be familiar with the revisions to the definition of ''disability'' in the 2-year-old EEOC revised regulation. Differences in language between the title I rules and the Department's proposed title II and title III rules are generally attributable either to the fact that certain sections of the EEOC rule deal with employment-specific issues or to structural differences between the title I rule and the title II and III rules.

V. Section-by-Section Analysis

Sections 35.101 and 36.101—Purpose and Broad Coverage

These sections propose to revise §§ 35.101 and 36.101 to add references to the ADA Amendments Act to §§ 35.101(a) and 36.101(a) and to add new §§ 35.101(b) and 36.101(b), which explain that ''[t]he primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA.'' These sections state that ''[c]onsistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of 'disability' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. . . . The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.''

Sections 35.104 and 36.104—Definitions

The current title II and title III regulations include the definition of ''disability'' in regulatory sections that contain all enumerated definitions in alphabetical order. Given the expanded length of the definition of ''disability'' and the number of additional subsections required in order to give effect to the ADA Amendments Act revisions, the Department is proposing to move the definition of ''disability'' from the general definitional sections at §§ 35.104 and 36.104 to its own new section in each regulation, §§ 35.108 and 36.105, respectively.

Sections 35.108(a)(1) and 36.105(a)(1) Definition of Disability—General

These sections of the regulations set forth the three-part basic definition of the term ''disability'' found in the prior version of the ADA that the ADA Amendments Act retained with minor revisions. The current ADA regulations state the following:

Disability means, with respect to an individual,

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.

The ADA, as amended by the ADA Amendments Act, limits the application of the ''regarded as'' prong to impairments that are not ''transitory and minor'' and defines a transitory impairment as ''an impairment with an actual or expected duration of 6 months or less.'' 42 U.S.C. 12102(3)(B). To reflect these amendments to the ADA, the Department proposes to modify the ''regarded as'' prong in the current regulations by adding a sentence at proposed §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) that limits the application of the ''regarded as'' prong and references proposed §§ 35.108(f) and 36.105(f), which define the phrase ''regarded as having such an impairment.'' Proposed §§ 35.108(f) and 36.105(f) clarify that an individual is ''regarded as'' having an impairment if he or she has been subject to an action prohibited by the ADA, as amended, because of an actual or perceived impairment that is not both ''transitory and minor.'' It may be a defense to a charge of discrimination by an individual claiming coverage under this prong if the covered entity demonstrates that the impairment is both ''transitory and minor.''

Sections 35.108(a)(2) and 36.105(a)(2)—Rules of Construction

These sections set forth rules of construction that give guidance on how to understand and apply the definition of disability. Proposed §§ 35.108(a)(2)(i) and 36.105(a)(2)(i) provide that an individual may establish coverage under any one or more of the prongs in the definition of disability. *See* §§ 35.108(a)(1)(i)-(iii); 36.105(a)(1)(i)-(iii). To be covered under the ADA, however, an individual is only required to satisfy one prong. The term ''actual disability'' is used in these rules of construction as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability. *See* §§ 35.108(a)(1)(i); 36.105(a)(1)(i). The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under the first prong has any greater rights under the ADA than an individual who is covered under the ''record of'' or ''regarded as'' prongs, with the exception that the ADA, as amended, expressly states that an individual who meets the definition of disability solely under the ''regarded as'' prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h).

Sections 35.108(a)(2)(ii) and 36.105(a)(2)(ii) are intended to amend the definition of ''disability'' to incorporate Congress's expectation that consideration of coverage under the first and second prongs of the definition of ''disability'' will generally not be necessary except in cases involving requests for reasonable modifications. *See* 154 Cong. Rec. H6068 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner). Accordingly, § 35.108(a)(2)(ii) states that ''[w]here an individual is not challenging a public entity's failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs,

[2] On September 23, 2009, the EEOC published its NPRM in the **Federal Register** proposing revisions to the title I definition of disability. *See* 74 FR 48431. The EEOC received and reviewed over 600 public comments in response to its NRPM. In addition, the EEOC and the Department held four joint ''Town Hall Listening Sessions'' throughout the United States and heard testimony from more than 60 individuals and representatives of the business/employer industry and the disability advocacy community.

which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the 'actual disability' or 'record of' prong regardless of whether the individual is challenging a public entity's failure to provide reasonable modifications.''

Similarly, § 36.105(a)(2)(ii) states ''[w]here an individual is not challenging a covered entity's failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the 'actual disability' or 'record of' prong regardless of whether the individual is challenging a covered entity's failure to provide reasonable modifications.''

Sections 35.108(b) and 36.105(b)—Physical or Mental Impairment

The ADA Amendments Act does not change the meaning of the term ''physical or mental impairment.'' Thus, the Department is retaining the general regulatory definitions for this term with only minor modifications. First, the Department is proposing to add examples of two new body systems—the immune system and the circulatory system—that may be affected by a physical impairment. *See* §§ 35.108(b)(1)(i); 36.105(b)(1)(i). In addition, the Department is adding a reference to ''dyslexia'' to §§ 35.108(b)(2) and 36.105(b)(2) as an example of a specific learning disability that falls within the meaning of the phrase ''physical or mental impairment.'' The Department is proposing to add the reference to ''dyslexia'' (i.e., a specific diagnosable learning disability that causes difficulties in reading and speaking unrelated to intelligence and education) because the Department has become aware that some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. The Department is interested in public comment regarding its proposed inclusion of a reference to dyslexia.

The definition of ''disability'' does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a ''record of'' a substantially limiting impairment, or may be covered under the ''regarded as'' prong if it is the basis for a prohibited action and is not both ''transitory and minor.''

Sections 35.108(c) and 36.105(c)—Major Life Activities

Prior to the ADA Amendments Act, the ADA did not define ''major life activities,'' leaving delineation of illustrative examples to agency regulations. Section 2 of the definition of ''disability'' in the Department's current title II and title III regulations states that ''[t]he phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'' *See* 28 CFR 35.104; *id.* at 36.104

The ADA, as amended, incorporates into the statutory language a non-exhaustive list of major life activities that includes, but is not limited to, ''caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.'' 42 U.S.C. 12102(2)(A). This list reflects Congress's concern that courts were interpreting the term ''major life activities'' more narrowly than Congress intended. *See* 42 U.S.C .12101(b)(4). In §§ 35.108(c) and 36.105(c), the Department proposes to revise its title II and title III regulatory definitions of disability to incorporate the statutory examples as well as to provide additional examples included in the EEOC title I final regulation—reaching, sitting, and interacting with others, *see* 29 CFR 1630.2(i)(1)(i).

In addition, the ADA, as amended, specifies that a person may meet the definition of ''disability'' if he or she has a physical or mental impairment that substantially limits the operation of a ''major bodily function,'' which includes the ''functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.'' 42 U.S.C. 12102(2)(B). The Department is proposing to revise its regulatory definitions of disability at §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii) to make it clear that the operations of major bodily functions are major life activities, and to include a non-exclusive list of examples of major bodily functions, consistent with the language of the statute. In addition to the examples included in the statute, the Department proposes to include the following additional examples: the functions of the special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems. These six major bodily functions are also specified in the EEOC title I final regulation. 29 CFR 1630.2(i)(1)(i).

The Department cautions that both the lists of major life activities and major bodily functions are illustrative. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulation.

Consistent with the ADA, as amended, proposed §§ 35.108(c)(2) and 36.105(c)(2) also state that, ''[i]n determining other examples of major life activities, the term 'major' shall not be interpreted strictly to create a demanding standard for disability.'' Moreover, the proposed regulations provide that ''[w]hether an activity is a 'major life activity' is not determined by reference to whether the activity is of 'central importance to daily life.'" *See* §§ 35.108(c)(2), 36.105(c)(2).

Sections 35.108(d) and 36.105(d)—Substantially Limits

Overview. The ADA, as amended, states that the term ''substantially limits'' is intended to be ''interpreted consistently with the findings and purposes of the ADA Amendments Act.'' 42 U.S.C. 12102(4)(B). One stated purpose of the Act is to expressly ''reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams* . . . that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central

importance to most people's daily lives.' '' Public Law 110–325, sec. 2(b)(4). The Department proposes to add nine rules of construction at §§ 35.108(d) and 36.105(d) clarifying the meaning of ''substantially limits'' when determining whether an impairment substantially limits an individual in a major life activity consistent with the mandates of the ADA Amendments Act. These rules of construction are based on the requirements of the statute and the clear mandates of the legislative history and are as follows:

Broad construction—not a demanding standard. Proposed §§ 35.108(d)(1)(i) and 36.105(d)(1)(i) state that ''[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard.'' *See* 42 U.S.C. 12102(4)(A).

Comparison to most people in the population. Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that ''[a]n impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.'' The Department cautions that this rule of construction addresses how to determine whether the individual's impairment substantially limits a major life activity and not how the impairment is diagnosed. For example, when a person is diagnosed with the impairment of a learning disability, one accepted method of arriving at that diagnosis is the administration of specific tests to determine whether there is a significant discrepancy between the individual's intelligence or aptitude and the individual's academic achievement. Having established the existence of the impairment (here, a learning disability), the individual must still demonstrate that his or her impairment substantially limits a major life activity as compared to most people in the general population.

Significant or severe restriction not required. Proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) also state ''[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.'' *See* 154 Cong. Rec. S8840–42 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110–730, pt. 1, at 9–10 (2008). (''While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity in order to qualify as a disability.'') In the findings and purposes of the ADA Amendments Act, Congress expressed concern that courts had required persons with disabilities seeking the protections of the ADA to demonstrate a greater degree of limitation than had been intended by Congress. Public Law 110–325, sec. 2(a)(7). In addition, Congress specifically found that the EEOC's ADA title I regulation had expressed too high a standard for proving disability by defining the term ''substantially limits'' as ''significantly restricted.'' *See* Public Law 110–325, sec. 2(a)(7), (8).

Primary focus of ADA cases. Proposed §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii) state that ''[t]he primary object of attention in cases brought under the [ADA] should be whether [public entities/covered entities] have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.'' Congress recognized that ''clearing the initial [disability] threshold is critical, as individuals who are excluded from the definition 'never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they [are] 'otherwise qualified.' '' H.R. Rep. No. 110–730 pt. 2, at 7 (2008) (internal quotation marks and citation omitted). This rule of construction addresses that concern.

''Substantially limits'' shall be interpreted to require a lesser degree of functional limitation than that provided prior to the ADA Amendments Act. Proposed §§ 35.108(d)(1)(iv) and 36.105(d)(1)(iv) state that ''[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.'' This rule of construction reflects Congress's concern that prior to the adoption of the ADA Amendments Act, courts were using too high a standard to determine whether an impairment substantially limited a major life activity. *See* Public Law 110–325, sec. 2(b)(4), (5).

Scientific, medical, or statistical evidence. Proposed §§ 35.108(d)(1)(v) and 36.105(d)(1)(v) state that ''[t]he comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.''

Determination made without regard to mitigating measures. The ADA, as amended, expressly prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity, save for the ameliorative effects of ordinary eyeglasses or contact lenses. 42 U.S.C. 12102(4)(E). Section 12102(4)(E)(i) provides an illustrative, but non-exhaustive, list of different types of mitigating measures that must be considered in determining whether an individual has a covered disability. *Id.*

Proposed §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi) track the revised statutory language prohibiting consideration of mitigating measures (with one identified exception). Proposed §§ 35.108(d)(4) and 36.105(d)(4), discussed below, set forth examples of mitigating measures.

Impairments that are episodic or in remission. Proposed §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) state that ''[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.'' *See* 42 U.S.C. 12102(4)(D). For example, a person with multiple sclerosis (MS) who is substantially limited in a major life activity when her MS is active, would be considered a person with a disability even when her condition is in remission. Similarly, a person who has a seizure disorder that manifests with episodic seizures that substantially limit a major life activity would be a person with a disability even though he is not substantially limited in a major life activity when his seizure disorder is not active.

Impairment need not substantially limit more than one major life activity. Proposed §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) state that ''[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.'' *See* 42 U.S.C. 12102(4)(C). This language reflects the statutory intent to reject court decisions that had required individuals to show that an impairment substantially limits more

than one major life activity. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). It is also intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA. For example, even if a person could engage in the manual activity of brushing his teeth or washing his face, he could still be a person with a disability if he were limited in the ability to perform other manual tasks.

Transitory and minor exception. The ADA, as amended, provides that the ''regarded as'' prong of the definition of ''disability'' does ''not apply to impairments that are [both] transitory and minor.'' 42 U.S.C. 12102(3)(B). ''[T]ransitory impairment'' is defined as ''an impairment with an actual or expected duration of six months or less.'' *See id.* As discussed below, §§ 35.108(f) and 36.105(f) incorporate this exception into the determination of disability under the ''regarded as'' prong. Whether an impairment is both transitory and minor is a question of fact that is dependent upon individual circumstances; however, it is likely that an uncomplicated sprained ankle with an expected recovery time of three months, for example, would be an impairment that is both transitory and minor.

The proposed rules of construction at §§ 35.108(d)(1)(ix) and 36.105(d)(1)(ix) further clarify that an impairment that lasts or is expected to last less than six months and that substantially limits a major life activity can be a disability under the first two prongs of the definition of ''disability.'' *See* 154 Cong. Rec. H6067 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner) (''[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.'')

Sections 35.108(d)(2) and 36.105(d)(2)—Predictable Assessments

Although there are no ''per se'' disabilities, the Department believes that the inherent nature of certain impairments will in virtually all cases give rise to a substantial limitation of a major life activity. Proposed §§ 35.108(d)(2) and 36.105(d)(2) provide examples of impairments that should easily be found to substantially limit a major life activity. *Cf. Heiko* v. *Columbo Savings Bank, F.S.B.,* 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADA Amendments Act, that ''certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness''). The analysis of whether the types of impairments referenced in these sections substantially limit a major life activity does not depart from the hallmark individualized assessment required by the ADA. These sections recognize that applying the various principles and rules of construction concerning the definition of ''disability,'' the individualized assessment of some types of impairments will, in virtually all cases, result in the conclusion that the impairment substantially limits a major life activity, and thus the necessary individualized assessment of these types of impairments should be particularly simple and straightforward.

For example, and as provided in proposed §§ 35.108(d)(2) and 36.105(d)(2), applying the rules of construction set forth in §§ 35.108(d)(1) and 36.105(d)(1), it should easily be concluded that the following non-exhaustive examples of types of impairments will, at a minimum, substantially limit the major life activities indicated: deafness substantially limits hearing and auditory function; blindness substantially limits visual function; an intellectual disability [3] substantially limits reading, learning, and problem solving; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits learning, social interaction, and communication; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Of course, the impairments listed in §§ 35.108(d)(2) and 36.105(d)(2) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting. Autism may substantially impair the major life activity of caring for oneself.

Sections 35.108(d)(3) and 36.105(d)(3)—Condition, Manner, and Duration

The preambles to the Department's original title II and title III regulations noted that a person is considered an individual with a disability for purposes of the first prong of the definition when one or more of the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. 56 FR 35694, 35699 (July 26, 1991). In the 2008 Senate Statement of the Managers, Congress reiterated what it had said at the time of the original ADA: ''A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.'' 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008)) (citing S. Rep. No. 101–116, at 23 (1989)). Congress also stated the following:

> We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations. . . . At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.

Id.

The Department has included this standard in proposed §§ 35.108(d)(3) and 36.105(d)(3), which provide that, taking into account the rules of construction in §§ 35.108(d)(1) and 36.105(d)(1), ''in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes

[3] This term is intended to replace the term ''mental retardation,'' which is a term that is no longer used.

the individual to perform the major life activity, or for which the individual can perform the major life activity.''

An impairment may substantially limit the ''condition'' or ''manner'' under which a major life activity can be performed in a number of different ways. For example, the condition or manner under which a major life activity can be performed may refer to how an individual performs a major life activity; e.g., the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment ''causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion.'' *See* H.R. Rep. No. 110–730, pt. 2, at 17 (2008). For example, the endocrine system of a person with type I diabetes does not produce sufficient insulin.

''Duration'' refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. However, ''[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.'' *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (citing S. Rep. No. 101–116, at 23 (1989).

Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii) include language that says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

For example, someone with a learning disability may achieve a high level of academic success, but may, nevertheless, be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As Congress emphasized in passing the ADA Amendments Act, ''[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.'' 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The House Education and Labor Committee Report noted that:

> In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to ''most people.'' When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price v. National Board of Medical Examiners, Gonzales* v. *National Board of Medical Examiners,* and *Wong* v. *Regents of University of California.*
>
> The Committee believes that the comparison of individuals with specific learning disabilities to ''most people'' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008).

The proposed regulations provide that the non-ameliorative effects of mitigating measures may be considered in assessing substantial limitation and considering facts such as condition, manner, or duration. *See* §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii). Such ''non-ameliorative effects'' could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative side effects of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and thus, it is not necessary to consider the burdens that dialysis treatment imposes.

Finally, condition, manner, or duration is not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. Rather, in referring to condition, manner, or duration, the proposed rules make clear that these are merely the types of factors that may be considered in appropriate cases. To the extent that such factors may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage.

At the same time, individuals seeking coverage under the first or second prong of the definition of ''disability'' should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Of course, covered entities may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment

does not impose a substantial limitation on a major life activity.

The Department also notes that although in general the comparison to ''most people'' means a comparison to most people in the general population, there are a few circumstances where it is only appropriate to make this comparison in reference to a particular population. For example, it would be inappropriate to evaluate whether a young child with a learning disability that affected her or his ability to read was substantially limited in reading compared to most people in the general population, because clinical assessments of such an impairment (e.g., dyslexia), are always performed in the context of similarly-aged children or a given academic year (e.g., sixth grade), and not in comparison to the population at large.

Sections 35.108(d)(4) and 36.105(d)(4)—Examples of Mitigating Measures

Proposed §§ 35.108(d)(4) and 36.105(d)(4) provide examples of mitigating measures that must not be considered in determining whether an individual has a disability that substantially limits a major life activity. Mitigating measures include but are not limited to medication, prosthetics, assistive technology, reasonable modifications and auxiliary aids or services, and learned behavioral or adaptive neurological modifications.

Learned behavioral or adaptive neurological modifications include those strategies developed by an individual to lessen the impact of an impairment. Reasonable modifications include informal or undocumented accommodations and modifications as well as those provided through a formal process.

Self-mitigating measures or undocumented modifications or accommodations for students with impairments that affect learning, reading, or concentrating, may include measures such as devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts; receiving extra time to complete tests; receiving modified homework assignments; or being permitted to take exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether formal or informal, documented or undocumented, can lessen the impact of, and improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. Nevertheless, these are only temporary supports; the individual still has a substantial limitation in a major life activity and would be a person with a disability under the ADA. *See also* discussion of §§ 35.108(d)(1) and 36.105(d)(1), above.

The ADA, as amended, specifies one exception to the rule on mitigating measures, stating that the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether a person has an impairment that substantially limits a major life activity and thereby is a person with a disability. 42 U.S.C. 12102(4)(E)(ii). Proposed §§ 35.108(d)(4)(i) and 36.105(d)(4)(i) incorporate this exception by excluding ordinary eyeglasses and contact lenses from the definition of ''low-vision devices,'' which are mitigating measures that may not be considered in determining whether an impairment is a substantial limitation.

Sections 35.108(e) and 36.105(e)—Has a Record of Such an Impairment

Section (3) of the definition of ''disability'' in the title II and title III regulations states the following: ''The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.'' The NPRM proposes to keep the language of section (3) in both the title II and title III regulations (with minor editorial changes) but renumbers it as §§ 35.108(e)(1) and 36.105(e)(1).

In addition, the NPRM proposes adding a new paragraph (2), which states that ''[w]hether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities or was misclassified as having had such an impairment.''

The NPRM also proposes adding paragraph (3), which provides that ''[a]n individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.'' For example, a high school student with an impairment that previously substantially limited, but no longer substantially limits, a major life activity may need permission to miss a class or have a schedule change to permit him or her to attend follow-up or monitoring appointments from a health care provider.

Sections 35.108(f) and 36.105(f)—''Is Regarded as Having Such an Impairment''

The ''regarded as having such an impairment'' prong of the definition of ''disability'' was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition, but who were subject to adverse decisions by covered entities based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The rationale for the ''regarded as'' part of the definition of ''disability'' was articulated by the Supreme Court in the context of Section 504 of the Rehabilitation Act of 1973 in *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987). In *Arline,* the Court noted that, although an individual may have an impairment that does not diminish his or her physical or mental capabilities, it could ''nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.'' *Id.* at 283. Thus, until the *Sutton* decision, individuals seeking the protection of the ADA under this prong only had to show that a covered entity took some action prohibited by the statute because of an actual or perceived impairment. There was no requirement that the individual demonstrate that he or she, in fact, had an impairment that substantially limited a major life activity. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, if a day care center refused to admit a child with burn scars because of the presence of the scars, then the day care center regarded the child as an individual with a disability, regardless of whether the child's scars substantially limited a major life activity.

In the *Sutton* decision, the Supreme Court significantly narrowed the application of this prong, holding that individuals who asserted coverage under the ''regarded as having such an impairment'' prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that ''an actual, nonlimiting impairment substantially limit[ed]'' a major life activity, when in fact the impairment was not so limiting.

527 U.S. at 489. Congress expressly rejected this holding in the ADA Amendments Act by adding language clarifying that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act. 42 U.S.C. 12102(3)(A). This provision restores Congress's intent to allow individuals to establish coverage under the ''regarded as'' prong by showing that they were treated adversely because of an impairment without having to establish the covered entity's beliefs concerning the severity of the impairment. *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008).

Thus, under the ADA Amendments Act, it is not necessary, as it was prior to the Act and following the Supreme Court's decision in *Sutton,* for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the ''regarded as'' prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be ''regarded as having such an impairment.'' In short, to be covered under the ''regarded as'' prong, an individual is not subject to any functional test. *See* 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong.''); H.R. Rep. No. 110–730, pt. 2, at 17 (2008) (''[T]he individual is not required to show that the perceived impairment limits performance of a major life activity.''). The concepts of ''major life activities'' and ''substantial limitation'' simply are not relevant in evaluating whether an individual is ''regarded as having such an impairment.''

Proposed §§ 35.108(f)(1) and 36.105(f)(1) restore the meaning of the ''regarded as'' prong of the definition of ''disability'' by adding language that incorporates the statutory provision and states: ''An individual is 'regarded as having such an impairment' if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor.'' The sections also incorporate the statutory definition of transitory impairment, and state that a ''transitory impairment is an impairment with an actual or expected duration of six months or less.''

Proposed §§ 35.108(f)(2) and 36.105(f)(2) provide that ''[a]n individual is 'regarded as having such an impairment' any time a [public entity/covered entity] takes a prohibited action against the individual because of an actual or perceived impairment, even if the [entity] asserts, or may or does ultimately establish, a defense to such action.''

Proposed §§ 35.108(f)(3) and 36.105(f)(3) provide that establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under either title II or III of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of the ADA. Thus, in order to establish liability, an individual must establish coverage as a person with a disability, as well as establish that he or she has been subjected to an action prohibited by the ADA.

Sections 35.108(g) and 36.105(g)—Exclusions

Sections 35.108(g) and 36.105(g) of the Department's proposed definition of ''disability'' renumber the exclusions contained in paragraph (5) of the definition of ''disability'' in the title II and title III regulations.

Section 35.130(b)(7)(i)—Claims of No Disability and Section 36.302(g)—Modifications in Policies, Practices, or Procedures

The ADA, as amended, states that a public entity under title II and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, ''need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability'' solely on the basis of being regarded as having an impairment. 42 U.S.C. 12201(h). Proposed §§ 35.130(b)(7)(i) and 36.302(g) reflect this concept and provide that a public entity/covered entity ''is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the 'regarded as' prong of the definition of disability,'' found in § 35.108(a)(1)(iii) and § 36.105(a)(1)(iii). Thus, proposed §§ 35.130(b)(7)(i) and 36.302(g) make it clear that the duty to provide reasonable modifications arises only when the individual establishes coverage under the first or second prong of the definition of ''disability.'' These sections are not intended to diminish the existing obligations to provide reasonable modifications under title II and title III of the ADA.

The Department notes that the ADA Amendments Act revised the rules of construction in title V of the ADA by including a provision affirming that nothing in the Act changed the ADA requirement that covered entities provide reasonable modifications in policies, practices, or procedures, unless the entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations involved. *See* 42 U.S.C. 12201(f). Congress noted that the reference to ''academic requirements in postsecondary education'' was included ''solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic. Specifically, the reference to academic standards in post-secondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability.'' 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers). Given that Congress did not intend there to be any change to the law in this area, the Department has made no changes to its regulatory requirements in response to this provision of the ADA Amendments Act.

Sections 35.130(i) and 36.201(c)—Claims of No Disability

The NPRM proposes adding §§ 35.130(*i*) and 36.201(c) to the title II and title III regulations, respectively, to reflect the language of the ADA, as amended, which states that ''[n]othing in this [Act] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.'' 42 U.S.C. 12201(g). This provision, and the proposed rules incorporating its language, clarify that persons without disabilities do not have an actionable claim under the ADA on the basis of not having a disability.

Regulatory Process Matters

A. Executive Order 13563 and 12866—Regulatory Planning and Review

This NPRM has been drafted in accordance with Executive Order 13563, 76 FR 3821 (Jan. 18, 2011), Improving Regulation and Regulatory Review, and Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), Regulatory Planning and Review. Executive Order 13563 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department has determined that this proposed rule is a ''significant regulatory action'' as defined by Executive Order 12866, section 3(f). The Department has determined, however, that this proposed rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This NPRM has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

1. Necessity for This Rulemaking

This rule is necessary to incorporate into the Department's current regulations the ADA Amendments Act of 2008, which became effective on January 1, 2009. The proposed regulations are intended to promote consistency of judicial interpretations and predictability of executive enforcement of the ADA, as now amended by Congress.

2. Relationship to EEOC's ADA Regulation Under Title I

The ADA Amendments Act's changes to the ADA apply to title I of the ADA, which is enforced by the Equal Employment Opportunity Commission (EEOC), and titles II and III of the ADA, which are enforced by the Department.[4] In keeping with the mandates of Executive Order 13563, and in order to promote consistency in the interpretation of the ADA Amendments Act, the Department and the EEOC held four joint public hearings prior to the publication of the EEOC's final title I ADA Amendments Act rule. *See* 76 FR 16978. In addition, the Department is proposing to revise its ADA title II and title III regulations in such a manner that, wherever possible, the regulatory language is the same as the language adopted by the EEOC in its final rule. This consistency will also ensure greater certainty for the public and businesses subject to the ADA.

As discussed earlier, Congress enacted the ADA Amendments Act in response to a growing number of ADA title I employment discrimination cases in which, contrary to the intent of Congress, persons with disabilities were unable to establish that they had disabilities as defined under the ADA. The EEOC's Regulatory Impact Analysis (RIA) published with its final title I rule discussed the effect of the ADA Amendments Act in terms of benefits to individuals with disabilities and costs to covered entities subject to title I. The EEOC RIA identifies a broad range of individuals with disabilities who, prior to the passage of the ADA Amendments Act, could not establish coverage under the ADA's definition of ''disability'' and, thus, were not entitled to reasonable accommodations in the workplace. The EEOC RIA focuses on the cost of the additional accommodations that could be required because the ADA Amendments Act results in a larger group of individuals who have disabilities under the ADA. The EEOC RIA concluded that, with respect to the revisions to the title I ADA regulation, the qualitative and quantitative benefits of the rule justified the estimated annual costs of $60 million to $183 million. 76 FR 16978, 16998 (March 25, 2011).

In contrast to the effects of the ADA Amendments Act on entities subject to title I, the Department believes that the statutory changes that the proposed title II and title III regulations incorporate will impact individuals and covered entities differently and will result in significantly less cost than $100 million in any given year. The Department has concluded this for several reasons. First, although the ADA Amendments Act was expected to have an impact on a broad range of individuals with disabilities who were seeking reasonable accommodations in employment under title I, its impact on individuals challenging discrimination under titles II or III was expected to be substantially less. The legislative history only identifies individuals with learning disabilities who require testing accommodations from higher education institutions and testing entities as likely to be affected by the Act. *See* H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008). Congress was concerned about the number of individuals with learning disabilities who were denied testing accommodations (usually extra time) because covered entities claimed that those individuals did not have disabilities covered by the ADA. *Id.*

Second, the case law and the Department's enforcement experience in the years since the Supreme Court's decision in *Sutton* suggest that determining whether a plaintiff was an individual with a disability under the ADA's definition of ''disability'' was rarely a central issue in title II and title III cases, except with respect to testing accommodations. In addition, the Department's research has not identified any entities outside of higher education and testing entities that purport to be affected by the changes to titles II and III of the ADA made by the ADA Amendments Act.

Third, although the ADA Amendments Act has been in effect for nearly four years, the Department's research has not identified information or data in the literature or on trade association Web sites suggesting that higher education institutions and testing entities have in fact borne significant additional costs attributable to the implementation of the statutory requirements of the ADA Amendments Act.

Fourth, the Department does not believe that there are significant additional costs for providing extended time for testing for students in kindergarten through grade 12 as the result of the ADA Amendments Act. The vast majority of these students are already receiving a range of classroom program modifications, including extended time for testing, pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400, *et seq.* To the extent that there are non-IDEA students in kindergarten through grade 12 who will receive additional classroom modifications (e.g., extended time for testing) as a result of the Department's implementing the ADA Amendments Act by amending its title II regulations, the Department believes that schools will not incur significant

[4] The title II regulation also designates eight federal agencies to investigate complaints with respect to the programs, services, and activities for certain public entities. See 28 CFR Subparts F, G.

additional costs because the extra time will be supervised by the student's teachers or other existing school personnel. The Department is interested in any data that school districts can provide with respect to costs they will incur related to the ADA Amendments Act.

Finally, the Department's preliminary assessment of the costs associated with the anticipated increase in the number of testing accommodation requests that would be granted in testing and licensing situations as a result of the revised ADA definition of ''disability'' clearly supports the Department's view that the proposed changes will cost significantly less than $100 million in any given year.

3. Cost Assessment

Robust data are not readily available on the actual numbers of persons who would be covered by the ADA due to the clarifications from the ADA Amendments Act, and the actual additional costs of accommodations. Nevertheless, some general cost estimates can be made using existing data and assumptions. The Department estimates that the total cost of the revisions required by the ADA Amendments Act and the proposed regulations will range between $36.2 and $61.8 million in the first year (the year with the highest costs) for providing testing accommodations to students with learning disabilities and students with Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (collectively, ''ADD''), who would request and receive testing accommodations and would not have received accommodations but for implementation of the ADA Amendments Act and the proposed regulations.

Research has found that, prior to the enactment of the ADA Amendments Act, a little more than half—51 percent—of students with learning disabilities or ADD were receiving testing accommodations in post-secondary schools or on national examinations.[5] To account for uncertainty regarding the remaining students who were not receiving accommodations but would be eligible to receive them now because of the ADA Amendments Act and the proposed regulations, we estimate the incremental effect of the revisions using a low (50 percent), medium (70 percent), and high (90 percent) range. The Department's research indicates that in the vast majority of cases, the accommodation requested by students with learning disabilities or ADD involves extra test-taking time. The estimate of costs of additional testing accommodations needed as a result of the ADA Amendments Act and the proposed regulations is developed from current data on the number of post-secondary students (undergraduate and graduate), the portion of students with learning disabilities, the portion of students with ADD, the number of students participating in online learning, the average hourly wage of teaching assistants and test proctors, and reasonable estimates of average test time, average course load, and average number of tests per course.[6]

SUMMARY OF TOTAL ESTIMATED COSTS IN FIRST YEAR

[$millions]

	Low	Med	High
Testing in Classes/Courses of Study in Post-Secondary Institutions			
ANNUAL Total Cost for Coursework Tests and Examinations	$30.5	$42.7	$54.9
ONE TIME Cost for Additional Training at Institutions	3.5	3.5	3.5
National Examination Testing			
ANNUAL Total Cost for National Examinations	1.5	2.1	2.7
ONE TIME Cost for Additional Training at Institutions	0.7	0.7	0.7
Total	36.2	49.0	61.8

a. Post-Secondary Institutions

The National Center for Education Statistics (NCES) reports that, as of 2010, there were an estimated 17.8 million post-secondary students,[7] including both undergraduate and graduate students. This figure represents full-time student equivalents. The NCES also reports that approximately 3.7 percent of those 17.8 million students are enrolled in online learning and that approximately 20.4 percent of students were taking online learning course(s).[8] The 3.7 percent is an estimate of the percent of all post-secondary students who are taking all their courses online. We removed these students from our cost estimate because if their entire program is online, the Department believes it is unlikely they will have timed tests at a physical location. We

[5] ''National examinations'' refers to those examinations administered by a private entity related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes. *Cf.* 28 CFR 36.309(a).

[6] Our data was derived from several sources. In addition to some basic internet resources, we relied on the following: (1) U.S. Gov't Accountability Office, GAO 10–33, Higher Education and Disability—Education Needs a Coordinated Approach to Improve Assistance to Schools in Supporting Students (2009); (2) U.S. Gov't Accountability Office, GAO 12–40, Higher Education and Disability—Improved Federal Enforcement Needed to Better Protect Students' Rights to Testing Accommodations (2011); (3) data from the U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 77, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8530.;* (4) Lindsey Jasinski and John Ranseen, *Malingered ADHD Evaluations: A Further Complication for Accommodation Reviews, The Bar Examiner,* December 2011; (5) U.S. Department of Education, The Condition of Education 160 (2003), available at *http://nces.ed.gov/pubs2003/2003067.pdf;* (6) Melana Zyla Vickers, Pope Center for Higher Education Policy, *Accommodating College Students with Learning Disabilities: ADD, ADHD, and Dyslexia* (March 2010), available at *http:www.popecenter.org/acrobat/Vickers-mar2010.pdf;* (7) Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012–13 Edition,* Teacher Assistants, available at *http://www.bls.gov/ooh/education-training-and-library/teacher-assistants.htm;* (8) data from the U.S. Census Bureau, *American FactFinder,* Table ECO761A1, available at *http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_61A1&prodType=;.*

[7] U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 77, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8530.*

[8] U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 4, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8155.*

did not remove from our cost estimate the students who are taking only some online courses. Instead, we treat these students the same for purposes of our analysis as we treat students taking all courses in physical classrooms, which likely overestimates the number of courses with timed tests at a physical location that we use in our estimate. The Department requests public comment on whether our assumption is correct that those in a post-secondary program where all classes are taken online do not take their tests in a physical location. We also request any information the public might have regarding whether online-only post-secondary programs will incur any costs that we have not accounted for as a result of incorporating the ADA Amendments Act's revised definition of ''disability.''

In 2008, approximately 10.8 percent of post-secondary students reported having a disability.[9] Out of those 10.8 percent of students with a disability, 8.9 percent of those students reported having a ''specific learning disability'' and 19.1 percent reported having ADD.[10] Thus, out of the 10.8 percent of students with a disability, 28 percent of those students have a specific learning disability or ADD. Some research suggests that this percentage may overestimate the proportion of students who self-identify as having ADD and actually require accommodations due to a disability.[11] To account for the possible overestimate, the Department reduced its estimate of the percentage of students with ADD (as a primary disability) by 30 percent, from 19.1 to 13.37 percent of students with a disability. Therefore, the Department estimates that out of the 10.8 percent of students with a disability, 22.3 percent of those students have a specific learning disability or ADD.

Research suggests that prior to the enactment of the ADA Amendments Act, 51 percent of college students with a learning disability or ADD were already receiving accommodations.[12] To calculate the incremental costs of this proposed rule, the percentage of remaining students with a learning disability or ADD (49 percent) who had not sought or received accommodations and who would now both seek and receive them was used as a baseline.

Based on the 49 percent baseline, the Department used a range to estimate the incremental change in the percentage of students with learning disabilities and ADD who would now request and receive accommodations involving extra test-taking time after the enactment of the ADA Amendments Act and the proposed regulations. These calculations proceeded with a low, medium, and high possible value for this unknown portion of students: 50.0 percent, 70.0 percent and 90.0 percent, respectively. The Department used a range because not all postsecondary students with learning disabilities or ADD who are eligible to receive testing accommodations actually request them. Some students may not want to identify themselves as having a disability or needing an accommodation. Other students may not have documentation of their disability at the time they request the accommodation, and they cannot afford to obtain the specific documentation requested by the testing entity. In addition, other students may have a disability, but not need that particular accommodation. Finally, despite the changes made by the ADA Amendments Act, not all students in the affected population are necessarily eligible to receive testing accommodations. The Department is interested in comment on whether the ranges it is using are appropriate or whether it has overestimated the number of additional students who will now request testing accommodations.

We thus estimate that between 101,227 and 182,209 more post-secondary students will request and receive testing accommodations as a result of the revisions to the definition of ''disability.'' That figure was calculated by multiplying 17.8 million post-secondary students by the percentage of students with disabilities (10.8 percent), multiplied by the percentage of students with disabilities who have a learning disability and 70 percent of students with ADD (22.3 percent), reduced by the 51 percent already receiving accommodations and the 3.7 percent of students taking courses fully online, and adjusting for the fact that either 50 percent, 70 percent, or 90 percent of those impacted students would actually request testing accommodations.

Our research indicated that 59 percent of testing accommodation requests were for 50 percent additional time and another 15 percent were for more than 50 percent additional time.[13] We thus conservatively assumed an average of 75 percent more time would accurately estimate the additional testing accommodation time requested for examinations in post-secondary institutions.[14] A brief review of the academic schedules for post-secondary schools found that most undergraduate courses meet twice a week for an hour and fifteen minutes or an hour and a half. Based on this information, we assumed that the average test time would be the length of the average class session—1.5 hours. Thus, we estimate 1.13 additional hours per test for each accommodation request—1.5 hours (average test time) multiplied by 75 percent (average additional testing time requested).

Little to no data were found on the average number of exams/tests taken per post-secondary student. In this estimation, we assumed that the average full-time equivalent student takes a full-time load of eight classes per year, with an average of 3 tests/quizzes per class (which includes some classes with no exams and some classes with several). Thus, we estimated that students will take approximately 24 exams/tests per year, on average, calculated as follows: 8 classes per year multiplied by 3 tests per class. Multiplying 24 exams/tests per student per year by the average (estimated above) of 1.13 additional hours per testing accommodation request, yields an estimate of 27 additional hours of test taking and proctor time needed per student per year, on average. The Department seeks public comment on the reasonableness of these assumptions.

Multiplying the estimated number of students who as a result of the revisions to the definition of ''disability'' would now request and be granted testing accommodations (between 101,227 and 182,209), by the average additional time for testing accommodations per student per year (27 hours), by the average hourly wage of teaching assistants

[9] GAO 10–33, Higher Education and Disability—Education Needs a Coordinated Approach to Improve Assistance to Schools in Supporting Students 37 (2009).

[10] *Id.* at 38.

[11] Researchers have estimated that nearly 25%–50% of students self-identifying as ADD may not necessarily meet the clinical definition of the disorder and thus would still not qualify for an accommodation under the revised definition of disability. Jasinski and Ranseen, *Malingered ADHD Evaluations: A Further Complication for Accommodation Reviews,* The Bar Examiner, December 2011, at 10.

[12] U.S. Department of Education, The Condition of Education 160 (2003), available at *http://nces.ed.gov/pubs2003/2003067.pdf; see also* Vickers, Pope Center for Higher Education Policy, *Accommodating College Students with Learning Disabilities: ADD, ADHD, and Dyslexia* 6 (March 2010), available at *http:www.popecenter.org/acrobat/Vickers-mar2010.pdf.*

[13] GAO 12–40, Higher Education and Disability—Improved Federal Enforcement Needed to Better Protect Students' Rights to Testing Accommodations 8 (2011)

[14] If 59% of takers requested 50% more time, and 15% of test takers requested 100% more time (double the time of other test takers), the average amount of time requested, on a per test taker basis, would be 60% more time. Thus, we believe that an estimate of 75% more time, on average, more than covers the likely net additional time requested.

($11.16 [15]) yields an annual cost of testing accommodations in the post-secondary education setting ranging between a low of $30.5 million and a high of $54.9 million.

Our methodology likely overestimates the actual costs for a variety of reasons. For example, because there will sometimes be more than one student needing additional testing time during the administration of a given test, only one proctor would likely be needed per class. Because of the inherent difficulties in accurately estimating when this will occur, we have calculated the costs to account for additional proctor time for each individual student, regardless of whether more than one student needing additional time would be taking the same test.

The Department believes institutions will experience some one-time costs due to the institution's disability services center (or its equivalent) needing to update its policies and procedures to bring them in line with the changes made by the ADA Amendments Act and explaining those changes to the employees responsible for evaluating testing accommodation requests. We estimate that one-time costs to adapt training and procedures will total $3.5 million, which is the result of multiplying the number of institutions affected (7,021 [16]), by $500 (assumed not to be higher than the cost of 5 hours of management time, valued at $100 an hour). We were not able to find estimates for the incremental costs resulting from training employees within post-secondary institutions who are responsible for assessing accommodation requests. We therefore used an estimate of 5 hours at $100 per hour to calculate a very high-level estimate of this cost, and are seeking public comment on these assumptions.

b. National Examinations

Using the same data as noted above, the calculation of the estimate of additional requests for testing accommodations in national examinations was made as follows: 9,287,619 total annual test takers of national exams,[17] multiplied by the percentage of post-secondary students with disabilities (10.8 percent [18]), multiplied by the percentage of students with disabilities who have learning disabilities and 70 percent of students with ADD (22.3 percent [19]), reduced by the 51 percent likely already receiving accommodations yields approximately 109,457 students previously not receiving testing accommodations who now could. As calculated above, a low, medium, and high range was used (50 percent, 70 percent, 90 percent) to represent the likely percentage of these additional students who, as a result of the ADA Amendments Act and proposed regulations, would actually ask for and now receive a testing accommodation. This calculation leads to an estimate of between 54,729 to 98,512 additional requests that would be granted for testing accommodations during national examinations as a result of the revisions to the definition of ''disability.'' The Department has not found data detailing the distribution of persons with disabilities who take national exams, and therefore has used the data on post-secondary students with disabilities as a proxy for the assumption that the populations are similar (both are adults seeking additional education and degrees/ certification). The Department is interested in any comments on the appropriateness of using this data and any alternative sources of information that can be used.

Our research noted that 59 percent of testing accommodation requests are for 50 percent additional time and another 15 percent are for more than 50 percent additional time.[20] We thus assumed an average of 75 percent more time would accurately estimate the additional testing accommodation time requested for national examinations.[21] Data from licensing administrators and the Department's independent research suggest that these national examinations last anywhere from two to eight hours. Averaging these test lengths, weighted by the number of takers for each test, results in a weighted average test length of 3.54 hours.[22] The estimate of additional testing accommodation requests was multiplied by the average test length of 3.54 hours, and multiplied by 75 percent (average additional testing time needed), and in turn multiplied by $10.38,[23] resulting in a range of annual costs between a low of $1.5 million and a high of $2.7 million.

Because our estimation of national exams and licensing tests is based on those which we could actively identify, it underestimates the likely number of actual test takers.[24] We ask the public to provide any information that would help us refine our estimates on the number of national examination test takers.

Although our analysis likely underestimates the number of test takers for national exams and licensing tests,

[15] The $11.16 per hour was estimated from the median annual wage for teaching assistants of $23,220. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012–13 Edition,* Teacher Assistants, available at *http://www.bls.gov/ooh/education-training-and-library/teacher-assistants.htm.* We distributed the annual wage over 52 weeks (40 hours) to translate it into an hourly comparable.

[16] U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 2, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460.*

[17] The figure of 9.2 million test takers is a summation from the following sources: *2011 Statistics,* The Bar Examiner, March 2012, available at *http://www.ncbex.org/assets/media_files/Statistics/2011Statistics.pdf;* National Council of Architectural Registration Boards, *ARE Pass Rates by Division,* available at *http://www.ncarb.org/ARE/ARE-Pass-Rates/DivisionPR.aspx; Teresa R. Metinko & Dahli Gray, Decrease in the Number of People Taking the CPA Exam Not Due to the 150-Hour Requirement,* American Journal of Business Education, Nov. 2010, available at *http://journals.cluteonline.com/index.php/AJBE/article/view/437;* National Association of Boards of Pharmacy, *NAPLEX Passing Rates for First-Time Candidates per Pharmacy School from 2007 to 2011,* available at *http://www.nabp.net/programs/assets/NAPLEX%20passing%20rates.pdf;* National Society of Professional Engineers, *The 80% Myth in the Engineering Profession* (Sept. 13, 2010), available at *http://community.nspe.org/blogs/licensing/archive/2010/09/13/the-80-myth-in-the-engineering-profession.aspx;* American Speech-Language-Hearing Association, Surveys and Information Unit, *National Summary Report: Descriptive Statistics of PRAXIS Examination Scores for the Speech-Language Pathology Specialty Test for Test Administration Years 2000–2001 through 2010–2011,* available at *http://www.asha.org/uploadedFiles/PraxisScoresSLP.pdf;* National Council of State Boards of Nursing, *Number of Candidates Taking NCLEX Examination and Percent Passing* (2011), available at *https://www.ncsbn.org/Table_of_Pass_Rates_2011.pdf.*

[18] GAO 10–33, Higher Education and Disability—Education Needs a Coordinated Approach to Improve Assistance to Schools in Supporting Students 37 (2009).

[19] Calculated from data in Table 7 of GAO 10–33, Higher Education and Disability—Education Needs a Coordinated Approach to Improve Assistance to Schools in Supporting Students 38 (2009).

[20] GAO 12–40, Higher Education and Disability—Improved Federal Enforcement Needed to Better Protect Students' Rights to Testing Accommodations 8 (2011)

[21] If 59% of takers requested 50% more time, and 15% of test takers requested 100% more time (double the time of other test takers), the average amount of time requested, on a per test taker basis, would be 60% more time. Thus, we believe that an estimate of 75% more time, on average, more than covers the likely net additional time requested.

[22] Because test length was not found for all types of national tests, this estimate of length may over- or under-estimate the actual time.

[23] This dollar figure represents the average hourly wage for test proctors based on internet searches conducted in June 2013 from the following Web sites: Utah State University job Web sites; data from Jobs.gov; College of Southern Idaho; job Web sites from Miami Dade College; Weber University; Davenport University; California State University; Delaware County Community College.

[24] We conducted sensitivity tests estimating what the incremental number of impacted test takers would be if the total number of persons sitting for all national examinations is actually 50% or 100% higher than the number we identified. The resulting ranges in annual costs increased to between $2.3 and $4.1 million (50% higher number of persons sitting for national exams) and between $3.0 and $5.4 million (double the number of persons sitting for national exams).

we likely overestimate the actual costs per test taker for the specific national examinations included in the analysis. As stated above, only one proctor would likely be needed at one location, even though in some instances more than one student may be receiving additional time. With respect to national examinations, we know many persons with learning disabilities or ADD were already requesting and receiving extra time as a testing accommodation. Thus, the companies that administer national examinations already employ and pay for additional testing proctors to proctor the examinations of those receiving additional time. The increase in the number of test-takers who would now request and be granted additional test-taking time will likely be placed in the same room or location where the proctors were already monitoring students receiving additional time prior to the ADA Amendments Act. Yet, we have calculated the costs to account for additional proctor time for each individual test taker, regardless of whether an additional proctor is needed because one is already provided to students previously requesting and receiving additional time.

One-time costs to adapt training and procedures were estimated to total $698,500, which is the result of multiplying the number of testing entities affected (1,397 [25]), by $500 (assumed not to be higher than the cost of 5 hours management time, valued at $100 an hour).[26] Again, because the Department was unable to find any data on the costs associated with training, we invite public comment on the accuracy of our assumptions.

4. Benefits

Congress enacted the ADA Amendments Act to ensure that persons with disabilities who were refused access to programs and services would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law benefits millions of Americans and the benefits to these individuals are nonquantifiable but nonetheless significant. The Department determined, however, that there was a specific group of individuals with disabilities who would be able to receive quantifiable benefits. With enactment of the ADA Amendments Act, certain post-secondary students and national examination test takers (e.g., Certified Public Accountant Examination, Law School Admission Test, and other professional examinations) with ADD or learning disabilities are now able to receive additional time to complete tests, whereas before the Act some of these students may have had their requests for additional time denied by testing entities because such entities believed the disability in question did not meet the ADA's definition of ''disability.''

In the first year, our analysis estimates that approximately 142,000 students will take advantage of additional testing accommodations that otherwise would not have occurred but for this rule. Over ten years, approximately 1.6 million full-time equivalent enrollees would benefit, or, assuming an average 4-year course of study, more than 400,000 individual students. An additional 800,000 national examination test takers would benefit over that same 10 years (assuming that people take an exam one time only). The Department is interested in comment on whether it is underestimating or overestimating the number of people who will benefit from this rule.

A number of these individuals could be expected to earn a degree or license that they otherwise would not have earned. We were unable to find robust data to estimate the number of students with learning disabilities or ADD who would receive a post-secondary degree or professional license due to the ADA Amendments Act, but note that extensive research has shown notably higher earnings for those with college degrees over those who do not have one. Estimates of lifetime earnings differential vary, with some studies estimating an earning differential ranging from approximately $300,000 to $1 million.[27] In addition, some number of students may be able to earn a degree in a higher paying field than otherwise and yet other students would still get the same degree, but be able to finish faster or more successfully (i.e., higher grades) than otherwise would be the case. All of these students would be expected to earn greater lifetime income and be more productive than they otherwise would if the ADA Amendments Act was not enacted into law.

In addition to these benefits, the ADA Amendments Act has significant non-quantifiable benefits to individuals with disabilities who, prior to the passage of the ADA Amendments Act, were denied the opportunity for equal access to an education or to become licensed in their chosen profession because of their inability to receive needed testing accommodations. As with all other improvements in access for individuals with disabilities, the ADA Amendments Act is expected to generate psychological benefits for covered individuals, including an increased sense of personal dignity and self-worth, as more individuals with disabilities are able to successfully complete tests and exams and more accurately demonstrate their academic skills and abilities. Some individuals will now be more likely to pursue a favored career path or educational pursuit, which will in turn lead to greater personal satisfaction.

There are additional benefits to society that arise from improved testing accessibility. For instance, if some persons with disabilities are able to increase their earnings, they may need less public support—either direct financial support or other programs or services. This, in turn, would lead to resource savings from reduced social service agency outlays. Others, such as family members, may also benefit from less financial and psychological pressure due to the greater independence and earnings of the family member whose disability is now covered by the ADA under the revised definition of ''disability.''

The Department believes (as did Congress when it enacted the ADA) that there is inherent value for all Americans which results from greater accessibility. Economists use the term ''existence value'' to refer to the benefit that individuals get from the plain existence of a good, service, or resource—in this case, the increased accessibility to post-secondary degrees and specialized licenses that would arise from greater access to testing accommodations or the increased accessibility to covered entities' facilities, programs, services, or activities as a result of the ADA Amendments Act. This can also be described as the value that people both with and without disabilities derive

[25] Census Bureau data for educational test development and evaluation services was used as a proxy. *See* U.S. Census Bureau, *American Factfinder,* Table ECO761A1, available at *http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_61A1&prodType=table.*

[26] The Department believes that this one-time cost per testing entity reflects the costs for the testing entity to update its policies and procedures for evaluating testing accommodation requests to bring them in line with the changes made by the ADA Amendments Act and explaining those changes to the employees responsible for evaluating testing accommodation requests.

[27] *See* Mark Schneider, *How Much Is That Bachelor's Degree Really Worth? The Million Dollar Misunderstanding,* AEI Online, May 2009, available at *http://www.aei.org/article/education/higher-education/how-much-is-that-bachelors-degree-really-worth/;* U.S. Census Bureau, *Work-Life Earnings by Field of Degree and Occupation for People with a Bachelor's Degree: 2011,* Oct. 2012, available at *http://www.census.gov/prod/2012pubs/acsbr11-04.pdf;* Anthony P. Carnevale, et al., *The College Payoff—Education, Occupations Lifetime Earnings,* The Georgetown University Center on Education and the Workforce 2011, available at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2011/collegepayoff.pdf.*

from the guarantees of equal protection and non-discrimination. In other words, people value living in a country that affords protections to persons with disabilities, whether or not they themselves are directly or indirectly affected. There can be numerous reasons why individuals might value accessibility even if they do not require it now and do not ever anticipate needing it in the future. These include: bequest motives, benevolence toward relatives or friends who require accessibility features, and general feelings of empathy and responsibility toward individuals with disabilities. In other words, people in society value equity, fairness, and human dignity; even if they cannot put a dollar value on how important it is to them. These are the exact values agencies are directed to consider in E.O. 13563.

c. Questions

In addition to the discrete questions set out above, the Department invites the public to provide information to assist the Department in improving its estimates of the costs and benefits of implementing the ADA Amendments Act (other than with respect to employment). The Department is interested in information regarding the additional actual costs incurred in providing testing accommodations since the ADA Amendments Act took effect and the actual incremental increase in testing accommodations granted since the ADA Amendments Act took effect. Finally, the Department is interested in information to ensure that its estimates of benefits and costs are comprehensive. For example, are other covered entities, besides post-secondary institutions and national examination centers incurring any costs in order to implement the Act's changes to titles II and III of the ADA? If so, who and how so? In addition to testing accommodations, are there any other specific benefits that people with disabilities have accrued (other than in employment) as a result of the ADA Amendments Act?

B. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. First, the ADA Amendments Act took effect on January 1, 2009, and all covered entities have been required to comply with the Act since that date and thus, should be familiar with the requirements of the law. Second, the rule does not include reporting requirements and imposes no new recordkeeping requirements.

Third, as shown above, the only title II and title III entities that would be significantly affected by the proposed changes to the ADA regulations are testing entities and institutions of higher education. The type of accommodations that most likely will be requested and required by those whose coverage has been clarified under titles II and III of ADA Amendments Act will be additional time in testing situations. While many of these testing or higher education entities are small businesses or small governmental entities, the costs associated with additional testing time are minimal; therefore, the Department believes the economic impact of the proposed regulation will be neither significant for these small entities nor disproportionate relative to the costs for larger entities.

The Department estimates that approximately 7,021 post-secondary institutions could be impacted based on data from the U.S. Department of Education, Institute of Education Sciences, and the National Center for Education Statistics.[28] The Department used data from the U.S. Census Bureau (Statistics of U.S. Businesses) from 2007 for Junior Colleges (NAICS [29] 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) that was analyzed by U.S. Small Business Administration, Office of Advocacy [30] to estimate the proportion of those entities that would meet the SBA's criteria for small business or entity. As shown in Table 2, small post-secondary entities are estimated to account for approximately 42.1 percent of all post-secondary establishments. Therefore, the Department estimates that 2,954 small post-secondary establishments would be impacted.

The overall rule's cost estimates for post-secondary institutions were calculated based on the number of entities and number of post-secondary students affected. Because larger entities have more students, on average, than smaller ones, the Department used the proportion of the industry sub-group's receipts for small and large entities as a proxy for the number of students. This method assumes that per student costs are roughly the same for institutions of differing sizes; the Department does not have robust data for adjusting the estimation. Thus, using receipts for Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) as a proxy for number of students, small post-secondary institutions are estimated to bear 4.8 percent of the costs for that industry sub-group, or approximately $2.2 million of the $46 million first year costs (*see* Table 2 in the Initial Regulatory Assessment for the NPRM) for post-secondary institutions, which would average to a little over $750 per small entity establishment in the first year, for the approximately 2,954 small entity post-secondary establishments. Approximately 4,067 post-secondary establishments (57.9 percent of the 7,021) would be medium or large entities, and they would incur $43.9 million in costs during the first year, which would average out to approximately $10,796 per medium/large post-secondary establishment during the first year. This $10,796 per medium/large post-secondary establishment during the first year is approximately 14.3 times higher than the cost that would be incurred by small post-secondary establishments during that same time.

TABLE 1—FIRM AND RECEIPTS DATA FOR POST-SECONDARY INSTITUTIONS IN 2007

[Firm and Receipts Data for Post-Secondary Institutions, All Firms and Small Entities 2007]

	Junior colleges (NAICS 6112)			Colleges, universities, and professional schools (NAICS 6113)			Sum of junior colleges (6112) and colleges, universities, and professional schools (6113)		
	Firms	Establishments	Est. receipts ($000,000)	Firms	Establishments	Est. receipts ($000,000)	Firms	Establishments	Est. receipts ($000,000)
Total (all firms/ entities)	468	862	6,982	2,456	4,022	165,761	2,924	4,884	172,743

[28] U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 2, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460.*

[29] NAICS refers to the North American Industry Classification System.

[30] U.S. Small Business Administration, *Firm Size Data,* available at *http://www.sba.gov/advocacy/849/12162.*

TABLE 1—FIRM AND RECEIPTS DATA FOR POST-SECONDARY INSTITUTIONS IN 2007—Continued

[Firm and Receipts Data for Post-Secondary Institutions, All Firms and Small Entities 2007]

	Junior colleges (NAICS 6112)			Colleges, universities, and professional schools (NAICS 6113)			Sum of junior colleges (6112) and colleges, universities, and professional schools (6113)		
	Firms	Establishments	Est. receipts ($000,000)	Firms	Establishments	Est. receipts ($000,000)	Firms	Establishments	Est. receipts ($000,000)
SBA size standards for small entities	*SBA small business standard is $19.0 million; small business totals here include those with receipts under $20 million.**			*SBA small business standard is $25.5 million; small business totals here include those with receipts under $25 million.**					
Total small entities	372	432	1,711	1,566	1,623	6,653	1,938	2,055	8,364
Percent small entities	79.5%	50.1%	24.5%	63.8%	40.4%	4.0%	66.3%	42.1%	4.8%

* Data reported in size categories which do not exactly match industry small business classifications: i.e. from $10 million to $14.99 million, and from $15 million to $19.99 million; and from $20 million to $24.99 million, and from $25 million to $29.99 million.

Source: Calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. *See* U.S. Small Business Administration, *Firm Size Data,* available at *http://www.sba.gov/advocacy/849/12162.*

TABLE 2—ESTIMATED SMALL ENTITY ESTABLISHMENTS FOR POST-SECONDARY INSTITUTIONS IN 2010–11

[Estimated Small Entity Establishments for Post-Secondary Institutions in 2010–11]

Total Post-Secondary Establishments (all firms/entities) Academic year 2010–2011 *	7,021
Percent small entities (2007) **	42.1%
Total impacted small entity establishments ***	2,954

* Source: U.S. Department of Education, Institute of Education Sciences, *College and Career Tables Library,* Table 2, available at *http://nces.ed.gov/datalab/tableslibrary/viewtable.aspx?tableid=8460.*

** Percent of small establishments calculated for the sum of Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113). Source calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. *See* U.S. Small Business Administration, *Firm Size Data,* available at *http://www.sba.gov/advocacy/849/12162.*

*** Estimated using percent of small establishments for sectors 6112 and 6113.

In addition to post-secondary institutions, the Department estimates that some national testing entities would also be impacted. Data specifically on national testing organizations, including size break-out by receipts, was not found, so the Department applied ratios calculated for the larger industry group of Educational Support Services (NAICS 611710) data to estimate the number of Educational Test Development and Evaluation Services (NAICS 6117102).[31] Approximately 1,397 national testing organizations would be impacted by this rule, irrespective of size. If the ratio of small to large Educational Test Development and Evaluation Services entities (NAICS 6117102) is the same as that for the larger industry group of Educational Support Services, 89.5 percent in 2007, then approximately 1,250 of 1,397 establishments would be small entity establishments.

TABLE 3—EDUCATION SUPPORT AND TEST DEVELOPMENT SERVICES ESTABLISHMENT AND RECEIPTS

	Educational support services (NAICS 611710)		Educational test development and evaluation services (NAICS 6117102)		
	Establishments	Est. receipts ($000,000)		Establishments	Est. receipts ($000,000)
Total (all firms)	6,781	10,672	*Census Bureau value*	1,397	2,907
SBA for small entities	*SBA small business standard is $14.0 million for all Educational Support Services; small business totals here include those with receipts under $15 million**				
Total small entities	6,067	4,062	*estimated*	*1,250*	*1,106*
Percent small entities	89.5%	38.1%	*Educational Support Services as proxy.*	*89.5%*	*38.1%*

* Data reported in size categories which do not exactly match industry small business classifications: i.e. from $10 million to $14.99 million, and from $15 million to $19.99 million.

Source: Calculated from data from U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, *see* U.S. Small Business Administration, *Firm Size Data,* available at *http://www.sba.gov/advocacy/849/12162* (last visited Nov. 1, 2013), and data from the U.S. Census Bureau, *see* U.S. Census Bureau, *Industry Statistics Portal,* available at *http://www.census.gov/econ/isp/index.php.*

[31] Using data reported by the Census Bureau for 2007 for both industry groups.

Small entity establishments in the Educational Support Services industry group account for 38.1 percent of that industry's receipts. If receipts are used as a proxy for number of students in a manner similar to that described above for post-secondary entity establishments, then small national testing entities (NAICS 611710) can be expected to bear 38.1 percent of the costs estimated for the industry as a whole, or approximately $1.1 million of the $2.8 million first-year costs. Thus, costs from this rule are estimated to average to a little over $850 each, in the first year, for the approximately 1,250 small national testing establishments. Approximately 147 national testing center establishments (10.5 percent of the 1,397) would be medium or large entities, and they would incur $1.74 million in costs during the first year, which would average out to approximately $11,818 per medium/large national testing center establishment during the first year. This $11,818 per medium/large national testing center establishment is approximately 13.8 times as high as the cost that would be incurred by small national testing center establishments during that same time.

As explained above, the Department estimates that 2,954 small post-secondary establishments and approximately 1,250 small national testing establishments would be impacted by this rule, for a total of approximately 4,200 small business establishments.

The estimates were based on average estimates for all entities, irrespective of size. The cost of the additional training these entities may need to undertake as a result of the ADA Amendments Act and this rule is expected to total no more than $500 per entity. The cost of additional proctors to these entities is unclear as we have not found robust information of the number of test-takers at these entities, on average.

Based on the above analysis, the Department can certify that the rule will not have a significant economic impact on a substantial number of small entities. The Department seeks comments and additional data on the costs to small entities of this rulemaking.

C. Executive Order 13132: Federalism

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, and does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

D. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514–0301 (voice); (800) 514–0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this proposed rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Zita Johnson-Betts, Deputy Chief, Disability Rights Section, whose contact information is provided in the introductory section of this proposed rule entitled, **FOR FURTHER INFORMATION CONTACT**.

E. Paperwork Reduction Act

This proposed rule does not contain any new or revised ''collection[s] of information'' as defined by the Paperwork Reduction Act of 1995.44 U.S.C. 3501 *et seq.*

F. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Parts 35 and 36

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments, Business and industry.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and sections 12134, 12186, and 12205a of the Americans With Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008, Public Law 110–325, 122 Stat. 3553 (2008), Parts 35 and 36 of title 28 of the Code of Federal Regulations are proposed to be amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

Subpart A—General

■ 1. The authority citation for 28 CFR Part 35 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a of the Americans with Disabilities Act, as amended.

■ 2. Revise § 35.101 to read as follows:

§ 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C.12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

■ 3. Amend § 35.104 to revise the definition of ''disability'' to read as follows:

§ 35.104 Definitions.

* * * * *

Disability. The definition of ''disability'' can be found at § 35.108.

* * * * *

■ 4. Add § 35.108 to subpart A to read as follows:

§ 35.108 Definition of disability.

(a) *General.* (1) Disability means, with respect to an individual,

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in § 35.108(f) of this part. This means that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both ''transitory and minor.''

(2) *Rules of construction.* (i) An individual may establish coverage under any one or more of the three prongs of the definition of disability in paragraph (a)(1) of this section, the ''actual disability'' prong in paragraph (a)(1)(i) of this section, the ''record of'' prong in paragraph (a)(1)(ii) of this section, or the ''regarded as'' prong in paragraph (a)(1)(iii) of this section.

(ii) Where an individual is not challenging a public entity's failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a public entity's failure to provide reasonable modifications.

(b) *Physical or mental impairment.* (1) The phrase ''physical or mental impairment'' means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) The phrase ''physical or mental impairment'' includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) The phrase ''physical or mental impairment'' does not include homosexuality or bisexuality.

(c) *Major life activities*—(1) *General.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(ii) The operation of a major bodily function, including the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term ''major'' shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a ''major life activity'' is not determined by reference to whether it is of ''central importance to daily life.''

(d) *Substantially limits*—(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ''Substantially limits'' is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

(iii) The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (f)(1) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of disability. The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in § 35.108(d)(1) are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a

framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying the principles set forth in § 35.108(d)(1), the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under § 35.108(a)(1)(i) (the ''actual disability'' prong) or § 35.108(a)(1)(ii) (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in § 35.108(d)(1), it should easily be concluded that the following types of impairments, will, at a minimum, substantially limit the major life activities indicated:

(A) Deafness substantially limits hearing and auditory function;

(B) Blindness substantially limits visual function;

(C) An intellectual disability substantially limits reading, learning, and problem solving;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits learning, social interaction, and communication;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(3) *Condition, manner and duration.* (i) At all times taking into account the principles in § 35.108(d)(1), in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(4) *Mitigating measures include, but are not limited to:* (i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment*—(1) *General.* An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in § 35.108(d)(1) apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* (1) An individual is ''regarded as having such an impairment'' if the individual is subjected to an action prohibited by the ADA, because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(2) An individual is ''regarded as having such an impairment'' any time a public entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under title II of the ADA only when an individual proves that a public entity discriminated on the basis of disability within the meaning of title II of the ADA, 42 U.S.C. 12131–12134.

(g) *Exclusions.* The term ''disability'' does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

■ 5. In § 35.130, add paragraphs (b)(7)(i), (b)(7)(ii), and paragraph (i) to read as follows:

§ 35.130 General prohibitions against discrimination.

* * * * *

(b) * * *

(7) * * *

(i) A public entity is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the ''regarded as'' prong of the definition of disability at § 35.108(a)(1)(iii).

(ii) [Reserved]

* * * * *

(i) *Claims of no disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES

Subpart A—General

■ 6. The authority citation for 28 CFR Part 36 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186b and 12205a of the Americans with Disabilities Act, as amended.

■ 7. Revise § 36.101 to read as follows:

§ 36.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

■ 8. Amend § 36.104 to revise the definition of ''disability'' to read as follows:

§ 36.104 Definitions.

* * * * *

Disability. The definition of ''disability'' can be found at § 36.105.

* * * * *

■ 9. Add § 36.105 to subpart A to read as follows:

§ 36.105 Definition of disability.

(a) *General.* (1) Disability means, with respect to an individual,

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in § 36.105(f) of this part. This means that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both ''transitory and minor.''

(2) *Rules of construction.* (i) An individual may establish coverage under any one or more of the three prongs of the definition of disability in paragraph (a)(1) of this section, the ''actual disability'' prong in paragraph (a)(1)(i), the ''record of'' prong in paragraph (a)(1)(ii), or the ''regarded as'' prong in paragraph (a)(1)(iii).

(ii) Where an individual is not challenging a covered entity's failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a covered entity's failure to provide reasonable modifications.

(b) *Physical or mental impairment.* (1) The phrase ''physical or mental impairment'' means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, post traumatic stress syndrome, emotional or mental illness, and specific learning disabilities.

(2) The phrase ''physical or mental impairment'' includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) The phrase ''physical or mental impairment'' does not include homosexuality or bisexuality.

(c) *Major life activities*—(1) *General.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term ''major'' shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a ''major life

activity'' is not determined by reference to whether it is of ''central importance to daily life.''

(d) *Substantially limits*—(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ''Substantially limits'' is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

(iii) The primary object of attention in cases brought under title III of the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive errors.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (f)(1) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of disability. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in § 36.105(d)(1) are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying the principles set forth in § 36.105(d)(1), the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under § 36.105(a)(1)(i) (the ''actual disability'' prong) or § 36.105(a)(1)(ii) (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation of a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in § 36.105(d)(1), it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:

(A) Deafness substantially limits hearing and auditory function;

(B) Blindness substantially limits visual function;

(C) An intellectual disability substantially limits reading, learning, and problem solving;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits learning, social interaction, and communication;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(3) *Condition, manner and duration.* (i) At all times taking into account the principles in § 36.105(d)(1), in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially impairs a major life activity.

(iii) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or

learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(4) *Mitigating measures include, but are not limited to:*

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies.

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment*—(1) *General.* An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in § 36.105(d)(1) apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* (1) An individual is ''regarded as having such an impairment'' if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(2) An individual is ''regarded as having such an impairment'' any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under title III of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of title III of the ADA, 42 U.S.C. 12181–12189.

(g) *Exclusions.* The term ''disability'' does not include: (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

■ 10. In § 36.201, add paragraph (c) to read as follows:

§ 36.201 General.

* * * * *

(c) *Claims of no disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

Subpart C—Specific Requirements

■ 11. In § 36.302. add paragraph (g) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

* * * * *

(g) A covered entity is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the ''regarded as'' prong of the definition of disability at § 36.105(a)(1)(iii).

Dated: January 22, 2014.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2014–01668 Filed 1–29–14; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0725; FRL–9904–01–Region 9]

Revisions to the California State Implementation Plan, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from solvent cleaning machines and operations, coating of metal parts and products and polyester resin operations. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by March 3, 2014.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0725, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *Email: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov*, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Adrianne Borgia, EPA Region IX, (415) 972–3576, *borgia.adrianne@epa.gov* or Nancy Levin, EPA Region IX, (415) 972–3848, *levin.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: SBCAPCD Rule 321, Solvent Cleaning Machines and Solvent Cleaning, SBCAPCD Rule 330, Surface Coating of Metal Parts and Products and SBCAPCD Rule 349, Polyester Resin Operations. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comments on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: November 22, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2014–01318 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 79, No. 20

Thursday, January 30, 2014

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0110]

Notice of Request for Extension of Approval of an Information Collection; Accreditation of Nongovernment Facilities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with accrediting nongovernment facilities to perform services related to the export of plants or plant products.

DATES: We will consider all comments that we receive on or before March 31, 2014.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0110-0001*.
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS–2013–0110, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0110* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on accrediting nongovernment facilities to perform plant related export services, contact Mr. Gregg Goodman, Senior Accreditation Manager, QPAS, PHP, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2074. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2283.

SUPPLEMENTARY INFORMATION:

Title: Accreditation of Nongovernment Facilities.

OMB Control Number: 0579–0130.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS), among other things, provides export certification services to assure other countries that the plants and plant products they are receiving from the United States are free of plant pests specified by the receiving country. This activity is authorized by the Plant Protection Act (7 U.S.C. 7701 *et seq.*).

The export certification regulations, which are contained in 7 CFR part 353, describe the procedures for obtaining certification for plants and plant products offered for export or reexport. Our regulations do not require that we engage in export certification activities; we perform this work as a service to exporters who are shipping plants or plant products to countries that require phytosanitary certification as a condition of entry.

After assessing the condition of the plants or plant products intended for export (i.e., after conducting a phytosanitary inspection), an inspector will issue an internationally recognized phytosanitary certificate, a phytosanitary certificate for reexport, or an export certificate for processed plant products. An important component of the certification process, when required, is laboratory testing of plant or plant product samples.

The regulations allow nongovernment facilities (such as commercial laboratories and private inspection services) to be accredited by APHIS to perform specific laboratory testing or phytosanitary inspections that could serve as the basis for issuing Federal phytosanitary certificates, phytosanitary certificates for reexport, or export certificates for processed plant products.

The accreditation process requires the use of several information collection activities to ensure that nongovernment facilities applying for accreditation possess the necessary qualifications.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 3.49 hours per response.

Respondents: U.S. National Seed Health System applicants, accredited entities, stakeholders, and State and local plant health regulatory authorities.

Estimated annual number of respondents: 9.

Estimated annual number of responses per respondent: 6.33.

Estimated annual number of responses: 57.

Estimated total annual burden on respondents: 199 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 23rd day of January 2014.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2014–01751 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0108]

Notice of Request for Extension of Approval of an Information Collection; Environmental Monitoring

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with environmental monitoring.

DATES: We will consider all comments that we receive on or before March 31, 2014.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0108-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2013–0108, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0108* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on environmental monitoring, contact Dr. Robert Baca, Environmental Compliance Lead, RPM, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851–2292. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Environmental Monitoring.

OMB Control Number: 0579–0117.

Type of Request: Extension of approval of an information collection.

Abstract: The mission of the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) is to provide leadership in ensuring the health and care of animals and plants, to improve agricultural productivity and competitiveness, and to contribute to the national economy and the public health.

APHIS is committed to accomplishing its mission in a manner that promotes and protects the integrity of the environment. This includes APHIS' compliance with all applicable environmental statutes and regulations, including the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), USDA regulations implementing NEPA (7 CFR part 1b), and APHIS' NEPA Implementing Procedures (7 CFR part 372). APHIS engages in environmental monitoring for certain activities that we conduct to control or eradicate certain pests and diseases. We monitor those activities that have the greatest potential for harm to the human environment to ensure that the mitigation measures developed to avoid that harm are enforced and effective. In many cases, monitoring is required where APHIS programs are conducted close to habitats of endangered and threatened species. This monitoring is developed in coordination with the U.S. Department of the Interior's Fish and Wildlife Service, in compliance with the Endangered Species Act (50 U.S.C. 17.11 and 17.12).

APHIS field personnel and State cooperators jointly use an Environmental Monitoring Form (APHIS Form 2060) to collect information concerning the effects of pesticide use in these sensitive areas. The goal of environmental monitoring is to track the potential impact that APHIS activities may have on the environment and to use this knowledge in making any necessary adjustments in future program actions.

This information collection activity was previously approved by the Office of Management and Budget (OMB) with an estimated annual number of respondents of 150. However, since the last approval, we no longer gather information from individual households. As a result, we have adjusted the estimated annual number of respondents, the estimated annual number of responses, and the estimated total annual burden on respondents.

We are asking OMB to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.50 hours per response.

Respondents: Growers, appliers of pesticides, State department of agriculture personnel.

Estimated annual number of respondents: 110.

Estimated annual number of responses per respondent: 20.

Estimated annual number of responses: 2,200.

Estimated total annual burden on respondents: 1,100 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 23rd day of January 2014.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2014–01754 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0098]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Animals and Poultry, Animal and Poultry Products, Certain Animal Embryos, Semen, and Zoological Animals

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the importation of animals and poultry, animal and poultry products, certain animal embryos, semen, and zoological animals.

DATES: We will consider all comments that we receive on or before March 31, 2014.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0098-0001.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2013–0098, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0098 or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of animals and poultry, animal and poultry products, certain animal embryos, semen, and zoological animals, contact Dr. Bettina Helm, Avian Import Specialist, National Import Export Services, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737; (301) 851–3300. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Animals and Poultry, Animal and Poultry Products, Certain Animal Embryos, Semen, and Zoological Animals.

OMB Control Number: 0579–0040.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) is authorized, among other things, to prohibit or restrict the importation of animals, animal products, and other articles into the United States to prevent the introduction of animal diseases and pests. In support of this mission, APHIS collects pertinent information from persons who import animals or poultry, animal or poultry products, certain animal embryos, semen, or zoological animals into the United States. This information includes data such as the origin of the animals or animal products to be imported, the health status of the animals or the processing methods used to produce animal products to be imported, and whether the animals or animal products were temporarily offloaded in another country during their transit to the United States. We need this information to help ensure that these imports do not introduce exotic animal diseases into the United States.

To collect this information, we use a variety of procedures and forms, including health certificates, import permits, specimen submission forms, inspection reports, cooperative and trust fund agreements, and certification statements.

These information collection activities were previously approved by the Office of Management and Budget (OMB) with an estimated annual number of responses of 259,871 and an estimated total annual burden on respondents of 101,626 hours. These numbers have decreased to 121,397 and 31,923, respectively, due to program changes. For instance, one required form now replaces two previously required forms. Also, we no longer allow the importation of ratites, except for those destined to zoos. In addition, we reduced the number of States providing written agreements for one program. Lastly, we corrected the number of respondents to more accurately reflect the various forms of payment and letters of credit we receive.

We are also revising this collection by returning five forms that had been moved to OMB control number 0579–0324; however, the return of these forms will not increase the overall burden.

We are asking OMB to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.26 hours per response.

Respondents: Foreign animal health authorities seeking to engage in the regionalization process, U.S. importers; State animal health officials; foreign exporters; foreign animal health officials; shippers, owners, and operators of foreign processing plants and farms; USDA-approved zoos, laboratories, and feedlots; private quarantine facilities; and other entities involved (directly or indirectly) in the importation of animals and poultry, animal and poultry products, zoological animals, certain animal embryos, and semen.

Estimated annual number of respondents: 1,278.

Estimated annual number of responses per respondent: 95.

Estimated annual number of responses: 121,397.

Estimated total annual burden on respondents: 31,923 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 23rd day of January 2014. .

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2014–01758 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0095]

Notice of Availability of a Treatment Evaluation Document for Methyl Bromide Treatment for Kumquat

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that we have determined that it is necessary to immediately add to the Plant Protection and Quarantine Treatment Manual a treatment schedule for methyl bromide fumigation of kumquats to control certain fruit flies. We have prepared a treatment evaluation document that describes the new treatment schedule and explains why we have determined that it is effective at neutralizing fruit flies. We are making this treatment evaluation document available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 31, 2014.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal*: Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0095-0001*.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2013–0095, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0095* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Marc Phillips, Senior Regulatory Policy Specialist with Regulations, Permits and Manuals, PPQ, APHIS, 4700 River Road Unit 135, Riverdale, MD 20737–1236; (301) 851–2114.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR chapter III are intended, among other things, to prevent the introduction or dissemination of plant pests and noxious weeds into or within the United States. Under the regulations, certain plants, fruits, vegetables, and other articles must be treated before they may be moved into the United States or interstate. The phytosanitary treatments regulations contained in part 305 of 7 CFR chapter III (referred to below as the regulations) set out standards for treatments required in parts 301, 318, and 319 of 7 CFR chapter III for fruits, vegetables, and other articles.

In § 305.2, paragraph (b) states that approved treatment schedules are set out in the Plant Protection and Quarantine (PPQ) Treatment Manual.[1] Section 305.3 sets out a process for adding, revising, or removing treatment schedules in the PPQ Treatment Manual. In that section, paragraph (b) sets out the process for adding, revising, or removing treatment schedules when there is an immediate need to make a change. The circumstances in which an immediate need exists are described in § 305.3(b)(1). They are:

- PPQ has determined that an approved treatment schedule is ineffective at neutralizing the targeted plant pest(s).
- PPQ has determined that, in order to neutralize the targeted plant pest(s), the treatment schedule must be administered using a different process than was previously used.
- PPQ has determined that a new treatment schedule is effective, based on efficacy data, and that ongoing trade in a commodity or commodities may be adversely impacted unless the new treatment schedule is approved for use.
- The use of a treatment schedule is no longer authorized by the U.S. Environmental Protection Agency or by any other Federal entity.

We have determined that a new methyl bromide fumigation treatment schedule to control the fruit flies *Ceratitis capitata* and *Anastrepha fraterculus* on kumquat (*Fortunella japonica*) is effective, and we have determined that ongoing trade in kumquat will be adversely impacted unless the new treatment is approved for use.

On July 10, 2013, we published in the **Federal Register** (78 FR 41259–41265, Docket No. APHIS–2011–0060) a rule[2] to amend the regulations to allow the importation of several species of fresh citrus and *Citrus* hybrids (''citrus fruit''), including kumquat, from Uruguay into the continental United States under certain conditions. Under § 319.56–59, citrus fruit other than lemons must be treated in accordance with part 305, and lemons may be imported without treatment if harvested green between May 15 and August 31; otherwise, lemons must be treated as well.

Currently, there are cold treatment schedules listed in the PPQ Treatment Manual to mitigate the risk of fruit flies on many citrus varieties, but there is currently no treatment available for kumquat from Uruguay.

Therefore, in accordance with § 305.3(b)(2), we have determined that it is necessary to immediately add a new treatment schedule for kumquat in the PPQ Treatment Manual. Based on existing treatments of several citrus commodities to control *C. capitata* and *A. fraterculus,* we are adding a new treatment schedule, T101-n-3, to treat kumquat for *C. capitata* and *A. fraterculus* when imported into the United States from countries that are authorized to export kumquat to the United States. The addition of the methyl bromide treatment for kumquat will ensure adequate quarantine security from fruit flies, and resolve the inconsistency inherent in § 319.56–59 that lists kumquat as a fruit that may be imported into the continental United States if treated in accordance with part 305 for *C. capitata* and *A. fraterculus.*

This treatment schedule will be listed in a separate section of the PPQ Treatment Manual, which will indicate that T101-n-3 was added through the immediate process described in § 305.3(b) and that is subject to change or removal based on public comment.

The reasons for this revision are described in a treatment evaluation document (TED) we have prepared to support this action. The TED may be viewed on the Regulations.gov Web site or in our reading room. You may also request paper copies of the TED by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**.

We are also announcing that we have prepared a finding of no significant

[1] The Treatment Manual is available at *http://www.aphis.usda.gov/import_export/plants/manuals/index.shtml* or by contacting the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Manuals Unit, 92 Thomas Johnson Drive, Suite 200, Frederick, MD 21702.

[2] To view the rule and supporting documents, including the environmental assessment, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0060*.

impact (FONSI) for this action. The FONSI, which is based on the environmental assessment (EA) prepared for the rulemaking that led to our July 2013 final rule, documents our conclusion that the importation of kumquats from Uruguay under the conditions prescribed in our July 2013 final rule, including treatment in accordance with the PPQ Treatment Manual, will not have a significant impact on the quality of the human environment.

The EA and FONSI were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

After reviewing the comments we receive, we will announce our decision regarding the new treatment schedule that is described in the TED in a subsequent notice, in accordance with paragraph (b)(3) of § 305.3. If we do not receive any comments, or the comments we receive do not change our determination that the treatment is effective, we will affirm the treatment schedule's addition to the PPQ Treatment Manual and make available a new version of the PPQ Treatment Manual in which T101-n-3 is listed in the main body of the manual. If we receive comments that lead us to determine that T101-n-3 needs to be changed or removed, we will make available a new version of the PPQ Treatment Manual that reflects the changes to or the removal of treatment schedule T101-n-3.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 23rd day of January 2014.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2014–01761 Filed 1–29–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Forestry Research Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Forestry Research Advisory Council (FRAC) will meet in Washington, DC. The Council is required by Section 1441 of the Agriculture and Food Act of 1981 to provide advice to the Secretary of Agriculture on accomplishing efficiently the purposes of the Act of October 10, 1962 (16 U.S.C. 582a, *et seq.*), commonly known as the McIntire-Stennis Act of 1962. The Council also provides advice relative to the Forest Service research program, authorized by the Forest and Rangeland Renewable Resources Research Act of 1978 (Pub. L. 95–307, 92 Stat. 353, as amended; 16 U.S.C. 1600 (note)). The meeting is open to the public.

DATES: The meeting will be held February 20 and 21, 2014, from 8:30 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at the Forest Service International Programs office located at 1 Thomas Circle, Suite 400, Washington, DC. Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses, when provided, are placed in the record and available for public inspection and copying. The public may inspect comments received at the USDA Forest Service—Washington Office. Visitors are encouraged to call ahead at 202–205–1665 to facilitate entry into the USDA Forest Service building.

FOR FURTHER INFORMATION CONTACT: Daina Apple, USDA Forest Service, Office of the Deputy Chief for Research and Development, by phone at 202–205–1665. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss current and emerging forestry and natural resource research issues. The discussion is limited to the Forest Service, National Institute of Food and Agriculture staff and Council members; however, persons who wish to bring forestry research matters to the attention of the Council may file written statements with the Council staff before or after the meeting. Written comments concerning this meeting should be addressed to Daina Apple, Designated Federal Officer, Forestry Research Advisory Council, USDA Forest Service, Office of Research and Development, Mail Stop 1120, 1400 Independence Ave. SW., Washington, DC 20250–1120, by February 14, 2014. Comments may also be sent via fascimile to 202–205–1530.

Meeting Accommodations: If you require sign language interpreting, assistive listening devices or other reasonable accommodation, please request this in advance of the meeting by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodations requests are managed on a case-by-case basis.

Dated: January 23, 2014.

Carlos Rodriguez-Franco,

Associate Deputy Chief, for Research and Development.

[FR Doc. 2014–01760 Filed 1–29–14; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Conflict of Interest Disclosure for Nonfederal Government Individuals Who Are Candidates to Conduct Peer Reviews.

OMB Control Number: 0648–0567.

Form Number(s): NA.

Type of Request: Regular submission (revision and extension of a current information collection)

Number of Respondents: 321.

Average Hours per Response: 30 minutes.

Burden Hours: 161.

Needs and Uses: This request is for revision and extension of a currently approved collection.

The Office of Management and Budget (OMB) issued government-wide guidance to enhance the practice of peer review of government science documents. OMB's Final Information Quality Bulletin for Peer Review (''Peer Review Bulletin'' or PRB) (available at *http://www.whitehouse.gov/omb/memoranda/fy2005/m05–03.pdf*) establishes minimum peer review standards for influential scientific information that Federal agencies intend to disseminate.

The Peer Review Bulletin also directs Federal agencies to adopt or adapt the National Academy of Sciences (NAS) policy for evaluating conflicts of interest when selecting peer reviewers who are

not Federal government employees (federal employees are subject to Federal ethics requirements). For peer review purposes, the term ''conflicts of interest'' means any financial or other interest which conflicts with the service of the individual because it could: (1) significantly impair the individual's objectivity; or (2) create an unfair competitive advantage for any person or organization. NOAA has adapted the NAS policy and developed two confidential conflict disclosure forms which the agency will use to examine prospective reviewers' potential financial conflicts and other interests that could impair objectivity or create an unfair advantage. One form is for peer reviewers of studies related to government regulation and the other form is for all other influential scientific information subject to the Peer Review Bulletin. The forms include questions about employment as well as investment and property interests and research funding. Curriculum vitae are also required. The information collected in the conflict of interest disclosure is essential to NOAA's compliance with the OMB PRB, and helps to ensure that government studies are reviewed by independent, impartial peer reviewers.

Revision: the form adapted from the general scientific and technical studies form, for Oceanic and Atmospheric Research (OAR) laboratory reviewers has not been used, and will be removed from the collection; OAR continues to use the previously existing form.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov*.

Dated: January 24, 2014.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2014–01795 Filed 1–29–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; State and Local Government Finance Forms

AGENCY: U.S. Census Bureau, Commerce.

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 March 31, 2014.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Jeff Barnett, Chief, Local Government Finance and Statistics Branch, Governments Division, U.S. Bureau of the Census, Washington, DC 20233–6800 (301–763–2787 or *Jeffrey.L.Barnett@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request clearance for the forms necessary to conduct the public finance program, which consists of an annual collection of information and a quinquennial collection in the census years ending in ''2'' and ''7''. During the upcoming three years, we intend to conduct the 2014 through 2016 Annual Surveys of State and Local Government Finances.

The Annual Surveys of State and Local Government Finances collect data on state government finances and estimates of local government revenue, expenditure, debt, assets, and pension systems nationally and within state areas. The surveys include the Annual Survey of State Government Finances, the Annual Survey of Local Government Finances, and the Annual Survey of Public Pensions. Data are collected for all agencies, departments, and institutions of the fifty state governments and for a sample of all local governments (counties, municipalities, townships, and special districts). Data for school districts are collected under a separate survey. In the census year, equivalent data are collected from all local governments.

The Census Bureau is exploring the possibility of reducing the number and content of items collected on survey forms of local government finances in the intercensal years. The reduction in form item collection will reduce respondent burden as well as reduce the time needed to edit, analyze, and disseminate data for the Annual Survey of Local Government Finances. Any final decisions on form revisions will be included in the formal clearance package submitted to the Office of Management and Budget after the comment period associated with this notice has ended. In addition, any reduction in form item collection occurring in 2014–2016 will be restored in the next quinquennial Census of Governments in 2017.

The Census Bureau provides these data to the Bureau of Economic Analysis to develop the public sector components of the National Income and Product Accounts and to the Federal Reserve Board for use in the Flow of Funds Accounts. Other Federal agencies that make use of the data include the Council of Economic Advisors, the Government Accountability Office, and the Department of Justice. Other users include state and local governments and related organizations, public policy groups, researchers, and private sector businesses.

Statistics are produced as data files in electronic formats. The program has collected comprehensive and comparable governmental statistics since 1957.

II. Method of Collection

These surveys use multiple modes for data collection including Internet collection, mail canvass, telephone, and central collection. Canvass methodology primarily consists of a mail out/mail back questionnaire and Internet data collection. Other methods used to collect data and maximize response include collecting state and local government data through submitted financial audits, state financial reports, and comprehensive financial reports.

The Census Bureau developed central collection agreements with state and large local government officials to collect the data from their dependent agencies and report to the Census Bureau as a central respondent. These arrangements eliminate the need for a mail canvass of approximately 4,000

governmental units. The arrangements reduce burden by greatly reducing the number of people who have to complete a form as the data are collected from a centralized source instead of from multiple sources. Currently, the Census Bureau has central collection arrangements to collect local government data with 28 states and state government data from all 50 states. The Census Bureau continues to expand the conversion of paper submissions into electronic formats by collaborating with state and local governments regarding electronic reporting of central collection data, and encouraging electronic responses from individual governments.

III. Data

OMB Control Number: 0607–0585.

Form Number: F–5, F–11, F–12, F–12(S), F–13, F–25, F–28, F–29, F–32, and F–42.

Type of Review: Regular submission.

Affected Public: State and local governments.

Estimated Number of Respondents: 11,895.

Estimated Time per Response: 2.910 hours.

Estimated Total Annual Burden Hours: 34,616.

Estimated Total Annual Cost: $888,391.

Respondents Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. 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: January 27, 2014.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2014–01834 Filed 1–29–14; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; SSA Supplement on Retirement, Pensions, and Related Content (SSA Supplement), 2014

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 March 31, 2014.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Jason M. Fields, Census Bureau, Room HQ–7H069, Washington, DC 20233–8400, (301) 763–2465 (or via the Internet at *jason.m.fields@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to conduct a survey for the Social Security Administration (SSA) beginning in September 2014. The survey is the SSA Supplement on Retirement, Pensions, and Related Content (SSA Supplement), which is the first externally sponsored supplement to the newly redesigned Survey of Income and Program Participation (SIPP). The sample for the SSA Supplement will come from completed interviews from Wave 1 of the 2014 panel of the Survey of Income and Program Participation, conducted from February to May of 2014 (2014 SIPP, OMB approval number 0607–0977). The SSA Supplement is expected to be conducted once per SIPP Panel, after the completion of Wave 1 interviews. Questions in the SSA Supplement are from 2008 SIPP topical modules selected by the SSA, with minimal modifications (2008 SIPP, OMB approval number 0607–0944).

The SSA bases two of its major policy micro-simulations on the SIPP: (1) Modeling Income in the Near Term (MINT) for evaluating Social Security reform; and, (2) the Financial Eligibility Model (FEM) for evaluating Supplemental Security Income, Qualified Medicare Beneficiary, and Medicare Part-D Low Income Subsidy programs. Recent economic events have had a profound impact on the overall economic well-being of our nation, and underscore the importance of the data the Social Security Administration is seeking to collect. Of specific importance to the SSA is the impact of this economic crisis on current and future beneficiaries. Since the 1996 SIPP panel, the SSA has used data collected by the SIPP for policy evaluation research and the modification of government programs. Prior to the 2014 SIPP redesign, the data came from core questions asked each wave and from intermittent topical supplements. As part of an effort to streamline the annual data collection in the SIPP instrument, the redesigned SIPP does not include some topical data previously used by the SSA for the MINT and FEM models. These items include detailed questions on personal retirement accounts, retirement and pension plans from current and previous employment, complete marital history, and functional limitations and disabilities affecting employment and daily living. The SSA Supplement will continue the collection of this necessary data which the SSA cannot obtain from any other source.

The Census Bureau, through sponsorship by the SSA, plans to collect the SSA Supplement data using Computer Assisted Telephone Interviewing (CATI). Interviews for the SSA supplement will not be conducted through personal visits.

Approximately 35,000 households are expected to be interviewed from the initial sample fielded in Wave 1 of the 2014 SIPP panel. Each household averages 2.1 people aged 15 and above, yielding approximately 73,500 person-level interviews. The sample for the SSA Supplement will consist of all households that have completed interviews, either in person or by telephone, from 2014 SIPP Wave 1. New additions to the household between the 2014 SIPP interview and the SSA Supplement interview will not be included in the SSA Supplement; however, movers will be followed and interviewed, as they are in the SIPP. Interviews take approximately 30 minutes per adult on average; consequently, the total burden for SSA Supplement interviews will be 36,750 hours.

The Census Bureau will release a public use file for availability to general data users via its Web site, with the ability to match to the 2014 SIPP public-use file.

II. Method of Collection

The SSA Supplement will use the Computer Assisted Telephone Interview (CATI) mode of data collection. The SSA Supplement will be conducted as one interview per person once per SIPP Panel, after the completion of Wave 1 interviews. The interviews for the SSA Supplement will be conducted via the Census Bureau's three telephone centers with all household members 15 years old or over using regular proxy-respondent rules. The SSA Supplement interviews are expected to last 2 to 3 months beginning in September 2014.

III. Data

OMB Control Number: 0607–XXXX.

Form Number: SSA Supplement/CATI Automated Instrument.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 73,500.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 36,750.

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 8(b) and Section 1110 of the Social Security Act.

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: January 24, 2014.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2014–01755 Filed 1–29–14; 8:45 am]

BILLING CODE 3511–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Renewing Order Temporarily Denying Export Privileges; Mahan Airways, et al.

In the matter of:

Mahan Airways, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran;

Zarand Aviation, a/k/a GIE Zarand Aviation, 42 Avenue Montaigne, 75008 Paris, France, and 112 Avenue Kleber, 75116 Paris, France;

Gatewick LLC, a/k/a Gatewick Freight & Cargo Services, a/k/a/Gatewick Aviation Services, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates;

Pejman Mahmood Kosarayanifard, a/k/a Kosarian Fard, P.O. Box 52404, Dubai, United Arab Emirates;

Mahmoud Amini, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404 Dubai, United Arab Emirates and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates;

Kerman Aviation, a/k/a GIE Kerman Aviation, 42 Avenue Montaigne 75008, Paris, France;

Sirjanco Trading LLC, P.O. Box 8709, Dubai, United Arab Emirates;

Ali Eslamian, 4th Floor, 33 Cavendish Square, London, W1G0PW, United Kingdom, and 2 Bentinck Close, Prince Albert Road St. Johns Wood, London NW87RY, United Kingdom;

Mahan Air General Trading LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates;

Skyco (UK) Ltd., 4th Floor, 33 Cavendish Square, London, W1G 0PV, United Kingdom;

Equipco (UK) Ltd., 2 Bentinck Close, Prince Albert Road, London, NW8 7RY, United Kingdom;

Mehdi Bahrami, Mahan Airways- Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey.

Order Renewing Order Temporarily Denying Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR Parts 730–774 (2013) (''EAR'' or the ''Regulations''), I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the July 31, 2013 Order Temporarily Denying the Export Privileges of Mahan Airways, Zarand Aviation, Gatewick LLC, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Ali Eslamian, Mahan Air General Trading LLC, Skyco (UK) Ltd., Equipco (UK) Ltd., and Mehdi Bahrami. I find that renewal of the Temporary Denial Order (''TDO'') is necessary in the public interest to prevent an imminent violation of the EAR.

I. Procedural History

On March 17, 2008, Darryl W. Jackson, the then-Assistant Secretary of Commerce for Export Enforcement (''Assistant Secretary''), signed a TDO denying Mahan Airways' export privileges for a period of 180 days on the grounds that its issuance was necessary in the public interest to prevent an imminent violation of the Regulations. The TDO also named as denied persons Blue Airways, of Yerevan, Armenia (''Blue Airways of Armenia''), as well as the ''Balli Group Respondents,'' namely, Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., and Blue Sky Six Ltd., all of the United Kingdom. The TDO was issued *ex parte* pursuant to Section 766.24(a), and went into effect on March 21, 2008, the date it was published in the **Federal Register**.

The TDO subsequently has been renewed in accordance with Section 766.24(d), including most recently on July 31, 2013.[1] As of March 9, 2010, the Balli Group Respondents and Blue Airways were no longer subject to the TDO. As part of the February 25, 2011 TDO renewal, Gatewick LLC, Mahmoud Amini, and Pejman Mahmood Kosarayanifard (''Kosarian Fard'') were added as related persons in accordance with Section 766.23 of the Regulations. On July 1, 2011, the TDO was modified by adding Zarand Aviation as a respondent in order to prevent an imminent violation. Specifically, Zarand Aviation owned an Airbus A310 subject to the Regulations that was being operated for the benefit of Mahan Airways in violation of both the TDO

[1] The July 31, 2013 Order was published in the **Federal Register** on August 7, 2013. 78 Fed. Reg. 48138 (Aug. 7, 2013). The TDO previously had been renewed on September 17, 2008, March 16, 2009, September 11, 2009, March 9, 2010, September 3, 2010, February 25, 2011, August 24, 2011, February 15, 2012, August 9, 2012, and February 4, 2013. The August 24, 2011 renewal followed the modification of the TDO on July 1, 2011, which added Zarand Aviation as a respondent. Each renewal or modification order was published in the **Federal Register**.

and the Regulations. As part of the August 24, 2011 renewal, Kerman Aviation, Sirjanco Trading LLC, and Ali Eslamian were added to the TDO as related persons. Mahan Air General Trading LLC, Skyco (UK) Ltd., and Equipco (UK) Ltd. were added as related persons on April 9, 2012. Mehdi Bahrami was added to the TDO as a related person as part of the February 4, 2013 renewal order.

On December 30, 2013, BIS, through its Office of Export Enforcement (''OEE''), submitted a written request for renewal of the TDO. The current TDO dated July 31, 2013, will expire on January 27, 2014, unless renewed on or before that date. Notice of the renewal request was provided to Mahan Airways and Zarand Aviation by delivery of a copy of the request in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to any aspect of the renewal of the TDO has been received from either Mahan Airways or Zarand Aviation. Furthermore, no appeal of the related person determinations I made as part of the September 3, 2010, February 25, 2011, August 24, 2011, April 9, 2012, and February 4, 2013 renewal or modification orders has been made by Gatewick LLC, Kosarian Fard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Ali Eslamian, Mahan Air General Trading LLC, Skyco (UK) Ltd., Equipco (UK) Ltd., or Mehdi Bahrami.[2]

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue or renew an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations. 15 CFR §§ 766.24(b)(1) and 776.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR § 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent [.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

B. The TDO and BIS's Request for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO and the TDO renewals in this matter and the evidence developed over the course of this investigation indicating a blatant disregard of U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s (''Aircraft 1–3''), items subject to the EAR and classified under Export Control Classification Number (''ECCN'') 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s (''Aircraft 4–6'') to Iran.

As discussed in the September 17, 2008 renewal order, evidence presented by BIS indicated that Aircraft 1–3 continued to be flown on Mahan Airways' routes after issuance of the TDO, in violation of the Regulations and the TDO itself.[3] It also showed that Aircraft 1–3 had been flown in further violation of the Regulations and the TDO on the routes of Iran Air, an Iranian Government airline. Moreover, as discussed in the March 16, 2009, September 11, 2009 and March 9, 2010 Renewal Orders, Mahan Airways registered Aircraft 1–3 in Iran, obtained Iranian tail numbers for them (including EP–MNA and EP–MNB), and continued to operate at least two of them in violation of the Regulations and the TDO,[4] while also committing an additional knowing and willful violation of the Regulations and the TDO when it negotiated for and acquired an additional U.S.-origin aircraft. The additional acquired aircraft was an MD–82 aircraft, which subsequently was painted in Mahan Airways' livery and flown on multiple Mahan Airways' routes under tail number TC–TUA.

The March 9, 2010 Renewal Order also noted that a court in the United Kingdom (''U.K.'') had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents had been litigating before the U.K. court concerning ownership and control of Aircraft 1–3. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, *inter alia,* that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 ''forward bookings'' for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

The September 3, 2010 renewal order discussed the fact that Mahan Airways' violations of the TDO extended beyond operating U.S.-origin aircraft in violation of the TDO and attempting to acquire additional U.S.-origin aircraft. In February 2009, while subject to the TDO, Mahan Airways participated in the export of computer motherboards, items subject to the Regulations and designated as EAR99, from the United States to Iran, via the United Arab Emirates (''UAE''), in violation of both the TDO and the Regulations, by transporting and/or forwarding the computer motherboards from the UAE to Iran. Mahan Airways' violations were facilitated by Gatewick LLC, which not only participated in the transaction, but also has stated to BIS that it acts as Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE.

Moreover, in a January 24, 2011 filing in the U.K. court, Mahan Airways asserted that Aircraft 1–3 were not being used, but stated in pertinent part that the aircraft were being maintained in Iran especially ''in an airworthy condition'' and that, depending on the outcome of its U.K. court appeal, the aircraft ''could immediately go back into service . . . on international routes into and out of Iran.'' Mahan Airways' January 24, 2011 submission to U.K. Court of Appeal, at p. 25, ¶¶ 108, 110. This clearly stated intent, both on its own and in conjunction with Mahan Airways' prior misconduct and statements, demonstrated the need to renew the TDO in order to prevent imminent future violations. Two of these three 747s subsequently were removed from Iran and are no longer in

[2] A party named or added as a related person may not oppose the issuance or renewal of the underlying temporary denial order, but may file an appeal of the related person determination in accordance with Section 766.23(c).

[3] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR §§ 764.2(a) and (k).

[4] The third Boeing 747 appeared to have undergone significant service maintenance and may not have been operational at the time of the March 9, 2010 renewal order.

Mahan Airway's possession. The third of these 747s, with Manufacturer's Serial Number (''MSN'') 23480 and Iranian tail number EP–MNE, remains in Iran under Mahan's control. Pursuant to Executive Order 13324, it was designated a Specially Designated Global Terrorist (''SDGT'') by the U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') on September 19, 2012.[5] Furthermore, as discussed in the February 4, 2013 Order, open source information indicated that this 747, which is painted in the livery and logo of Mahan Airways, has been flown between Iran and Syria, and is suspected of ferrying weapons and/or other equipment to the Syrian Government from Iran's Islamic Revolutionary Guard Corps. Open source information shows this aircraft remains in active operation in Mahan Airways' fleet and has been flown from Iran to Syria as recently as June 30, 2013.

In addition, as first detailed in the July 1, 2011 and August 24, 2011 orders, and discussed in the subsequent renewal orders in this matter, Mahan Airways also has continued to evade U.S. export control laws by operating two Airbus A310 aircraft, bearing Mahan Airways' livery, colors and logo, on flights into and out of Iran.[6] The aircraft are owned, respectively, by Zarand Aviation and Kerman Aviation, both of whose corporate registrations list Mahan Air General Trading as a member of their Groupement D'interet Economique (''Economic Interest Group'').[7] At the time of the July 1, 2011 and August 24, 2011 Orders, these Airbus A310s were registered in France, with tail numbers F–OJHH and F–OJHI, respectively. OEE subsequently presented evidence that after the August 24, 2011 renewal, Mahan Airways and Zarand Aviation worked in concert, along with Kerman Aviation, to de-register the two Airbus A310 aircraft in France and to register both aircraft in Iran (with, respectively, Iranian tail numbers EP–MHH and EP–MHI). It was determined subsequent to the February 15, 2012 renewal order that the registration switch for these A310s was cancelled; however, both aircraft continued to actively fly for Mahan Airways under the original French tail numbers.

In addition to Mahan Airways' continued unlawful operation and/or possession of these two A310s, as well as the remaining 747 (MSN 23480 and Iranian tail number EP–MNE) discussed above, the August 2012 renewal order found that Mahan Airways had acquired another Airbus A310 aircraft subject to the Regulations,[8] with MSN 499 and Iranian tail number EP–VIP, in violation of the TDO and the Regulations. On September 19, 2012, all three Airbus A310 aircraft (tail numbers F–OJHH, F–OJHI, and EP–VIP) were designated as SDGTs.[9]

The February 4, 2013 Order laid out further evidence of continued and additional efforts by Mahan Airways and other persons acting in concert with Mahan, including Kral Aviation and another Turkish company, to procure U.S.-origin engines (MSNs 517621 and 517738) and other aircraft parts in violation of the TDO and the Regulations.[10] The February 4, 2013 renewal order also added Mehdi Bahrami as a related person in accordance with Section 766.23 of the Regulations. Bahrami, a Mahan Vice-President and the head of Mahan's Istanbul Office, also was involved in Mahan's acquisition of the original three Boeing 747s (Aircraft 1–3) that resulted in the original TDO, and has had a business relationship with Mahan dating back to 1997.

The July 31, 2013 Order detailed additional evidence obtained by OEE showing efforts by Mahan Airways to obtain another GE CF6–50C2 aircraft engine (MSN 528350) from the United States via Turkey. Multiple Mahan employees, including Mehdi Bahrami, were involved in or aware of matters related to the engine's arrival in Turkey from the United States, plans to visually inspect the engine, and prepare it for shipment from Turkey.

Mahan sought to obtain this U.S.-origin engine through Pioneer Logistics Havacilik Turizm Yonetim Danismanlik (''Pioneer Logistics''), an aircraft parts supplier located in Turkey, and its director/operator, Gulnihal Yegane, a Turkish national who previously has conducted Mahan related business with Mehdi Bahrami and Ali Eslamian. Moreover, as referenced in the July 31, 2013 Order, a sworn affidavit by Kosol Surinanda, also known as Kosol Surinandha, Managing Director of Mahan's General Sales Agent in Thailand, stated that the shares of Pioneer Logistics for which he is the listed owner are ''actually the property of and owned by Mahan.'' He further stated that he held ''legal title to the shares until otherwise required by Mahan'' but would ''exercise the rights granted to [him] exactly and only as instructed by Mahan and [his] vote and/or decisions [would] only and exclusively reflect the wills and demands of Mahan[.]'' [11]

OEE's current renewal request includes evidence discovered or obtained after the July 31, 2013 Order was issued that further establishes Mahan's continued efforts to evade and violate the TDO and the Regulations, including through efforts to further expand its network of procurement agents. OEE has obtained evidence confirming an attempt by Mahan, which OEE thwarted, to obtain, via an Indonesian aircraft parts supplier, two U.S.-origin Honeywell ALF–502R–5 aircraft engines (MSNs LF5660 and LF5325), items subject to the Regulations, from a U.S. company located in Texas. An invoice of the Indonesian aircraft parts supplier dated March 27, 2013, lists Mahan Airways as the purchaser of the engines and includes a Mahan ship-to address. OEE also has obtained a Mahan air waybill dated March 12, 2013, listing numerous U.S.-origin aircraft parts, including, but not limited to, a vertical navigation gyroscope, a transmitter, and a power control unit, items subject to the Regulations, being transported by

[5] See *http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.*

[6] The Airbus A310s are powered with U.S.-origin engines. The engines are subject to the EAR and classified under Export Control Classification (''ECCN'') 9A991.d. The Airbus A310s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR. They are classified under ECCN 9A991.b. The reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Section 746.7 of the Regulations.

[7] Kerman Aviation's corporate registration also lists Mahan Aviation Services Company as an additional member of its Economic Interest Group.

[8] See note 6, *supra.*

[9] See *http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.* Mahan Airways was previously designated by OFAC as a SDGT on October 18, 2011. 77 FR 64,427 (October 18, 2011).

[10] Kral Aviation was referenced in the February 4, 2013 Order as ''Turkish Company No. 1.'' Kral Aviation purchased a GE CF6–50C2 aircraft engine (MSN517621) from the United States in July 2012, on behalf of Mahan Airways. OEE was able to prevent this engine from reaching Mahan by issuing a redelivery order to the freight forwarder in accordance with Section 758.8 of the Regulations. OEE also issued Kral Aviation a redelivery order for the second CF6–50C2 engine (MSN 517738) on July 30, 2012. The owner of the second engine subsequently cancelled the item's sale to Kral Aviation. In September 2012, OEE was alerted by a U.S. exporter that another Turkish company (''Turkish Company No. 2'') was attempting to purchase aircraft spare parts intended for re-export by Turkish Company No. 2 to Mahan Airways. *See* February 4, 2013 Order.

On December 31, 2013, Kral Aviation was added to BIS's Entity List, Supplement No. 4 to Part 744 of the Regulations. *See* 78 Fed. Reg.75458 (Dec. 12, 2013). Companies and individuals are added to the Entity List for engaging in activities contrary to the national security or foreign policy interests of the United States. *See* 15 CFR § 744.11.

[11] Pioneer Logistics, Gulnihal Yegane, and Kosol Surinanda also were added to the Entity List on December 12, 2013. *See* 78 FR 75458 (Dec. 12, 2013).

Mahan from Turkey to Iran in violation of the TDO.

Finally, Mahan continues to publically list in its active fleet both U.S.-origin aircraft and aircraft such as the Airbus A310, which, based on its U.S.-origin engines, is subject to the Regulations.

C. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that Mahan Airways has continually violated the EAR and the TDO, that such knowing violations have been significant, deliberate and covert, and that there is a likelihood of future violations. The record includes further evidence uncovered by OEE since the July 31, 2013 Order regarding on-going efforts by Mahan Airways in concert with its far-reaching network of affiliates and agents to procure EAR items in violation of the TDO and the Regulations. Therefore, renewal of the TDO is necessary to prevent imminent violation of the EAR and to give notice to companies and individuals in the United States and abroad that they should continue to cease dealing with Mahan Airways, Zarand Aviation, and the other denied persons under the TDO in export transactions involving items subject to the EAR.

IV. Order

It is therefore ordered:

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; ZARAND AVIATION A/K/A GIE ZARAND AVIATION, 42 Avenue Montaigne, 75008 Paris, France, and 112 Avenue Kleber, 75116 Paris, France; GATEWICK LLC, A/K/A GATEWICK FREIGHT & CARGO SERVICES, A/K/A GATEWICK AVIATION SERVICE, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; PEJMAN MAHMOOD KOSARAYANIFARD A/K/A KOSARIAN FARD, P.O. Box 52404, Dubai, United Arab Emirates; MAHMOUD AMINI, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; KERMAN AVIATION A/K/A GIE KERMAN AVIATION, 42 Avenue Montaigne 75008, Paris, France; SIRJANCO TRADING LLC, P.O. Box 8709, Dubai, United Arab Emirates; ALI ESLAMIAN, 4th Floor, 33 Cavendish Square, London W1G0PW, United Kingdom, and 2 Bentinck Close, Prince Albert Road, St. Johns Wood, London NW87RY, United Kingdom; MAHAN AIR GENERAL TRADING LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates; SKYCO (UK) LTD., 4th Floor, 33 Cavendish Square, London, W1G 0PV, United Kingdom; EQUIPCO (UK) LTD., 2 Bentinck Close, Prince Albert Road, London, NW8 7RY, United Kingdom; and MEHDI BAHRAMI, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey; and when acting for or on their behalf, any successors or assigns, agents, or employees (each a ''Denied Person'' and collectively the ''Denied Persons'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Export Administration Regulations (''EAR''), or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

SECOND, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

THIRD, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

FOURTH, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Sections 766.24(e) of the EAR, Mahan Airways and/or Zarand Aviation may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022. In accordance with the provisions of Sections 766.23(c)(2) and 766.24(e)(3) of the EAR, Gatewick LLC, Mahmoud Amini, Pejman Mahmood Kosarayanifard, Kerman Aviation, Sirjanco Trading LLC, Ali Eslamian, Mahan Air General Trading LLC, Skyco (UK) Ltd., Equipco (UK) Ltd., and/or Mehdi Bahrami may, at any time, appeal their inclusion as a related person by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Mahan Airways and/or Zarand Aviation as

provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Mahan Airways, Zarand Aviation and each related person, and shall be published in the **Federal Register**. This Order is effective immediately and shall remain in effect for 180 days.

Dated: January 24, 2014.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2014–01835 Filed 1–29–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–898]

Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 10, 2013, the Department of Commerce (the Department) published its *Preliminary Results* of the 2011–2012 administrative review of the antidumping duty order on chlorinated isocyanurates (chloro isos) from the People's Republic of China (PRC).[1] The period of review (POR) is June 1, 2011, through May 31, 2012. This review covers six producers/exporters of subject merchandise: (1) Arch Chemicals (China) Co. Ltd. (Arch China); (2) Hebei Jiheng Chemical Co., Ltd. and Hebei Jiheng Baikang Chemical Industry Co., Ltd. (collectively, Jiheng); (3) Heze Huayi Chemical Co. Ltd. (Heze); (4) Juancheng Kantgai Chemical Co., Ltd. (collectively, Kangtai); (5) Sinocarbon International Trading Co., Ltd. (Sinocarbon); and (6) Zhucheng Taisheng Chemical Co., Ltd. (Zhucheng). Jiheng and Kangtai are the mandatory respondents. We invited parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we made certain changes to our margin calculations for Jiheng and Kangtai. The final dumping margins for this review are listed in the ''Final Results'' section below.

DATES: *Effective Date:* January 30, 2014.

FOR FURTHER INFORMATION CONTACT: Sean Cary or Emily Halle, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3964 or (202) 482–0176, respectively.

Background

On July 10, 2013, the Department published its *Preliminary Results.* On August 9, 2013, Jiheng and Kangtai each submitted a hearing request to address issues raised in their case and rebuttal case briefs. On August 15, 2013, the Department extended the deadline for the final results in this administrative review until January 6, 2014.[2] The Department conducted a verification of Kangtai between September 23 and September 27, 2013.[3] On November 29, 2013, Clearon Corporation and Occidental Chemical Corporation (collectively, Petitioners), Jiheng, and Kangtai each submitted a case brief.[4] On December 4 and 5, 2013, Jiheng, Petitioners, and Kangtai each submitted a rebuttal case brief.[5] On January 7, 2014, we held a public hearing to address issues raised in the case and rebuttal briefs.[6]

As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, 2013, through October 16, 2013.[7] Therefore, all deadlines in this segment of the proceeding were extended by 16 days. Therefore, the revised deadline for the final results of this review is January 22, 2014.

Scope of the Order

The products covered by the order are chlorinated isos, which are derivatives of cyanuric acid, described as chlorinated s-triazine triones. Chlorinated isos are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.5000 of the Harmonized Tariff Schedule of the United States.[8]

Final Determination of No Shipments

For these final results of review, we continue to find that Heze had no shipments during the POR.[9]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary*

[1] *See* Chlorinated Isocyanurates From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012, 78 FR 41364 (July 10, 2013) (*Preliminary Results*).

[2] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, ''Chlorinated Isocyanurates from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' (August 15, 2013).

[3] *See* Memorandum to the File, ''Verification of the Sales and Factors Response of Juancheng Kangtai Chemical Co., Ltd. in the Antidumping Review of Chlorinated Isocyanurates from the People's Republic of China,'' (November 29, 2013).

[4] *See* ''Case Brief of Clearon Corp. and Occidental Chemical Corporation,'' (November 29, 2013); ''Chlorinated Isocyanurates from China (Seventh Administrative Review)—Hebei Jiheng Chemical Co., Ltd. Case Brief,'' (November 29, 2013) and; ''Chlorinated Isocyanurates from the People's Republic of China Kangtai Case Brief,'' (November 29, 2013).

[5] *See* ''Chlorinated Isocyanurates from China (Seventh Administrative Review)—Hebei Jiheng Chemical Co., Ltd. Rebuttal Brief,'' (December 4, 2013); ''Rebuttal Brief of Clearon Corp. And Occidental Chemical Corporation,'' (December 5, 2013); and ''Chlorinated Isocyanurates from the People's Republic of China Kangtai Rebuttal Brief,'' (December 5, 2013).

[6] *See* ''Public Hearing in the Matter of: Administrative Review under the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China,'' (January 7, 2014).

[7] *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Shutdown of the Federal Government,'' (October 18, 2013).

[8] *See* Memorandum to Christian Marsh, Acting Secretary for Enforcement and Compliance, ''Chlorinated Isocyanurates from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2011–2012 Antidumping Duty Administrative Review,'' issued concurrently with this notice (Issues and Decision Memorandum) for a complete description of the scope of the Order.

[9] *See Preliminary Results,* 78 FR 41364.

Results, we have made revisions to the margin calculations for Jiheng and Kangtai.[10]

Separate Rates

In our *Preliminary Results,* we determined that Arch China, Sinoacarbon, and Zhucheng each demonstrated their eligibility for separate rates status.[11] We have not received any information since the issuance of the *Preliminary Results* that provides a basis for reconsideration of this determination. Therefore, the Department continues to find that Arch China, Sinoacarbon, and Zhucheng are each eligible for separate rate status.

Final Results

We determine that the following weighted-average dumping margins exist for the POR:

Exporter	Weighted-average dumping margin (percentage)
Arch Chemicals (China) Co. Ltd.*	53.15
Hebei Jiheng Chemical Co., Ltd.	47.17
Juancheng Kangtai Chemical Co., Ltd.	59.12
Sinoacarbon International Trading Co., Ltd.*	53.15
Zhucheng Taisheng Chemical Co., Ltd.*	53.15

* These companies demonstrated eligibility for a separate rate in this administrative review. The rate for these companies is the simple average of the calculated antidumping duty rates for Jiheng and Kangtai.

Assessment Rates

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of these final results of this review. In accordance with 19 CFR 351.212(b)(1), we are calculating importer- (or customer-) specific assessment rates for the merchandise subject to this review. For any individually examined respondent whose weighted-average dumping margin is above *de minimis* (*i.e.,* 0.50 percent), the Department will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of sales.[12] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate is above *de minimis.* Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The Department announced a refinement to its assessment practice in non-market economy (NME) cases. Pursuant to this refinement in practice, for entries that were not reported in the U.S. sales databases submitted by companies individually examined during this review, the Department will instruct CBP to liquidate such entries at the NME-wide rate. In addition, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the NME-wide rate. For a full discussion of this practice, *see Assessment in NME Antidumping Proceedings.*[13]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act): (1) For Heze, which claimed no shipments, the cash deposit rate will remain unchanged from the rate assigned to Heze in the most recently completed review of the company; (2) for Jiheng and Kangtai, the cash deposit rate be 47.17 percent and 53.15 percent, respectively; (3) for previously investigated or reviewed PRC and non-PRC exporters that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (4) or all PRC exporters of subject merchandise that have not been found to be entitled a separate rate, the cash deposit rate will be that for the PRC-wide entity established in the final determination of the less than fair value investigation (*i.e.,* 285.63 percent); and (5) 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 exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure

We will disclose the calculations performed regarding these final results within five days of the date of publication of this notice in this proceeding in accordance with 19 CFR 351.224(b).

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and that subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations

[10] *See* Issues and Decision Memorandum.

[11] *See Preliminary Results,* 78 FR 41364.

[12] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[13] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*Assessment in NME Antidumping Proceedings*).

and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: January 22, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—Issues and Decision Memorandum

Comment 1: Selection of Surrogate Country
Comment 2: Selection of Surrogate Values if the Department Continues to Use the Philippines as the Primary Surrogate Country:
A. Steam
B. Water
C. Ammonium Sulfate
D. Labor
E. Electricity
F. Sulfuric Acid
G. Chlorine
H. Ammonium Chloride
Comment 3: Selection of Surrogate Values if the Department Chooses Thailand as the Primary Surrogate Country:
A. Ammonium Chloride
B. Chlorine
Comment 4: Whether the Department is Authorized by Law to Apply the Alternative Methodology under Section 777A(d)(1)(B) of the Act to Annual Reviews
A. Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Less-Than-Fair-Value Investigations
B. Consideration of an Alternative Comparison Method in an Administrative Review
C. The Average-to-Transaction Method and the Denial of Offsets for Non-Dumped Sales
D. Differential Pricing Analysis
Comment 5: Methodological Issues
A. Value-Added Tax (VAT) Adjustment for Kangtai's and Jiheng's U.S. Sales
B. By-Product Offsets
C. Adjusting the Value of By-Product Hydrogen to Eliminate the Cost of Ocean Shipping Containers
D. Adjusting for the Concentration of Sodium Hydroxide
E. Valuing Well Water as a Factor of Production
Comment 6: Ministerial Errors
A. Conversion Errors
B. Double-Counting of VAT
C. Calculation of Inter-Company Transportation Costs for Intermediate Chemicals
D. Calculation of Financial Ratios

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 131105931–3931–01]

RIN 0648–XC970

Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition to List the Caribbean Electric Ray as Threatened or Endangered Under the Endangered Species Act (ESA)

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

ACTION: Notice of 90-day petition finding, request for information, and initiation of status review.

SUMMARY: We (NMFS) announce a 90-day finding on a petition to list the Caribbean electric ray (*Narcine bancroftii*) as threatened or endangered under the ESA. We find that the petition and information readily available in our files present substantial scientific or commercial information indicating that the petitioned action may be warranted. We will conduct a status review of the species to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species from any interested party.

DATES: Information and comments on the subject action must be received by March 31, 2014.

ADDRESSES: You may submit comments, information, or data on this document, identified by the code NOAA–NMFS–2014–0011, by any of the following methods:

• *Electronic Submissions*: Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0011,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Therese Conant, NMFS, Office of Protected Resources, (301) 427–8456.

SUPPLEMENTARY INFORMATION:

Background

On September 7, 2010, we received a petition from WildEarth Guardians to list the Caribbean electric ray as threatened or endangered throughout its historic and current range and to designate critical habitat within the territory of the United States concurrently with listing the species under the ESA. On March 22, 2011 (76 FR 15947), we made a 90-day finding that the petition did not present substantial scientific or commercial information indicating that the petitioned action may be warranted. On March 22, 2012, we received a 60-day notice of intent to sue from WildEarth Guardians on the negative 90-day finding. On February 26, 2013, WildEarth Guardians filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Florida, Tampa Division, on the negative 90-day finding. On October 1, 2013, we entered a court settlement agreement to accept a supplement to the 2010 petition, if any is provided, and to make a new 90-day finding based on the 2010 petition, its supplement, and any additional information readily available in our files. On October 31, 2013, we received a supplemental petition from WildEarth Guardians and Defenders of Wildlife.

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When a petition includes substantial scientific or commercial information indicating that the petitioned action may be warranted (a ''positive 90-day finding''), we are required to promptly commence a review of the status of the species concerned, which includes conducting a

comprehensive review of the best available scientific and commercial information. In such cases, and within 12 months of receipt of the petition, we must conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a finding that the ''petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted'' at this point does not predetermine the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any DPS that interbreeds when mature (16 U.S.C. 1532(16)). A joint NMFS–USFWS (jointly, ''the Services'') policy (DPS Policy) clarifies the agencies' interpretation of the phrase ''distinct population segment'' for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). A species, subspecies, or DPS is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five section 4(a)(1) factors: (1) The present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define ''substantial information'' in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Judicial decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petition presents substantial information indicating the petitioned action ''may be'' warranted. As a general matter, these decisions hold that a petition need not establish a ''strong likelihood'' or a ''high probability'' that a species is either threatened or endangered to support a positive 90-day finding.

At the 90-day finding stage, we evaluate the petitioners' request based upon the information in the petition including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information readily available in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating that the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating that the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (e.g., population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; we then assess the potential significance of that negative response.

Many petitions identify risk classifications made by non-governmental organizations, such as the International Union on the Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by other organizations or made under other Federal or state statutes may be informative, but such classification alone may not provide the rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do ''not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act'' because NatureServe assessments ''have different criteria, evidence

requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide'' (*http://www.natureserve.org/prodServices/statusAssessment.jsp*). Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Analysis of the Petition

The following analyzes the 2010 petition from WildEarth Guardians and the 2013 supplement to the petition from WildEarth Guardians and Defenders of Wildlife.

General

The petition clearly indicates the administrative measure recommended and gives the scientific and common name of the species. Based on the information presented in the petition, the supplement to the petition, along with the information readily available in our files, we find that the petitioned species, *Narcine bancroftii,* constitutes a valid ''species'' eligible for listing under the ESA as it is considered a valid taxonomic species. The petition also contains a narrative justification for the recommended measures and provides limited information on the species' geographic distribution, habitat, and threats. Finally, the petition is accompanied by supporting documentation.

Species Description and Distribution

The petition describes the Caribbean electric ray as a small, shallow-water ray found on soft, sandy substrates from the intertidal zone to depths of 35 m (Carvalho *et al.* 2007) to 55 meters (Press 2010). It concentrates in the surf zone or sand bars adjacent to barrier beaches during warm months and moves offshore in winter (Rudloe 1989). It is the only electric ray that inhabits shallow waters along the United States coastline. The Caribbean electric ray is sandy or brown in color with darker, dusty blotches, and the underside is white to creamy, sometimes with grey or brown blotches (McEachran and Carvalho 2002). It is characterized by a flattened, oval-shaped disc, large pelvic fins, and oversized dorsal and caudal fins that cover most of its tapering tail (Tricas *et al.* 1997). The Caribbean electric ray produces 14–37 volts of electricity that can deliver a small jolt but is not strong enough to harm humans (Smith 1997; Tricas *et al.* 1997). The shock may be used to stun prey or as a defense against predators (Smith 1997). The Caribbean electric ray eats bottom-dwelling invertebrates, primarily sand worms, but also small fishes, young snake eels, anemones, and crustaceans (Tricas *et al.* 1997; Press 2010). Predators include large fishes and sharks (Press 2010).

Caribbean electric ray males mature at a size of 22–33 cm and females at 20–26 cm body length. It can reach a maximum size of 60 cm total length (Press 2010; Carvalho *et al.* 2007). Females reach sexual maturity at about two years (Carvalho *et al.* 2007) and retain developing embryos during a three-month gestation period (Press 2010). However, diapause is possible, extending the gestation period to up to 11–12 months (Press 2010). Embryos are first nourished with yolk and then with histotroph, a protein-rich liquid (Press 2010). Females move into the surf zone in late summer to bear approximately 20 live pups (Smith 1997; Tricas *et al.* 1997; McEachran and Carvalho 2002; Carvalho *et al.* 2007). Pups average about 11 cm in length at birth and, like other sharks and rays, have a more intense color pattern than adults (Tricas *et al.* 1997). At birth, the young are able to produce the electrical charge (Press 2010).

The petition cites Carvalho *et al.* (2007), which describes the Caribbean electric ray as ranging in the western Atlantic from North Carolina, through the Gulf of Mexico, the Caribbean (except for the Bahamas where its presence is unknown), the Lesser and Greater Antilles, and the north coast of South America. Individual populations are localized, but individuals move onshore during warm months and offshore during winter months in the Gulf of Mexico (Rudloe 1989).

Species Status

The petition states the ray has declined 98 percent since 1972 in the northern Gulf of Mexico citing Carvalho *et al.,* (2007). The petition refers to a study by Shepherd and Myers (2005) that estimated the species' relative abundance from fisheries independent survey data available from 1972 to 2002. The data presented in that study show what appears to be a significant decline in mean standardized catch per tow of the Caribbean electric ray from 1972 to 1973, then consistently low catch through 2002. Shepherd and Myers (2005) found steep declines in catch per tow for shallow water shark and ray species, including the Caribbean electric ray, while catch per tow increased for deep water species. They concluded, ''While a suitable time series of elasmobranch bycatch in this fishery [shrimp] was not available, our results and supporting evidence suggest that the declines we observed are because of bycatch in the shrimp trawl fishery, from which deeper waters provide refuge.'' Shepherd and Myers (2005; supplement S2) found a more positive, but not significant, trend in Caribbean electric ray abundance since 1992 when turtle excluder devices (TEDs) were required by regulation to be used in shrimp trawls operating in the Gulf of Mexico.

Additional data in our files is from the Southeast Area Monitoring and Assessment Program (SEAMAP-Gulf of Mexico *http://seamap.gsmfc.org/*) for the period 1992 through 2012 regarding the annual capture of Caribbean electric rays. This is a continuation of the same dataset analyzed by Shepherd and Myers (2005). Using the NMFS Gulf Shrimp Landing Statistical Zones (for a Zone map see Figure 1: *http://www.sefsc.noaa.gov/sedar/download/S27_RD_05_SEAMAP%20TRAWL%20PROTOCOL.pdf?id=DOCUMENT*) we analyzed the additional data at finer geographic resolution. That analysis shows high variability in catch both temporally and spatially. For example, if we divide the data by decade in Zone 11 (off shore Mississippi and Alabama) in the autumn, 60 Caribbean electric rays were counted between 1982 to 1991; 25 between 1992–2001; and 20 between 2002–2011. During spring in the same Zone 11, 97 Caribbean electric rays were counted between 1982–1991 and 0 between 1992–2011. In Zone 12 (off shore Louisiana), 19 Caribbean electric rays were counted in 1989 and virtually were absent in all other years. Yet other zones appear to have increased counts of Caribbean electric rays. For example, Zone 20 (off shore mid to lower Texas) during the summer, 1 Caribbean electric ray was captured between 1982–1991; 4 between 1992–2001; and 34 between 2002–2011. The apparent trends in the counts could be due to many factors, including sampling error, sampling regime (e.g., not consistently sampling habitat types where the Caribbean electric ray is found), and environmental conditions that cue the ray to congregate or disperse. However, this interpretation is tempered by the Shepherd and Myers (2005) abundance study in the northern Gulf of Mexico, and the examination of the updated SEMAP- GOM showing high counts in some zones followed by zero counts over several decades. In the absence of a detailed sampling regime for the SEMAP–GOM surveys, we would anticipate such long-term data set to account, in part, for catch variability due to distribution and

abundance or sampling regimes. Thus, one fair interpretation of the data is that localized populations are being depleted in some areas of the northern Gulf of Mexico.

The petition cites Shepherd and Myers (2005) claiming that the population has decreased around 95 percent in coastal areas between Cape Canaveral, Florida, and Cape Hatteras, North Carolina, in trawl surveys between 1989 and 2001. Although we were unable to find such statement in the referenced study, we found it in the IUCN report (Carvalho *et al.* 2007). We accept the characterization of the information at this 90-day finding, but note that Carvalho *et al.* (2007) provide no citation or source to support their statement. Also, we were unable to locate information readily available in our files to support the statement. The 2013 supplement to the petition provided Southeast Area Monitoring and Assessment Program (SEAMAP–SA) reports from 1990 through 2007 (*https://www.dnr.sc.gov/marine/mrri/SEAMAP/SMreports.html*). SEMAP trawl surveys were conducted in coastal waters from Cape Hatteras, North Carolina, south to Cape Canaveral, Florida. From 1990–2000, 98 Caribbean electric rays were counted, of which 96 were reported from shallow water (4–10 meter depth) surveys. In 2001, outer strata sampling stations were eliminated and inner strata stations increased from 78 to 102. Given that the majority of rays were found in shallow water strata, we averaged the annual number of Caribbean electric rays counted at shallow water stations from 1990 through 2000 (8.7 rays/year) and 2001 (the year sampling methods changed) through 2007 (7.9 rays/year). The data can also be presented as the number of Caribbean electric ray observations per unit sampling effort for inner strata stations, which shows 0.037 (96 observations/2570 inner strata stations) from 1990 through 2000 and 0.026 (55 observations/2142 inner strata stations) from 2001 through 2007. We do not have the raw data to derive the confidence intervals around all of these numbers, and we cannot assume a normal distribution given the possibility of catch variability. However, the numbers are lower in recent years, which may indicate changes in sampling regimes, habitat type surveyed, or localized environmental events. Also plausible, the lower counts in recent years may indicate a decline in the Caribbean electric ray population in the region.

The petitioner claims the Caribbean electric ray has such a critically low population count that it is increasingly vulnerable to extirpation from stochastic events. To determine that there is substantial information indicating that the species may be in danger of extinction now or in the foreseeable future due to small population size or stochastic events, information provided in the petition or readily available in our files should be specific to the species and should reasonably suggest that these factors may be operative threats that act on the species to the point that it may warrant protection under the ESA. Broad statements about a generalized threat to species with small populations do not constitute substantial information that listing may be warranted. The petition mischaracterizes Rudloe (1989) as indicating the Caribbean electric ray exhibits small home ranges and is highly localized within an area (Rudloe 1989). Instead, Rudloe (1989) reports on capture of Caribbean electric rays from four offshore stations where sampling was designed to include areas utilized by the species at various seasons as the ray moves on and offshore through the year. Rudloe (1989) found that the Caribbean electric ray was ''concentrated over an extremely limited area on each bar'' and ''as little as several tens of meters change in position could determine whether there were two or 20 rays.'' The petition cites Rudloe (1989) stating the Caribbean electric ray does not migrate extensively. Rudloe (1989) tagged 455 rays and released them at the point of capture off Franklin and Gulf Counties, Florida. Ten rays were recaptured between 1 and 7 months. Although Rudloe (1989) did not provide distances between release and recapture, three of the 10 were found at the release point after 1 or 2 months, and an examination of maps indicate those that travelled went a linear distance of approximately 25 miles (40 km) between release and recapture. Rudloe (1989) did not provide population estimates but concluded that ''. . . its low rate of reproduction and localized distribution make it highly vulnerable to over fishing.''

Although, the petition fails to provide substantial evidence that the Caribbean electric ray's population is critically low throughout its range, data in the petition and in our files suggest the number of Caribbean electric rays reported from fisheries independent survey data has been variable (SEAMAP-Gulf of Mexico *http://seamap.gsmfc.org*) and declines of 98 percent of their 1972 survey abundance may have occurred in the northern Gulf of Mexico (Shepherd and Myers 2005). Also, fewer rays have been reported annually since 2001 despite increased sampling in nearshore waters along the U.S. Atlantic coast (SEAMAP-Gulf of Mexico *http://seamap.gsmfc.org*). However, the petition and information in our files do not provide evidence that the species' distribution and abundance is vulnerable to threats and at greater extinction risk due to stochastic and chronic events.

The petition describes several other demographic factors specific to the Caribbean electric ray that could indicate extinction risk, including the abortion of embryos by gravid females when stressed (Acevedo *et al.* 2007a) and low survival rates of incidentally caught individuals (Carvalho *et al.* 2007; Moreno *et al.* 2010). The majority of the other demographic factors are discussed in the IUCN (Carvalho *et al.* 2007) synopsis of the threats to the species, which the petitioner relies heavily upon to support the assertion that the Caribbean electric ray is imperiled. The IUCN could not identify a population trend for the Caribbean electric ray.

The petition cites the abortion of embryos by gravid females caught in shrimp trawls as another characteristic that imperils the species by lowering its reproductive output (Acevedo *et al.* 2007a). The petition cites Acevedo *et al.* (2007a) as a source for abortions by gravid females as a result in Colombian artisanal shrimp fisheries. Acevedo *et al.* (2007a) reported on two adult females caught in Colombian artisanal shrimp fisheries and one female had placental material in the uterus. It is unclear whether the exposure to the fishery was the cause for the absence of embryos or whether the individual had given birth recently. Although removing gravid females from a population is a characteristic that would lower reproductive output, the petition provides no information on the rate at which gravid females are caught or the rate of spontaneous natural abortion. The petition also asserts that Caribbean electric rays are generally discarded at sea, and survivorship rates are believed to be quite low, citing Moreno *et al.* (2010) and the IUCN's assessment of the species (Carvalho *et al.,* 2007). Moreno *et al.* (2010) state the Caribbean electric ray has no commercial value in Colombia and is returned to the sea. They do not provide data on bycatch condition or survivability. Review of the IUCN assessment provided no additional information, and we have no information readily available in our files on the survivorship of incidentally caught Caribbean electric rays. Beyond the IUCN statement, the petition provides no additional information on

the survival rates of Caribbean electric rays incidentally caught in shrimp trawls. Without specific information on the extent of bycatch of reproductive females, rates of abortion, and post-interaction survivorship, it is difficult to determine what effects these traits may have on the species' extinction risk.

The petition cites García *et al.* (2010) who found that chondrichthyans tend to have a higher extinction risk if they are matrotrophically viviparous (*i.e.,* embryos are nourished by their mothers during development) as are Caribbean electric rays. Garcia *et al.* (2010) also found that the life-history traits and the extinction risk of chondrichthyans are highly associated with habitat. That is, deep water chondrichthyans with longer turnover times (i.e. slower growth, later age at maturity, and higher longevity) are at higher risk of extinction than oceanic and continental shelf chondrichthyans (Garcia *et al.* 2010) as are Caribbean electric rays. These data on life-history traits and extinction risk are general statements on risk to the Class Chondrichthyans and are not specific to the Caribbean electric ray. Broad statements about generalized extinction vulnerability do not constitute substantial information indicating that listing may be warranted due to concerns for extinction risk.

Threats to the Caribbean Electric Ray

The petition asserts that the Caribbean electric ray meet three of the ESA section 4(a)(1) listing factors: The present or threatened destruction, modification, or curtailment of habitat or range; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species' existence.

In terms of habitat destruction, the petition claims the Caribbean electric ray is threatened from energy development, burgeoning human populations, and other pressures. The petition states that although the Caribbean electric ray's range is relatively large, localized habitat loss and degradation are threats to significant portions of the species' range. The petition also makes a general reference to how coastal areas of the United States and other nations are being threatened and destroyed, and references studies suggesting these changes are affecting all species of sharks and rays (Camhi *et al.,* 1998). The only specific statement provided in the petition regarding the extent of habitat degradation is from the proposed rule to list the largetooth sawfish under the ESA (75 FR 25174; May 7, 2010), which stated that wetland losses from 1998 to 2004 in the Gulf of Mexico region averaged annual net losses of 60,000 acres (242.8 km^2) of coastal and freshwater habitats, largely due to commercial and residential development, port construction (dredging, blasting, and filling activities), construction of water control structures, modification to freshwater inflows (Rio Grande River in Texas), and gas and oil related activities. The species description provided in the petition states the Caribbean electric ray concentrates in the surf zone adjacent to barrier beaches and sand bars in warm months and moves offshore in winter (Rudloe 1989), and ''are unable to penetrate fresh water to any extent.'' Given this description, the petition fails to demonstrate why or how the loss of wetlands and freshwater habitats would affect a species commonly found in sandy marine habitats.

The petition mentions the BPDeepwater Horizon (DWH) oil spill that occurred in April 2010. The petition claims that following the DWH oil spill disaster, the threat of habitat modification and degradation is now more acute for Gulf of Mexico marine life, including the Caribbean electric ray. The petition concludes that ''the current oil spill situation, combined with the already-strained ecosystems in the Gulf of Mexico and coastal areas within the Ray's range, is a recipe for extinction, particularly given its current lack of ESA protection.'' The petition further states that drilling for oil and gas subjects marine species, including the Caribbean electric ray, to elevated risks. Finally, the petition references the IUCN's statement that pollution and oil exploration may also adversely affect the habitat of the Caribbean electric ray, although no specific information is available (Carvalho *et al.,* 2007), as supporting evidence of habitat degradation.

We acknowledge that coastal habitats in the United States are being impacted by urbanization and oil and gas exploration may adversely affect the marine environment. The DWH oil spill was an unprecedented disaster, likely impacting the marine ecosystem in ways that may not be fully known for decades. However, the petition fails to provide any information on the specific effects to Caribbean electric rays beyond broad statements on the impacts of coastal development and oil and gas exploration. Thus, these threats do not constitute substantial information that listing may be warranted.

Beyond the impacts from habitat loss and oil and gas exploration, the petition also presents arguments that the destruction of coral reef habitats may be adversely affecting the Caribbean electric ray. The petition states that habitat degradation in the form of coral reef destruction is a serious threat to Caribbean electric ray populations living in coral reef habitats. The petition erroneously cites Press (2010) as describing the Caribbean electric ray possibly inhabiting coral reefs. Press (2010) describes the electric ray habitat as ''shallow coastal waters buried beneath the sand, mud or swimming among the sea grass beds.'' Press (2010) also states that the species can be found at greater depth, but does not specify the habitat type. Reef habitats in the Gulf of Mexico and Caribbean are threatened by multiple factors, including: Natural abrasion and breakage, anthropogenic abrasion and breakage, sedimentation, persistent elevated sea surface temperature, competition, excessive nutrients, and sea level rise. However, the petition fails to demonstrate to what extent, if any, the Caribbean electric ray use these habitats and how impacts to coral reefs would cause specific adverse effects to the species. Thus, the petition fails to provide substantial information that listing may be warranted because of destruction of coral reef habitat.

The petition also requests that we consider the effects of Florida red tide in limiting the range of Caribbean electric ray. The petition asserts that the red tide (*Karenia brevia*) impacts many species of fish and wildlife in the Gulf of Mexico and along the Florida coast. While red tide events can cause deaths of aquatic species, possibly even the Caribbean electric ray, the petition fails to describe how and to what extent red tides may be affecting the species. More importantly, the petition fails to provide compelling evidence regarding how the natural, localized phenomenon of red tide is impacting habitat used by the Caribbean electric ray. Thus, the petition fails to provide substantial information that listing may be warranted due to the present or threatened destruction, modification, or curtailment of habitat or range.

In terms of the inadequacy of existing regulatory mechanisms, the petition asserts there are no specific regulations in place to protect the Caribbean electric ray. The petition claims that since shrimp trawl bycatch is the primary threat to the species, the regulations requiring the use of TEDs and bycatch reduction devices (BRDs) are inadequate because TEDs and BRDs do not effectively release Caribbean electric rays.

The lack of species-specific regulations does not necessarily mean a species' listing is warranted. To conclude that listing may be warranted because of inadequate regulatory

mechanisms, there must be evidence that the lack of regulations has actually caused or is a contributing factor to the potential endangerment of the Caribbean electric ray. The petition fails to provide any supporting information about how the lack of species specific regulations has actually contributed to the endangerment of the Caribbean electric ray. Regarding the efficacy of TEDs and BRDs in releasing Caribbean electric rays, the petition fails to provide substantial information specific to the species regarding the release or retention rates of Caribbean electric rays in shrimp nets equipped with TEDs and BRDs. Instead, the claim that TEDs and BRDs are ineffective is based on broad statements about finfish swimming ability related to size. Specifically, the petition states that devices intended to reduce bycatch are ineffective for this species due to its size and slow speed (Steele *et al.* 2002). Steele *et al.* (2002) did not include the Caribbean electric ray or any other ray species. The statement that larger fish are more likely to escape than smaller fish because swimming ability is positively associated with size is not applicable to the Caribbean electric ray because it is not a finfish. The petition fails to present any information to suggest that TEDs and BRDs are ineffective in releasing Caribbean electric ray. Thus, the petition fails to provide substantial information that listing may be warranted due to inadequacy of existing regulatory mechanisms.

In terms of other natural or manmade factors, the petition claims that the Caribbean electric ray faces threats from incidental take in inshore shrimp trawls and other fisheries in U.S. waters and abroad. The 2013 supplement characterizes this threat under the listing factor: Overutilization for commercial, recreational, scientific, or educational purposes. For purposes of this notice, we will keep the discussion under other natural or manmade factors as there is no evidence of directed harvest. The petition cites several documents indicating that the Caribbean electric ray is incidentally taken in shrimp fisheries, especially in Colombia (Acevedo *et al.* 2007a, b; Grijalba-Bendeck *et al.* 2007, 2012; Moreno *et al.* 2010). We accept that the Caribbean electric ray is bycaught in fisheries. Approximately 140 females and 60 males were incidentally taken in artisanal and commercial fisheries operating in Colombia from August 2005 through October 2006 (Moreno *et al.* 2010; Grijalba-Bendeck *et al.* 2007, 2012). The bycatch consisted mostly of sexually mature adults, but all life stages were represented. Acevedo *et al.* (2007a) subsampled discards from the shrimp trawl fleet operating in Colombia from August through November 2004. A total of six Caribbean electric rays were sampled, and all were mature adults (Acevedo *et al.* 2007a). However, these studies looked at reproductive aspects by necropsying individuals, and it is unclear whether the samples were killed in the fisheries or were killed for the study. Either scenario is plausible. Other studies examined composition and distribution of shark and ray assemblages bycaught in fisheries over short periods of time in different regions of Colombia (Acevedo *et al.* 2007b; Grijalba-Bendeck *et al.* 2007). None of these studies provide specific information on how the species may be responding to the exposure to the Colombian fisheries. The petition also cites Shepherd and Myers (2005) as indicating that nearshore shrimp trawl fisheries are impacting the Caribbean electric ray in the northern Gulf of Mexico. Shepherd and Myers (2005) analyzed fisheries independent data and found a severe decline in catch per unit effort between 1972 and 1973 of the Caribbean electric ray in the northern Gulf of Mexico. Shepherd and Myers (2005) concluded that the decline was due to bycatch in the shrimp trawl fishery (see Species Status section above). All other petition documents and information readily available in our files provide general information on the threat of bycatch to rays; none of these documents are specific to the Caribbean electric ray. Thus, we know some bycatch of the Caribbean electric ray occurs in fisheries operating in Colombia (Acevedo *et al.* 2007a, b; Grijalba-Bendeck *et al.* 2007, 2012; Moreno *et al.* 2010), and we have one study (Shepherd and Myers 2005) indicating that nearshore shrimp trawl fisheries operating in the northern Gulf of Mexico may impact the Caribbean electric ray in this region. It is reasonable to infer that if Caribbean electric ray populations may have declined in one area due to fisheries, then it is plausible that similar impacts to the species may occur in other areas of known fisheries bycatch. For these reasons, we conclude that the information in the petition and readily available in our files constitute substantial information indicating that listing may be warranted due to impacts from incidental take in fisheries.

Petition Finding

We conclude that the 2010 petition and 2013 supplement to the petition present substantial scientific or commercial information indicating that the petitioned action may be warranted due to the following ESA section 4(a)(1) factor that may be causing or contributing to an increased risk of extinction for the Caribbean electric ray: Other natural and manmade factors due to incidental capture in fisheries. Data in the petition suggest that declines in Caribbean electric ray populations in localized areas in the northern Gulf of Mexico may have occurred. Data in the petition and in our files suggest that numbers of Caribbean electric rays reported in the fisheries independent surveys in both the Gulf of Mexico are highly variable: Some areas have increased counts and others have decreased counts. One explanation is that the concentrated distribution of the ray would result in variable catch data. However, some areas have high counts followed by zero counts over the decades of the data series, indicating an absence of individuals from an area over time. Data in the petition and in our files show fewer Caribbean electric rays have been reported in the southeast Atlantic since 2001 when surveys were increased in shallow waters where the ray has historically been found. Data in the petition and in our files suggest that in the northern Gulf of Mexico those declines may be due to incidental capture in fisheries and incidental capture in fisheries occurs in other areas of the species' range. Further, we conclude that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted based on the following ESA section 4(a)(1) factors: The present or threatened destruction, modification, or curtailment of its habitat or range; or inadequacy of existing regulatory mechanisms. The petition also asserts that listing the Caribbean electric ray may not be warranted based on the ESA section 4(a)(1) factors: Overutilization for commercial, recreational, scientific, or educational purposes (note: The 2013 supplement categorized incidental capture in fisheries under this factor, whereas the original petition discussed it under other natural or manmade factors. For purposes of the analysis, we considered it as categorized by the original petition because there is no evidence of directed harvest); or disease or predation. Because we have determined that the petitioned action may be warranted, we did not examine those assertions as they will be analyzed in the status review.

After reviewing the information contained in the petitions, as well as information readily available in our files, and based on the above analysis,

we conclude that the petition presents substantial scientific information indicating that the petitioned action of listing the Caribbean electric ray may be warranted. Therefore, in accordance with section 4(b)(3)(B) of the ESA and NMFS' implementing regulations (50 CFR 424.14(b)(2)), we will commence a status review of the species.

Information Solicited

To ensure that the status review is based on the best available scientific and commercial data, we are soliciting information on whether the Caribbean electric ray may warrant listing as threatened or endangered. Specifically, we are soliciting data and information, including unpublished data and information, in the following areas: (1) Historical and current distribution and abundance of this species throughout its range; (2) historical and current population trends; (3) life history and habitat requirements (4) population structure information, such as genetics data; (5) past, current and future threats specific to the Caribbean electric ray, including any current or planned activities that may adversely impact the species, especially information on destruction, modification, or curtailment of habitat and on bycatch in commercial and artisanal fisheries worldwide; (6) ongoing or planned efforts to protect and restore the species and its habitat; and (7) management, regulatory, and enforcement information species and their habitats; We request that all information be accompanied by: (1) Supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

References Cited

A complete list of references is available upon request from NMFS Protected Resources Headquarters Office (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 24, 2014.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2014–01895 Filed 1–29–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

RIN 0648–XD103

Endangered Fish and Wildlife; Petition for Rulemaking To Exclude Federally-Maintained Dredged Entrance Channels and Pilot Boarding Areas for Ports From New York to Jacksonville From Vessel Speed Restrictions

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

ACTION: Receipt of petition for rulemaking; request for comments.

SUMMARY: This notice announces receipt by the National Marine Fisheries Service (NMFS) of a petition for rulemaking to exclude federally-maintained dredged entrance channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville from vessel speed restrictions to reduce fatal vessel collisions with North Atlantic right whales. NMFS is also requesting comments on the petition and will consider all comments when determining whether to proceed with the suggested rulemaking.

DATES: The closing date for comments on the petition is March 3, 2014.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2014–0013, by any of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA–NMFS–2014–0013,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

Mail: Send comments or requests for copies of reports to: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226, Attn: Vessel Speed Rule Petition.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Gregory Silber, Ph.D., *Greg.Silber@noaa.gov,* Office of Protected Resources, NMFS, at (301)427–8402.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 2008, NMFS published a final rule (73 FR 60173) that established vessel speed restrictions to reduce the likelihood of deaths and serious injuries to endangered North Atlantic right whales from collisions with vessels. The regulation limited vessel speeds to 10 knots or less for vessels 65 ft (19.8 m) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard. The regulation contained a provision that allows for an exception to the speed restriction when navigational safety requires a deviation. This rule also contained a provision whereby the regulation would expire (or ''sunset'') on December 9, 2013.

On June 6, 2013, NMFS published a proposed rule (78 FR 34024) seeking public comment on a proposal to eliminate the sunset provision contained in the October 2008 final rule. Based on the best available science, on December 9, 2013, NMFS published a final rule (78 FR 73726) that removed the sunset provision. All other aspects of the regulation remained the same, including the navigational safety exception referenced above.

During the public comment period for the June 2013 proposed rule, some commenters expressed concern about compromised safety that may arise from the 10-knot limit in some circumstances, despite the navigational safety exception contained in the regulation. In particular, the American Pilots' Association indicated that navigation is compromised in specific areas and suggested that NMFS ''exclude federally-maintained dredged channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville''—which they state is an approximate aggregate area of 15 square miles—from the vessel speed restrictions.

With regard to the American Pilots' Association request, NMFS stated in its December 2013 final rule removing the sunset provision:

[We] will treat the request to exclude vessels using federally-maintained dredged port entrance channels from the speed restrictions as a petition for rulemaking under the Administrative Procedure Act, though this is not required nor is it NMFS' normal practice. We plan to issue a Notice in the **Federal Register** announcing receipt of the petition, along with a concise statement of the request and seek comment on the request. If NMFS decides to proceed with the suggested rulemaking, we will notify the petitioner within 120 days, publish a notice in the **Federal Register** of our decision to engage in rulemaking in a prompt manner, and thereafter proceed in accordance with the requirements for rulemaking. If NMFS decides not to proceed with the petitioned rulemaking, we will notify the petitioner, provide a brief statement of the grounds for the decision, and publish in the **Federal Register** a notice of our decision not to proceed with the petitioned action.

Therefore, NMFS is issuing this notice to solicit comments and information on all issues related to the petition to exclude federally-maintained dredged entrance channels and pilot boarding areas (and the immediately adjacent waters) for ports from New York to Jacksonville from vessel speed restrictions to protect North Atlantic right whales.

Please include scientific or commercial data, studies, or research to support your comments and position, including scientific data or research that supports any pertinent industry or professional standards, or specific examples in support of your comments, to aid NMFS in evaluating the request for rulemaking and in determining what action, if any, is appropriate. We will consider all comments and recommendations in determining whether to engage in the suggested rulemaking and thereafter will proceed as described above.

Authority: 5 U.S.C. 551 et seq.

Dated: January 24, 2014.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2014–01734 Filed 1–29–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Initial Patent Applications.

Form Number(s): PTO/SB/01, 01A, 02, 02A, 02B, 02CN, 02DE, 02ES, 02FR, 02IT, 02JP, 02KR, 02LR, 02NL, 02RU, 02SE, 03, 03A, 04, 06, 07, 14 EFS-Web, 16, 16 EFS-Web, 17, 29, 29A, and 101–110. This collection also includes the following AIA forms: PTO/AIA01 through AIA04, AIA08 through AIA11, AIA14 and 15, AIA18 and 19, and AIA01CN and 01DE, 01ES, 01FR, 01IT, 01JP, 01KR, 01NL, 01RU, 01SE, 02CN, 02DE, 02ES, 02FR, 02IT, 02JP, 02KR, 02NL, 02RU, and 02SE.

Agency Approval Number: 0651–0032.

Type of Request: Revision of a currently approved collection.

Burden: 15,076,442 hours annually.

Number of Respondents: 597,047 responses per year. The USPTO estimates that approximately 157,950 of these responses will be from small entities (this estimate reflects a 25% small entity response rate for all items in the collection except for design-related items in the collection, for which a 50% small entity response rate is estimated). The USPTO estimates that 577,624 responses will be filed electronically.

Avg. Hours per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.50 hours) to 40 hours to complete the applications, petitions, and additional papers in this collection, depending on the complexity of the request. This includes the time to gather the necessary information, prepare the application, petition, or other papers, and submit the completed request to the USPTO. The USPTO assumes that, on balance it takes the same amount of time to gather the necessary information, prepare the application, petition, or other papers, and submit the completed request to the USPTO, whether the applicant submits it in paper form or electronically.

Needs and Uses: This collection of information is required by 35 U.S.C. 131 and 37 CFR 1.16 through 1.84 and 1.495(b). Each patent applicant must provide sufficient information to allow the USPTO to properly examine the application, petition, or paper to determine whether the application, petition, or paper meets the criteria set forth in the patent statutes and regulations. The various fee and application transmittal forms, the declarations, the cover sheets, the petitions, and the papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2) permit applicants to supply all of the information necessary to process the application and enables the USPTO to ensure that all of the information has been provided in order to process the application.

Affected Public: Individuals or households; businesses or other for-profits; non-profit institutions; and the Federal Government.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Nicholas A. Fraser, email: *Nicholas_A._Fraser@omb.eop.gov*.

Once submitted, the request will be publicly available in electronic format through the Information Collection Review page at *www.reginfo.gov*.

Paper copies can be obtained by:

- Email: *InformationCollection@uspto.gov*. Include ''0651–0032 copy request'' in the subject line of the message.
- Mail: Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before March 3, 2014 to Nicholas A. Fraser, OMB Desk Officer, via email to *Nicholas_A._Fraser@omb.eop.gov,* or by fax to 202–395–5167, marked to the attention of Nicholas A. Fraser.

Dated: January 24, 2014.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2014–01777 Filed 1–29–14; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Technology Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) announces that the public meeting for the CFTC's Technology Advisory Committee (TAC) initially scheduled on January 21, 2014, was postponed due to the inclement weather that closed the Federal Government. The TAC meeting has been rescheduled for February 10, 2014, from 10:00 a.m. to 5:00 p.m. at the CFTC's Washington, DC headquarters. The TAC meeting will focus on swap data reporting; the Commission's concept release on

automated trading environments; and swap execution facilities.

DATES: The meeting will be held on February 10, 2014, from 10:00 a.m. to 5:00 p.m. Members of the public who wish to submit written statements in connection with the meeting should submit them by February 3, 2014. The Commission is announcing the meeting with less than 15 calendar days public notice because the meeting is being rescheduled due to the inclement weather that closed the Federal Government.

ADDRESSES: The meeting will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Written statements should be submitted by electronic mail to: *secretary@cftc.gov.* Statements may also be submitted by mail to: Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581, attention: Office of the Secretary. Please use the title ''Technology Advisory Committee'' in any written statement you submit. Any statements submitted in connection with the committee meeting will be made available to the public.

FOR FURTHER INFORMATION CONTACT: Amir Zaidi, TAC Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581, (202) 418–6770.

SUPPLEMENTARY INFORMATION: The CFTC is rescheduling the public meeting of the CFTC TAC that had been announced for January 21, 2014 (*see* 79 FR 646, Jan. 6, 2014). That meeting was postponed due to the inclement weather that closed the Federal Government. The CFTC TAC will now hold a public meeting on Monday, February 10, 2014, from 10:00 a.m. to 5:00 p.m. at the CFTC's Washington, DC, headquarters. The TAC meeting will focus on significant issues facing the futures and swaps industries as the Commission continues to implement rules under the Dodd-Frank Act. These issues include: (1) Swap data reporting; (2) the Commission's concept release on automated trading environments; and (3) various issues surrounding the operation of swap execution facilities.

The meeting will be open to the public with seating on a first-come, first-served basis. Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person listed above.

Members of the public may also listen to the meeting by telephone by calling a toll-free telephone line to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation. The call-in information is as follows:

Domestic Toll Free: 1–866–844–9416.

International Toll and Toll Free: Will be posted on the CFTC's Web site, *http://www.cftc.gov,* on the page for the meeting, under Related Documents.

Conference ID: 3976745.

Pass Code/Pin Code: 7493290.

After the meeting, a transcript of the meeting will be published through a link on the CFTC's Web site, *http://www.cftc.gov.* All written submissions provided to the CFTC in any form will also be published on the CFTC's Web site.

Authority: (5 U.S.C. Appendix, Federal Advisory Committee Act, Sec. 10(a)(2))

Dated: January 24, 2014.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

[FR Doc. 2014–01684 Filed 1–29–14; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, February 5, 2014, 9 a.m.–11 a.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East-West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED: Briefing Matter: Infant Stroller Final Rule (Sec. 104).

A live webcast of the Meeting can be viewed at *www.cpsc.gov/live.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: January 28, 2014.

Todd A. Stevenson,

Secretary.

[FR Doc. 2014–02024 Filed 1–28–14; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2012–OS–0061]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense (Personnel and Readiness), Office of the Assistant Secretary of Defense (Reserve Affairs), DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense (Personnel and Readiness (Reserve Affairs)) announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 31, 2014.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Attn: Ms. Jennifer Atkin, 4825 Mark Center Drive,

Alexandria, VA 22311–1850 or call (703) 824–2885.

SUPPLEMENTARY INFORMATION:

Title; OMB Number: Impact of ChalleNGe on Participants' Noncognitive Skills; OMB Control Number: 0704–TBD.

Needs and Uses: The information collection requirement is necessary to obtain data on the noncognitive skills of National Guard Youth ChalleNGe program participants at the beginning and the end of their participation in the program. The data will be used by DoD to evaluate whether the ChalleNGe program positively impacts participants' noncognitive skills. The data will also be used to determine whether there are program-specific differences in terms of the impact.

Affected Public: Individuals or households.

Annual Burden Hours: 334 Hours.

Number of Respondents: 1,200.

Responses per Respondent: 1.667.

Average Burden per Response: 10 minutes.

Frequency: On occasion.

Respondents are cadets enrolled in the National Guard Youth ChalleNGe program. The ChalleNGe program, operated jointly by states and the state National Guard units, targets at-risk male and female youth ages 16–18. Today there are 34 programs in 28 states (plus Puerto Rico). Several states have multiple campuses. It is a 22-week residential program that includes instruction on academic subjects in an effort to help cadets attain a GED (General Education Development) credential. The program also focuses on noncognitive skills (those skills which are not academic in nature including motivation and perseverance) which have been shown to be a determining factor in educational and economic success. To date, no research has been done to assess the degree to which the ChalleNGe program improves participants' noncognitive skills. This information collection will provide data on the noncognitive skills of program participants both before and after their completion of the program. The data will be used to evaluate the program's effectiveness in this area.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01839 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2013–0040]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: U.S. Army ROTC 4-Year College Scholarship Application (For High School Students); OMB Control Number 0702–0073.

Type of Request: Extension.

Number of Respondents: 11,369.

Responses per Respondent: 1.

Annual Responses: 11,369.

Average Burden per Response: 45 minutes.

Annual Burden Hours: 8,527 hours.

Needs and Uses: The Army ROTC Program produces approximately 80 percent of the newly commissioned officers for the U.S. Army. The Army ROTC scholarship is an incentive to attract men and women to pursue educational degrees in the academic disciplines required by the Army. The information is collected annually.

Affected Public: Individuals or Households.

Frequency: Annually.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01833 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0102]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form And Omb Number: Statement of Claimant Requesting Recertified Check; DD 2660; OMB Control Number 0730–0002.

Type of Request: Extension.

Number of Respondents: 38,157.

Responses per Respondent: 1.

Annual Responses: 38,157.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 3,180.

Needs and Uses: In accordance with TFM Volume 1, Part 4, Section 7060.20 and DoD 7000.14–R, Volume 5, there is a requirement that a payee identify himself/herself and certify as to what happened to the original check issued by the government (non-receipt, loss, destruction, theft, etc.). This collection will be used to identify rightful reissuance of government checks to individuals or businesses outside the Department of Defense.

Affected Public: Business or other for-profit; individuals or households; or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 23, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01641 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2013–0038]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Letter Permit for Non-Army Agency Radiation Sources on Army Land; OMB Control Number 0702–0109.

Type of Request: Extension.

Number of Respondents: 235.

Responses per Respondent: 1.

Annual Responses: 235.

Average Burden per Response: 2 hours.

Annual Burden Hours: 470 hours.

Needs and Uses: Army radiation permits are required for use, storage, or possession of radiation sources by non-Army agencies (including their civilian contractors) on an Army installation.

The non-Army applicant will apply by letter, email, or facsimile with supporting documentation to the garrison commander through the appropriate tenant commander or garrison director.

The Army radiation permit application will specify the effective date and duration for the Army radiation permit and describe the purposes for which the Army radiation permit is being sought. The application will include identification of the trained operating personnel who will be responsible for implementation of the activities authorized by the permit and a summary of their professional qualifications; the point-of-contact name and phone number for the application; the applicant's radiation safety Standing Operating Procedures (SOPs); storage provisions when the radiation source is not in use; and procedures for notifying the installation of reportable incidents/accidents.

Affected Public: Business or other for-profit; not-for-profit institutions; State, local, or Tribal governments.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01825 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2013–0039]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Terminal and Transfer Facilities Descriptions; IWR Forms 1–9; OMB Control Number 0710–0007.

Type of Request: Extension.

Number of Respondents: 1,262.

Responses per Respondent: 1.

Annual Responses: 1,262.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 316 hours.

Needs and Uses: Data gathered and published as one of the 56 Port Series Reports, relating to terminals, transfer facilities, storage facilities, and intermodal transportation. This information is used in navigation, planning, safety, National Security, emergency operations, and general interest studies and activities. Respondents are terminal and transfer facility operators. This data is essential to the Waterborne Commerce Statistics Center in exercising their enforcement and quality control responsibilities in the collection of data from vessel reporting companies.

Affected Public: Business or other for Profit; Federal Government; and State, Local or Tribal government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Jim Laity.

Written comments and recommendations on the proposed information collection should be sent to Mr. Jim Laity at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01864 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0185]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION: *Title, Associated Form and OMB Number:* Child Care Development Program (CDP)—Background Investigations and Program Requests; DD 2606 and DD 2652; OMB Control Number 0704–XXXX.

Type of Request: New Collection.

Number of Respondents: 5,000.

Responses per Respondent: 1.

Annual Responses: 5,000.

Average Burden per Response: 10 minutes.

Annual Burden Hours: 833.

Needs and Uses: The information from the DD 2606 is used to place applicants into programs or onto waiting lists for child development program services. It is also used to assist management in the determination in the effectiveness of present and projection of future program requirements. The information in DD 2652 is used to apply child care fee subsidies for families enrolled in the DoD CDP.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required To Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01820 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0189]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION: *Title, Associated Form and OMB Number:* Child Care Development Program (CDP)—Criminal History; DD X656; OMB Control Number 0704–XXXX.

Type of Request: New Collection.

Number of Respondents: 5,000.

Responses per Respondent: 1.

Annual Responses: 5,000.

Average Burden per Response: 10 minutes.

Annual Burden Hours: 833.

Needs and Uses: The information from the DD X656 is used to annotate employees understanding of the background check requirements and obtain information in regards to any criminal history that might prevent an individual from being employed in a CDP.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01821 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2014–OS–0013]

Privacy Act of 1974; System of Records

AGENCY: Defense Information Systems Agency, DoD.

ACTION: Notice to add a new System of Records.

SUMMARY: The Defense Information Systems Agency proposes to add a new system of records in its inventory of record systems subject to the Privacy Act of 1974, as amended. The new system K890.16, Enterprise Mission Assurance Support Service (EMASS), will automate the DoD certification and accreditation process.

DATES: This proposed action will be effective on March 3, 2014 unless comments are received which result in a contrary determination. Comments will be accepted on or before March 3, 2014.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Jeanette Weathers-Jenkins, 6916 Cooper Avenue, Fort Meade, MD 20755–7901.

SUPPLEMENTARY INFORMATION: The Defense Information Systems Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 18, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: January 23, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

K890.16

SYSTEM NAME:

Enterprise Mission Assurance Support Service (EMASS).

SYSTEM LOCATION:

Defense Information Systems Agency, Defense Enterprise Computing Centers (DECC), 3990 E. Broad Street, Columbus, OH 43213–1130.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD government employees, military personnel and DoD contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Full name, organization, office phone number, title, position, grade, current DISA identification badge, grade, work email address, information technology (IT) position category, and clearance level.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulation; DoD Directive 5105.19, Defense Information Systems Agency (DISA); and DoDI 8510.01, Department of Defense Information Assurance Certification and Accreditation Process (DIACAP).

PURPOSE(S):

The system automates the DoD certification and accreditation process. Information collected on individuals is to determine role based access and whether or not a person has the correct qualifications to perform certification and accreditation within the DoD organization that is utilizing the system.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a (b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the DISA's compilation of systems of records notices may apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Retrieved by name.

SAFEGUARDS:

Access to EMASS is an encrypted Public Key-Enabled and requires authorization from the organization system administrator. The system is a role based access application and administrators have the rights to assign. Information is stored within the database that resides within a DISA Enclave. The DISA enclave has a number of security measures in place to protect the database from unauthorized access from outside the .mil. Backup tapes are stored in a locked safe and information is also backed up daily.

RETENTION AND DISPOSAL:

Disposition pending (until the National Archives and Records Administration approves retention and disposal schedule, records will be treated as permanent).

SYSTEM MANAGER(S) AND ADDRESS:

EMASS Program Manager, Defense Information Systems Agency, Program Executive Office-Mission Assurance (PEO–MA) Room IA5, 6914 Cooper Ave, Fort Meade, MD 20755–0549.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Information Systems Agency, PEO–MA IA5, and 6914 Cooper Ave, Fort Meade, MD 20755–0549.

The full name of the requesting individual will be required to determine if the system contains a record about him or her.

The requester may also visit the system manager listed. The requester must present a copy of their current DISA identification badge or a copy of driver's license as proof of identity.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Defense Information Systems Agency, PEO–MA IA5, 6914 Cooper Ave, Fort Meade, MD 20755–0549.

The full name of the requesting individual will be required to determine if the system contains a record about him or her.

The requester may also visit the system manager listed. The requester must present a copy of their current DISA identification badge or a copy of driver's license as proof of identity.

DISAs rules for accessing records, for contesting content and appealing initial agency determinations are published in DISA Instruction 210–225–2; 32 CFR part 316; or may be obtained from the systems manager.

CONTESTING RECORD PROCEDURES:

DISAs rules for accessing records, for contesting content and appealing initial agency determinations are published in DISA Instruction 210–225–2; 32 CFR part 316; or may be obtained from the systems manager.

RECORD SOURCE CATEGORIES:

From the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2014–01640 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Academy Board of Visitors Notice of Meeting

AGENCY: U.S. Air Force Academy Board of Visitors, DOD.

ACTION: Meeting notice.

SUMMARY: The U.S. Air Force Academy (USAFA) Board of Visitors (BoV) will hold a meeting on January 14, 2014. The meeting will begin at 9 a.m. The purpose of this meeting is to review morale and discipline, social climate, curriculum, instruction, infrastructure, fiscal affairs, academic methods, and other matters relating to the Academy.

DATES: The meeting will be held on January 14, 2014 at 9 a.m.

ADDRESSES: The meeting will take place in the Rayburn Building, Room B–339 in Washington DC.

FOR FURTHER INFORMATION CONTACT: For additional information or to attend this BoV meeting, contact Maj Mark Cipolla, Accessions and Training Division, AF/A1PT, 1040 Air Force Pentagon, Washington, DC 20330, (703) 695–4066.

SUPPLEMENTARY INFORMATION: In accordance with 10 U.S.C. Section 9355, the Air Force Academy Board of Visitors will meet on January 14. Specific topics for this meeting include a Superintendent's Update; an Honor Oath discussion; OSI Confidential Informants discussion; and two closed sessions to discuss Status of Discipline/Investigations and Personnel Issues. In accordance with 5 U.S.C. Section 552b, as amended, and 41 CFR Section 102–3.155, two sessions of this meeting shall be closed to the public because they involve matters covered by subsection (c)(6) of 5 U.S.C. Section 552b. Public attendance at the open portions of this USAFA BoV meeting shall be accommodated on a first-come, first-served basis up to the reasonable and safe capacity of the meeting room. In addition, any member of the public wishing to provide input to the USAFA BoV should submit a written statement in accordance with 41 CFR Section 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements must address the following details: the issue, discussion, and a recommended course of action. Supporting documentation may also be included as needed to establish the appropriate historical context and provide any necessary background information. Written statements can be submitted to the Designated Federal Officer (DFO) at the Air Force address detailed below at any time. However, if a written statement is not received at least 10 calendar days before the first day of the meeting which is the subject of this notice, then it may not be provided to or considered by the BoV until its next open meeting. The DFO will review all timely submissions with the BoV Chairman and ensure they are provided to members of the BoV before the meeting that is the subject of this notice. For the benefit of the public, rosters that list the names of BoV members and any releasable materials presented during the open portions of this BoV meeting shall be made available upon request.If after review of timely submitted written comments and the BoV Chairman and DFO deem appropriate, they may choose to invite the submitter of the written comments to orally present the issue during an open portion of the BoV meeting that is the subject of this notice. Members of the BoV may also petition the Chairman to allow specific personnel to make oral presentations before the BoV. In accordance with 41 CFR Section 102–3.140(d), any oral presentations before the BoV shall be in accordance with agency guidelines provided pursuant to a written invitation and this paragraph. Direct questioning of BoV members or meeting participants by the public is not permitted except with the approval of the DFO and Chairman. Due to difficulties beyond the control of the designated federal officer the meeting announcement requirements of 41 CFR Section 102–3.150(a) pertaining to the scheduled meeting of the U.S. Air Force Academy Board of Visitors for January 14, 2014, were not met. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR Section 102–3.150(b), waives the 15-calendar day notification requirement.

Henry Williams, GS–12, DAF

Acting Air Force Federal Register Liaison Officers.

[FR Doc. 2014–01449 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–010–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2013–0037]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION: *Title, Associated Form and OMB Number:* Lock Performance Monitoring System

(LPMS) Waterway Traffic Report; ENG 3102c and ENG 3102d; OMB Control Number 0710–0008.

Type of Request: Extension.

Number of Respondents: 6,529.

Responses per Respondent: 93.

Annual Responses: 607,197.

Average Burden per Response: 2.6 minutes.

Annual Burden Hours: 26,311.87 hours.

Needs and Uses: The U.S. Army Corps of Engineers utilizes the data collected to monitor and analyze the use and operation of federally owned and operated locks. General data of vessel identification, tonnage and commodities are supplied by the master of vessels at all locks owned and operated by the U.S. Army Corps of Engineers. The information is used for sizing and scheduling replacements, the timing of rehabilitation or maintenance actions, and the setting of operation procedures and closures for locks and canals.

Affected Public: Business or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Mr. Jim Laity.

Written comments and recommendations on the proposed information collection should be sent to Mr. Jim Laity at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01861 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2014–0001]

Proposed Collection; Comment Request

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Department of the Army announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 31, 2014.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the U.S. Army ROTC Cadet Command, ATTN: ATCC–01, 55 Patch Road, Building 56, Fort Monroe, VA 23651–1052, or call Department of the Army Reports Clearance Officer at 703–428–6440.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Army ROTC Referral Information, ROTC Form 155–R, OMB Control Number 0702–0111.

Needs and Uses: The Army ROTC Program produces approximately 75 percent of the newly commissioned officers for the U.S. Army. The Army ROTC must have the ability to attract quality men and women who will pursue college degrees. Currently, there are 13 recruiting teams (Goldminers) located in various places across the United States aiding in this cause. Their mission is to refer quality high school students to colleges and universities offering Army ROTC. Goldminers, two officer personnel, will collect ROTC referral information at a high school campus and document it on ROTC Cadet Command Form 155–R.

Affected Public: Individuals or households.

Annual Burden Hours: 4,075.

Number of Respondents: 16,300.

Responses Per Respondent: 1.

Average Burden Per Response: 15 minutes.

Frequency: On occasion.

The purpose of the information is to provide prospect referral data to a Professor of Military Science to contact individuals who have expressed an interest in Army ROTC. If Goldminers did not collect referral information, we would suffer a negative impact on the recruiting effort and subsequent commissioning of new officers for the U.S. Army.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01865 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning Spray Foam Splint

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Patent Application Serial No. 13/988,260, entitled ''Spray Foam Splint,'' filed on August 16, 2013. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to orthopedic splinting materials and methods for stabilizing an injured limb or extremity and allowing the foam to set to sufficient rigidity.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2014–01840 Filed 1–29–14; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning Methods of Treating Amniotic Membranes and Compositions and Apparatuses Prepared Therein

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Patent Application Serial No. 13/815,827, entitled ''Methods of Treating Amniotic Membranes and Compositions and Apparatuses Prepared Therein,'' filed on March 15, 2013. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to a method of sterilizing compositions prepared from amniotic membrane tissues.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2014–01837 Filed 1–29–14; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Record of Decision for the Conversion of an Armor Brigade Combat Team to a Stryker Brigade Combat Team at Fort Carson, CO

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of the Record of Decision (ROD) to convert an Armor Brigade Combat Team (BCT) to a Stryker BCT at Fort Carson, Colorado. The Deputy Chief of Staff of the Army, G–3/5/7 has reviewed the 2008 Final Environmental Impact Statement for the Permanent Stationing of the 2/25th Stryker Brigade Combat Team (2008 EIS), and has determined that the EIS adequately evaluated the potential environmental and socioeconomic effects associated with this conversion, and that no supplementation of the EIS is required. The ROD explains that the Army will expand on the decision made in 2008 to meet the changed needs of the Army and adjust to constantly evolving mission requirements, and discusses the potential environmental and socioeconomic impacts associated with the Stryker BCT conversion.

ADDRESSES: The ROD can be obtained from *http://aec.army.mil/Services/Support/NEPA/Documents.aspx.* Written requests for a copy of the ROD should be addressed to: U.S. Army Environmental Command, Public Affairs Office, 2450 Connell Road (Building 2264), JBSA Fort Sam Houston, TX 78234–7664.

FOR FURTHER INFORMATION CONTACT: Public Affairs Office, U.S. Army Environmental Command, at (210) 466–1590 or by email at *USARMY.JBSA.AEX.MBX@mail.mil.*

SUPPLEMENTARY INFORMATION: The Army announced on June 25, 2013 that it was reducing the number of Active Army BCTs from 45 to 33 over the next several years. As this overall reduction occurs, the Army will have to rebalance the remaining BCTs to retain the required mix of Infantry, Armor, and Stryker BCTs.

Under Alternative C of the 2008 EIS, the Stryker BCT would have replaced the 4th BCT, 4th Infantry Division—an Infantry BCT at Fort Carson. Instead of replacing an Infantry BCT with a Stryker BCT, this decision converts an Armor BCT to a Stryker BCT. The ROD, which incorporates the 2008 EIS by reference, discusses the minor differences in equipment and training between the two scenarios and why the 2008 analysis is adequate to support this decision.

The potential environmental and socioeconomic impacts of stationing a Stryker BCT at Fort Carson were analyzed in the 2008 EIS and addressed for both Fort Carson and Piñon Canyon Maneuver Site (PCMS). At Fort Carson, the 2008 EIS identified significant impacts in the areas of soil erosion, wildfire management, and air quality. At PCMS, the EIS found significant impacts could occur in the areas of soil erosion, wildfire management, and cultural resources.

Because this action coincides with the inactivation of another BCT, the net number of Soldiers training at Fort Carson and PCMS will be less than anticipated in the 2008 EIS. The action also replaces M1 tanks and Bradley Fighting Vehicles (BFVs) with lighter Stryker combat vehicles. In addition, no construction will be required for this action at either Fort Carson or PCMS. This means that the significant impacts predicted for Fort Carson and PCMS in the 2008 EIS will not be likely to occur. Site-specific National Environmental Policy Act (NEPA) analysis on implementing this stationing decision will be prepared for both Fort Carson and PCMS.

It is important to note that this action will not require any expansion of PCMS.

All practicable means to avoid or minimize environmental harm identified in the 2008 EIS for the alternative of stationing the Stryker BCT at Fort Carson will be adopted, unless different measures are developed and identified in the site-specific NEPA documents.

This action reduces heavy vehicle maneuver use at Fort Carson. The Stryker vehicles use less fuel than the M1 tanks and BFVs they are replacing. These factors will likely reduce dust and air pollution.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2014–01841 Filed 1–29–14; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2014–0005]

Proposed Collection; Comment Request

AGENCY: Naval Supply Systems Command (NAVSUP) Business Systems Center, U.S. Navy, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Department of the Navy's NAVSUP Business Systems Center announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 31, 2014.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please email *navsupbscaaa@navy.mil* or address written inquiries to NAVSUP Enterprise Portal Program Manager, 5450 Carlisle Pike, Mechanicsburg, PA 17055–0791.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: NAVSUP Enterprise Portal and Master Directory Services System Authorization Access Request (SAAR–N); SAAR–N OPNAV 5239/14; 0703–XXXX.

Needs and Uses: The information collection requirement is necessary to provide NAVSUP with a directory service capability that offers a single source from which NAVSUP Enterprise applications can obtain identity and contact information, via controlled interfaces, about NAVSUP Logistic users and Agency personnel; supports access control and authorization decisions, via controlled interfaces, for approved personnel to NAVSUP Enterprise applications.

Affected Public: Federal Government is the primary public source affected. Individuals and business or other for-profit organizations affected are Navy and Marine Corps Active and Reserve military members, civilian employees, and contractors and civilians assigned to duty or visiting on board Navy ships, NAVSUP Agencies and/or accessing NAVSUP Enterprise applications.

Annual Burden Hours: 500 Total hours.

Number of Respondents: 2000.

Responses per Respondent: 1.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

Respondents are NAVSUP customers seeking access to NAVSUP Enterprise systems. The completed NAVSUP Enterprise Portal and Master Directory Services System Authorization Access Request (SAAR–N) form and associated NAVSUP User Provisioning system are used to associate users with access to specific NAVSUP systems. The information collected is necessary to provide NAVSUP with a directory service capability that offers a single source from which NAVSUP Enterprise applications can obtain identity and contact information to be used in access control and authorization decisions. If the form and registration are not completed, access to NAVSUP Enterprise web systems is not allowed.

Dated: January 27, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–01842 Filed 1–29–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Proposed Agency Information Collection

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted to the OMB for clearance, a proposal for collection of information pursuant to the Paperwork Reduction Act of 1995. The collection would be used to measure the impact and progress of DOE's Workplace Charging Challenge (Challenge). The Challenge is an initiative through which DOE provides employers with specialized resources, expertise, and support to incorporate workplace charging programs into their operations successfully.[1] The initiative is a part of the EV Everywhere Grand Challenge, which focuses on enabling U.S. vehicle manufacturers to be the first in the world to produce plug-in electric vehicles (PEVs) that are as affordable and convenient for the average American family as today's gasoline-powered vehicles by 2022. As the EV Everywhere Grand Challenge is focused on PEV research and development as well as deployment, it has been developed with input from sustainability professionals, industry representatives, and DOE's Clean Cities program staff coordinators.

DATES: Comments regarding this proposed information collection must be received on or before March 3, 2014. If you anticipate difficulty in submitting comments within that period, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4650.

ADDRESSES: Written comments should be sent to:

DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street NW., Washington, DC 20503, *Chad_S_Whiteman@omb.eop.gov.*

And to

Sarah Olexsak, Office of Energy Efficiency and Renewable Energy (EE–3V), U.S. Department of Energy,

[1] Excluded from the Challenge are the Federal government and employers that are integrally involved in the sale of EVSE products and services.

1000 Independence Avenue SW., Washington, DC 20585–0121, or by email at *WorkplaceCharging@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Sarah Olexsak, Office of Energy Efficiency and Renewable Energy (EE–3V), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0121, (202) 286–2149, *WorkplaceCharging@ee.doe.govmailto:*.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. New; (2) Information Collection Request Title: Workplace Charging Challenge; (3) Type of Request: New collection; (4) Purpose: DOE's Vehicle Technologies Office (VTO) has developed a voluntary initiative, the EV Everywhere Workplace Charging Challenge. This initiative, launched in January 2013, aims to increase the number of U.S. employers offering workplace charging for PEVs to their employees. Participating employers may sign on as Partners to signal their commitment to workplace charging and otherwise promote workplace charging. As designed, the initiative is intended to benefit both employees and employers.

The goal of the Workplace Charging Challenge is to increase to over 500 the number of employers offering workplace charging to their U.S. employees by 2018, the scheduled end of the program. Individual employers that make available at least one electric vehicle supply equipment (EVSE), or charger, to their employees at one major employer location will count towards this goal, regardless of whether or not the employer is a partner in the Workplace Charging Challenge.

As part of this program, DOE will conduct outreach to deploy workplace charging, provide technical assistance to support employers' workplace charging programs, and identify specific success stories, lessons learned, and best practices employers have deployed, thereby increasing the value and facilitating the deployment of additional workplace charging programs. The effort is part of the larger EV Everywhere Grand Challenge, and as the Grand Challenge by necessity incorporates a deployment component, DOE will be able to use its experience and expertise through the VTO Clean Cities Program to educate the public about PEVs, as well as help identify potential workplace charging barriers and the means to remove such barriers.

The Challenge does not endeavor to engage an exhaustive number of employers, but rather will work with self-identified employers committed to leading the way in reducing petroleum consumption through the deployment of PEVs and associated charging infrastructure.

In January 2013, relying on employers' public records and communications, DOE began identifying employers that might be interested in becoming voluntary partners to the Workplace Challenge Program. To measure progress towards the Workplace Charging Challenge goal of more than 500 employers through 2018, DOE will be monitoring some employers directly, and others through data DOE can gather from available online resources, including the Alternative Fuels Data Center. For those employers DOE is monitoring directly, DOE will develop an annual progress update and will publish the generalized results gathered. To generate this annual update, DOE will collect annually from these Workplace Charging Challenge Partners, or employers, data and narratives associated with their PEV charging program and infrastructure.

The principal objective of collecting the information DOE seeks to gather through the Challenge is to allow DOE to develop an objective assessment and estimate of the number of U.S. employers that have established a workplace charging program or otherwise installed EVSE, and to document specific information associated with the offering of such a program to employees. Information requested would be used to establish basic information for Partner employers, which will then be used for future comparisons and analysis of instituted programs and policies. A designated representative for each participating Partner will provide the requested information. The intended respondent is expected to be aware of relevant aspects of the company's charging infrastructure and program if such exists, such that the gathering of information is not expected to be very resource consuming. DOE will compile and issue an annual progress update that would provide an update on the Workplace Charging Challenge program partners' activities, as well as report on metrics DOE is evaluating related to energy consumption, costs, numbers of employers in the program, and best practices that can be identified for the purpose of helping others take steps to deploy charging infrastructure.

The Challenge effort will rely on data the Partners will provide via an online response tool. The data collection would address the following topic areas: (1) Charging infrastructure and use; (2) employee PEV ownership; and (3) feedback on the Challenge.

The data will be compiled for the purpose of assessing and setting forth in the annual progress updates the Workplace Charging Challenge program's impact in terms of increasing both the number of employers offering workplace charging and the deployment of EVSEs and PEVs.

The data and subsequent analyses will allow DOE to compare historical records dynamically, and provide the opportunity for DOE to determine annual progress toward Workplace Charging Challenge goals. Calculation of progress and impacts will be undertaken on an annual basis.

The Workplace Charging Challenge program is targeted at U.S. employers. Providing initial baseline information for each participating employer, which occurs only once, is expected to take 1.5 hours. Follow-up questions and clarifications for the purpose of ensuring accurate analyses may take up to 3.5 hours; (5) Annual Estimated Number of Respondents: 400; (6) Annual Estimated Number of Total Responses: 400; (7) Annual Estimated Number of Burden Hours: 2,000; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: The total estimated annual cost for all respondents to respond to the voluntary collection is $9,702.

Authority: 42 U.S.C. Sec 13233; 42 U.S.C. Sec. 13252(a)–(b); 42 U.S.C. 13255.

Issued in Washington, DC, on January 24, 2014.

Patrick B. Davis,

Director, Vehicle Technologies Office, Energy Efficiency and Renewable Energy.

[FR Doc. 2014–01853 Filed 1–29–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD14–2–000]

Proposed Agency Information Collection

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Energy Regulatory Commission (Commission) invites public comment in Docket No. RD14–2–000 on a proposed collection of information that the Commission is

developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before March 31, 2014.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- *Electronic Filing through http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: The proposed information collection in Docket No. RD14–2–000 relates to a proposed revision to the definition of bulk electric system, developed by the North American Electric Reliability Corporation (NERC), and submitted to the Commission for approval. NERC's petition related to the revised definition of bulk electric system is pending before the Commission. The proposed revision modifies the definition of bulk electric system in response to Commission directives in Order Nos. 773 and 773–A as well as some other clarifying revisions.[1] The information collection requirements contained in the definition of bulk electric system are contained in FERC–725J (OMB Control Number 1902–0259).

On December 20, 2012, the Commission issued Order No. 773, a Final Rule approving NERC's modifications to the definition of ''bulk electric system'' and the Rules of Procedure exception process to be effective July 1, 2013. On April 18, 2013, in Order No. 773–A the Commission largely affirmed its findings in Order No. 773. In Order Nos. 773 and 773–A the Commission directed NERC to modify the definition of bulk electric system in two respects: (1) Modify the local network exclusion (exclusion E3) to remove the 100 kV minimum operating voltage to allow systems that include one or more looped configurations connected below 100 kV to be eligible for the local network exclusion; and (2) modify the exclusions to ensure that generator interconnection facilities at or above 100 kV connected to bulk electric system generators identified in inclusion I2 are not excluded from the bulk electric system.

In its December 13, 2013 Petition, NERC proposed revisions to respond to the Commission directives. In addition, NERC revised inclusion I4 to include the collector system at the point of aggregation.[2] Therefore, the estimates for this information collection are based on the three proposed modifications.

The Commission estimates a modest decrease in information collection and reporting that would result from implementing the proposed revisions to the definition of bulk electric system. Specifically, the Commission estimates a decrease in information collection and reporting that would result from implementing NERC's proposed revisions to the definition of bulk electric system. The estimate is derived in NERC's alternative proposal in addressing the Commission's concern regarding low voltage looped configurations. NERC explains that its technical analysis shows that a 50 kV threshold for sub-100 kV loops does not affect the application of exclusion E1. NERC states that this approach will ease the administrative burden on entities as it negates the necessity for an entity to prove that they qualify for exclusion E1 if the sub-100 kV loop in question is less than or equal to 50 kV.[3] This administrative burden falls into the category of ''System Review and List Creation'' as described in Order Nos. 773 and 773–A.[4] NERC's technical justification has shown that a subset of low voltage loops (operating between 0 and 50 kV) do not provide parallel flows and thus qualify for exclusion E1.

Because the E1 exclusion applies to low voltage loops operated below 50 kV, entities will no longer evaluate looped configurations for either the E3 network exclusion or the NERC exception process.[5] Accordingly, we estimate a decrease of one engineering hour needed for ''System Review and List Creation'' for transmission owners and distribution providers, respectively. With respect to the revisions to inclusion I4, NERC states that the standard drafting team ''identified the portions of the collector system which consistently provide a reliability benefit to the interconnected transmission network and are easily identified within collector systems.'' [6] Thus, the Commission estimates no material change in information collection because the engineering time needed to evaluate the collector system component that NERC proposes to be included in the bulk electric system is a simple and straightforward determination of whether the collector system aggregates to greater than 75 MVA.

Burden Statement: Public reporting burden for this proposed collection is estimated as:

[1] *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure,* Order No. 773, 141 FERC ¶ 61,236 (2012); *order on reh'g,* Order No. 773–A, 143 FERC ¶ 61,053 (2013), *order on reh'g and clarification,* 144 FERC ¶ 61,174.

[2] The bulk electric system definition components consist of the core definition, five inclusions and four exclusions. NERC does not propose any changes to the core definition, inclusion I3 or exclusion E2. The proposed changes chiefly affect exclusions E1 and E3 and inclusion I4. NERC also made minor clarifying changes to inclusions I1, I2, and I5 and exclusion E4. These minor changes do not affect the information collection and reporting requirements approved in Order Nos. 773 and 773–A.

[3] NERC Petition at 19–25, Exhibit D at 2, 48–90.

[4] System Review and List Creation corresponds to step 1 of NERC's proposed transition plan, which requires each U.S. asset owner to apply the revised bulk electric system definition to all elements to determine if those elements are included in the bulk electric system pursuant to the revised definition. *See* Order No. 773, 141 FERC ¶ 61,236 at P 330.

[5] *Cf.,* Order No. 773–A, 143 FERC ¶ 61,053 at P 128.

[6] NERC Petition at 16.

RD14–2–000 (FERC–725J): REVISION TO THE DEFINITION OF BULK ELECTRIC SYSTEM

	Number of respondents [7]	Number of responses per respondent	Total number of responses	Average burden hours per response	Estimated total year 1 burden reduction
	(A)	(B)	(A) × (B) = (C)	(D)	(C) × (D)
Transmission Owners (System Review and List Creation)	333	1	333	−1	−333
Distribution Providers (System Review and List Creation)	554	1	554	−1	−554
Total					−887

The total estimated decrease in cost burden to respondents (year 1 only) is $53,220; [*i.e.,* −887 hours * $60 [8] = −$53,220].

Dated: January 24, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01872 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13570–002]

Warm Springs Irrigation District: Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Application for New License for a Major Water Project 5 Megawatts (MW) or Less—Existing Dam.

b. *Project No.:* 13570–002.

c. *Date filed:* April 15, 2013.

d. *Applicant:* Warm Springs Irrigation District.

e. *Name of Project:* Warm Springs Dam Hydroelectric Project.

f. *Location:* On the Malheur River, near the Town of Juntura, Malheur County, Oregon. The project would utilize the existing Warm Springs dam and reservoir, which is owned by the U.S. Bureau of Reclamation (Reclamation) and would occupy 13.5 acres of land administered by the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Randy Kinney, Warmsprings Irrigation District, 334 Main Street North, Vale, OR 97918, (541) 473–3951.

i. *FERC Contact:* Ken Wilcox, (202) 502–6835; *kenneth.wilcox@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file filing motions to intervene and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–13570–002.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. The proposed project would utilize the existing Reclamation's Warm Springs Dam and reservoir, and would consist of the following new facilities: (1) A new steel liner fitted into one of the outlets; (2) new trashrack at the entrance to the existing outlet works; (3) a 3.5-foot-long, 6-to-8-foot-diameter steel increaser section attached to the liner to transition the outlet into an 8-foot-diameter steel penstock; (4) a 150-foot-long increaser/penstock assembly to convey water to the new powerhouse located in the stilling basin below the dam; (5) a new 4-foot-diameter fixed cone bypass valve upstream of the powerhouse; (6) a 150-foot-long, 8-foot-diameter steel penstock; (7) a powerhouse containing one 2.7–MW Francis or Kaplan turbine; (8) a 2.2-mile-long, 25-kilovolt transmission line; and (9) appurtenant facilities. The average annual generation is estimated to be 7.442 gigawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with

[7] The number of respondents for transmission owners and distribution providers is based on the NERC Compliance Registry referenced in Order No. 773.

[8] The estimate for cost per hour for an electrical engineer is $60 (the average salary plus benefits) according to the Bureau of Labor Statistics at *http://bls.gov/oes/current/naics2_22.htm.*

the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE,'' ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' or ''COMPETING APPLICATION;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: January 24, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01871 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 13948–002; 13994–002]

Public Utility District No. 1 of Snohomish County; Notice of Scoping Meetings and Environmental Site Review and Soliciting Scoping Comments

Take notice that the following hydroelectric applications have been filed with Commission and are available for public inspection:

a. Type of Application: New Major License.

b. Project Nos.: 13948–002 and 13994–002.

c. Date filed: August 1, 2013.

d. Applicant: Public Utility District No. 1 of Snohomish County (SnoPUD).

e. Name of Projects: Calligan Creek Hydroelectric Project and Hancock Creek Hydroelectric Project.

f. Location: The Calligan Creek Hydroelectric Project would be located on Calligan Creek in King County, approximately 9 miles northeast of North Bend, Washington. It would not occupy any federal lands.

The Hancock Creek Hydroelectric Project would be located on Hancock Creek in King County, approximately 9 miles northeast of North Bend, Washington. It would not occupy any federal lands.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Kim D. Moore, P.E., Assistant General Manager of Generation, Water and Corporate Services; Public Utility District No. 1 of Snohomish County, 2320 California Street, P.O. Box 1107, Everett, WA 98206–1107; (425) 783–8606; *KDMoore@snopud.com.*

i. FERC Contact: Kelly Wolcott, *kelly.wolcott@ferc.gov,* (202) 502–6480.

j. Deadline for filing scoping comments: March 29, 2014.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket numbers P–13948–002 and/or P–13994–002.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. The Calligan Creek Hydroelectric Project would consist of the following new facilities: (1) An approximately 130-foot-long, 15-foot-wide diversion structure traversing Calligan Creek, consisting of a 45-foot-long, 8-foot-high spillway and two 14-foot-high wingwalls; (2) a 1.04-acre-foot impoundment; (3) an intake equipped with a 220-square-foot fish screen with 0.125-inch-wide openings, a trashrack, and a sluice gate; (4) a 1.2-mile-long, approximately 41-inch-diameter buried penstock; (5) approximately 1.2 miles of buried power and fiber optic cable providing power to the intake area for monitoring the remote sensors and operating screens and gates; (6) a powerhouse containing a single 6–MW two-jet horizontal-shaft Pelton turbine/generator; (7) a 135-foot-long rip-rap-lined tailrace channel discharging into Calligan Creek; (8) two access roads totaling 300 feet long; (9) a 2.5-mile-long, 34.5-kilovolt buried transmission line connecting to the existing Black Creek Hydroelectric Project (P–6221) switching vault; and (10) appurtenant facilities. No federal lands are included in the project.

The Hanock Creek Hydroelectric Project would consist of the following new facilities: (1) An approximately 130-foot-long, 10.7-foot-wide diversion structure traversing Hancock Creek, consisting of a 45-foot-long, 6-foot-high spillway and two 12-foot-high wingwalls; (2) a 0.85-acre-foot impoundment; (3) a 25-foot-wide, 12-foot-high, 53-foot-long intake with a trashrack, a 220-square-foot fish screen, and a sluice gate; (4) a 1.5-mile-long, approximately 40-inch-diameter buried penstock; (5) approximately 1.5 miles of buried power and fiber optic cable providing power to the intake area for monitoring the remote sensors and operating screens and gates; (6) a powerhouse containing a single 6–MW two-jet horizontal-shaft Pelton turbine/generator; (7) a 12-foot-wide, approximately 100-foot-long rip-rap-lined tailrace channel discharging into Hancock Creek; (8) two existing logging roads totaling 1,210 feet long; (9) three new access roads totaling 1,220 feet long; (10) a 0.3-mile-long, 34.5-kilovolt buried transmission line connecting to the existing Black Creek Hydroelectric Project (P–6221) switching vault; and (11) appurtenant facilities. No federal lands are included in the project.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available

for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Scoping Process

The Commission intends to prepare an Environmental assessment (EA) on the project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Scoping Meetings

FERC staff will conduct one agency scoping meeting and one public meeting. The agency scoping meeting will focus on resource agency and non-governmental organization concerns, while the public scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA.

The scoping meetings and the site review for both projects will be conducted jointly since these projects are in close proximity to each other. At the scoping meetings, we will discuss the Calligan Creek Project first, followed by the Hancock Creek Project.

The times and locations of these meetings are as follows:

Agency Scoping Meeting

Date: Thursday, February 27, 2014.
Time: 9:00 a.m. (PST).
Place: North Bend Rail Depot.
Address: 205 McClellan Street, North Bend, Washington.

Public Scoping Meeting

Date: Wednesday, February 26, 2014.
Time: 7:00 p.m. (PST).
Place: North Bend Rail Depot.
Address: 205 McClellan Street, North Bend, Washington.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the SD1 will be available at the scoping meeting or may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above).

Environmental Site Review

The Applicant and FERC staff will conduct a project Environmental Site Review beginning at 8:00 a.m. (PST) on Wednesday, February 26, 2014. All interested individuals, organizations, and agencies are invited to attend. All participants should meet at Snoqualmie Falls Project parking area, across from the Salish Lodge. The address for the Snoqualmie Falls Project parking area is: 6501 Railroad Avenue, Snoqualmie, Washington. All participants are responsible for their own transportation to the site. Anyone with questions about the Environmental Site Review should contact Ms. Dawn Presler of SnoPUD at (425) 783–1709.

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings are recorded by a stenographer and become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

Dated: January 24, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01866 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–523–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed Mobile Bay South III Expansion Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Mobile Bay South III Expansion Project, proposed by Transcontinental Gas Pipe Line Company, LLC (Transco) in the above-referenced docket. Transco requests authorization to modify two existing compressor stations in Choctaw and Mobile Counties, Alabama, in order to provide 225,000 dekatherms per day to serve expanding markets in southern Alabama and Florida.

The EA assesses the potential environmental effects of the construction and operation of the Mobile Bay South III Expansion Project in accordance with the requirements of the National Environmental Policy Act. The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The proposed Mobile Bay South III Expansion Project includes the following facilities at Transco's existing Compressor Station 85 in Choctaw County, Alabama:

- one new 20,500-horsepower (hp) natural gas-fired Solar Titan 130 turbine compressor;
- 2,050 feet of 30-inch-diameter interconnect pipeline between the existing Gulf South Pipeline Company, LP Scott Mountain Meter Station and the new compressor unit;
- a new compressor building to house the new compressor unit; and
- appurtenant facilities.

In addition, the project includes uprating an existing 15,000-hp Solar Mars 100 natural gas-fired compressor unit to 16,000 hp at Transco's Compressor Station 83 in Mobile County, Alabama.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the project area; and parties to this proceeding. In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or

lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before February 24, 2014.

For your convenience, there are three methods you can use to file your comments with the Commission. In all instances please reference the project docket number (CP13–523–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature located on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP13–523). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Dated: January 24, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01868 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

[1] See the previous discussion on the methods for filing comments.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2307–066]

Alaska Electric Light and Power Company; Notice of Application To Amend License and Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License.

b. *Project No:* 2307–066.

c. *Date Filed:* December 4, 2013, and supplemented on January 22, 2014.

d. *Applicant:* Alaska Electric Light and Power Company.

e. *Name of Project:* Annex Creek and Salmon Creek Hydroelectric Project.

f. *Location:* The project is located on Annex and Salmon Creeks near Juneau, Alaska. The project occupies federal lands within the Tongass National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 USC 791(a)–825(r).

h. *Applicant Contact:* Scott Willis, Vice President—Generation, Alaska Electric Light and Power Company, 5601 Tonsgard Court, Juneau, Alaska 99801–7201; telephone: (907) 463–6396.

i. *FERC Contact:* Linda Stewart, telephone: (202) 502–6680, and email address: *linda.stewart@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests, is 30 days from the issuance date of this notice by the Commission. The Commission strongly encourages electronic filing. Please file any motion to intervene, protest, comments, and/or recommendations using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The first page of any filing should include docket number P–2307–066.

k. *Description of Request:* Alaska Electric Light and Power Company (AEL&P) proposes to convert 0.3 mile of the Annex Creek development's 12-mile-long, 23-kilovolt overhead transmission line to an underground transmission line. Pursuant to an amendment order issued in 1999, approximately 1 mile of the 12-mile-long transmission line was buried in the summer of 2000. The proposed underground section of transmission line would extend from the previously buried section of line located on the west side of Powerline Ridge and transition back to the existing overhead line near the location of Camp 6. The proposed underground line route would remain within both the Tongass National Forest and the existing project boundary. AEL&P proposes to change the transmission line from overhead to underground due to the harsh weather conditions that regularly damage this section of line.

l. *Locations of the Application:* This filing may be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number P–2307 in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208- 3676 or

email *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above and at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: January 23, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01870 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14559–000]

ECOsponsible, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 24, 2013, ECOsponsible, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Setting Pole Rapids Dam Hydro Project (project) to be located on the Raquette River, in Franklin County, New York, near the Town of Tupper Lake, New York. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) Installing three RivGen™ Turbine Generator Units with a total installed capacity of 1,487 kilowatts below Setting Pole Rapids Dam in the Raquette River; (2) a shore power station housing two inverters to convert direct current to alternating current; (3) an overhead 1,450-foot-long, 46.1-kilovolt (kV) transmission line extending from the project to the interconnection with National Grid; and (4) appurtenant facilities. The estimated annual generation of the Setting Pole Rapids Dam Hydro Project would be 10,420 megawatt-hours.

Applicant Contact: Mr. Dennis Ryan, ECOsponsible, Inc., 120 Mitchell Road, Suite 100, East Aurora, NY 14052; phone: (716) 655–3524.

FERC Contact: Tim Looney; phone: (202) 502–6096.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–14559–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14559) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 23, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01867 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14–45–000]

Dominion Transmission, Inc.; Notice of Request Under Blanket Authorization

Take notice that January 9, 2014, Dominion Transmission, Inc. (Dominion), 701 East Cary Street, Richmond, Virginia 23219, filed a prior notice application pursuant to sections 157.205 and 157.208 of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act (NGA), and Dominion's blanket certificate issued in Docket No. CP82–537–000, for authorization to replace certain pipeline facilities (Project) located in Westmoreland County, Pennsylvania. Specifically, the Project consists of replacing 9.7 miles of various diameter pipelines, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket

number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Tiffany Werts, Regulatory and Certificates Analyst, Dominion Transmission, Inc., 701 East Cary Street, Richmond, VA 23219, or telephone (804) 771–4613 or fax (804) 771–4804 or by email *Tiffany.N.Werts@dom.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: January 23, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–01869 Filed 1–29–14; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ -OW–2003–0033; FRL 9905–73–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Modification of Secondary Treatment Requirements for Discharges Into Marine Waters (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Modification of Secondary Treatment Requirements for Discharges into Marine Waters (Renewal)'' to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through 01/31/2014. Public comments were previously requested via the **Federal Register** (78 FR 59345) on September 26, 2013, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before March 3, 2014.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OW–2003–0033, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Virginia Fox-Norse, Oceans and Coastal Protection Division, Office of Wetlands, Oceans and Watersheds, (Mail Code 4504T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 566–1266; fax number: (202) 566–1337; email address: *fox-norse.virginia@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

EPA ICR Number: 0138.10.

OMB Control Number: 2040–0088.

Abstract: The Clean Water Act (CWA) section 301(h) program involves collecting information from two sources: (1) The municipal wastewater treatment facility, commonly called a publicly owned treatment works (POTW); and (2) the state in which the POTW is located. Municipalities had the opportunity to apply for a waiver from secondary treatment requirements, but that opportunity closed in December 1982. A POTW that seeks a section 301(h) waiver does so voluntarily to obtain or retain a benefit. A POTW seeking to obtain a 301(h) waiver, holding a

current waiver, or reapplying for a waiver, provides application, monitoring, and toxic control program information. The state provides information on its determination whether the proposed conditions of the waiver ensure the protection of water quality, biological habitats, and beneficial uses of receiving waters, and whether the discharge will result in additional treatment, pollution control, or any other requirement for any other point or nonpoint sources. The state also provides information to certify that the discharge will meet all applicable state laws and that the state accepts all permit conditions. EPA requires updated information on the discharge to: (1) Determine whether the section 301(h) criteria are still being met and whether the section 301(h) waiver should be reissued; (2) determine whether the water quality, biological habitats, and beneficial uses of the receiving waters are protected; and (3) ensure that the permittee is effectively minimizing industrial and nonindustrial toxic pollutant and pesticide discharges into the treatment works. EPA needs information from the state to: (1) Allow the state's views to be taken into account when EPA reviews the section 301(h) application and develops permit conditions; and (2) ensure that all state laws are met and that the state accepts all permit conditions. This information is the means by which the state can non-concur with a section 301(h) approval decision made by the EPA Regional office. Regulations implementing CWA section 301(h) are found at 40 CFR part 125, subpart G. The information covered by this information collection request involves treatment plant operating data, effects of POTWs' discharges on marine environments, and states' viewpoints on issues concerning effects of POTWs' discharges on marine environments.

Form Numbers: ''None.''

Respondents/affected entities: Entities potentially affected by this action are those municipalities that currently have section 301(h) waivers from secondary treatment, or have applied for a renewal of a section 301(h) waiver, and the states within which these municipalities are located.

Respondent's obligation to respond: Required to obtain or retain a benefit.

Estimated number of respondents: 37 (total).

Frequency of response: From once every five years, to varies case-by-case, depending on the category of information.

Total estimated burden: 59,370 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $1.3 million (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease in the total estimated respondent burden compared with the ICR currently approved by OMB, due to changes in the respondent universe, program status, information needs, and the use of technology.

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. 2014–01855 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0394; FRL 9905–75–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Approval of State Coastal Nonpoint Pollution Control Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Approval of State Coastal Nonpoint Pollution Control Programs (CZARA Section 6217)'' to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through January 31, 2014. Public comments were previously requested via the **Federal Register** (78 FR 69664) on November 20, 2013 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before March 3, 2014.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OW–2006–0394, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Don Waye, Assessment and Watershed Protection Division, Office of Wetlands Oceans and Watersheds, Mail Code 4503–T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 566–1170; fax number: (202) 566–1333; email address: *waye.don@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

EPA ICR No.: 1569.08

OMB Control No.: 2040–0153

Abstract: Under the provisions of national Program Development and Approval Guidance implementing section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) which was jointly developed and published by EPA and the National Oceanic and Atmospheric Administration (NOAA), 29 coastal States and 5 coastal Territories with federally approved Coastal Zone Management Programs have developed and submitted to EPA and NOAA Coastal Nonpoint Pollution Programs. Another State (Illinois) is developing its program for submittal to EPA and NOAA in early 2014. EPA and NOAA have fully approved 17 States and 5 Territories, and conditionally approved 11 States. Another State that was conditionally approved (Alaska) ceased its participation in this program in 2011. States and Territories with conditional approvals are required to submit additional information in order to obtain final program approval. CZARA section 6217 requires States and Territories to obtain final approval of their Coastal Nonpoint Pollution Programs in order to retain their full

share of funding available to them under section 319 of the Clean Water Act and section 306 of the Coastal Zone Management Act.

Form Numbers: None.

Respondents/affected entities: Entities affected by this action are 11 coastal States with conditionally approved Coastal Nonpoint Pollution Control Programs and 1 coastal State that will submit its program for federal approval in 2014.

Respondent's obligation to respond: Required to obtain or retain benefits.

Estimated number of respondents: 12 States (total).

Frequency of response: On occasion.

Total estimated burden: 1,500 hours (per year). Burden is defined at 5 CFR 1320.03(b).

T*otal estimated cost:* $55,500 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 125 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is the result of progress that States which are not yet unconditionally approved have made that have resulted in the reduction in the number of conditions imposed on them by EPA and NOAA, offset by the addition of a new State coastal nonpoint program (Illinois), as well as the sunsetting of one State program in 2011 (Alaska).

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. 2014–01792 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9906–08–OA]

Request for Nominations to the National and Governmental Advisory Committees to the U.S. Representative to the Commission for Environmental Cooperation

AGENCY: Environmental Protection Agency.

ACTION: Notice of request for nominations.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is inviting nominations from a diverse range of qualified candidates to be considered for appointment to fill vacancies on the National Advisory Committee (NAC) and the Governmental Advisory Committee (GAC) to the U.S. Representative to the Commission for Environmental Cooperation (CEC). Vacancies on these two committees are expected to be selected by the spring of 2014. Additional sources may be utilized in the solicitation of nominees.

DATES: Please submit nominations by February 28, 2014.

ADDRESSES: Submit nominations to: Oscar Carrillo, Designated Federal Officer, Office of Federal Advisory Committee Management and Outreach, U.S. Environmental Protection Agency (1601–M), 1200 Pennsylvania Avenue NW., Washington, DC 20460. You may also email nominations with subject line Committee Resume 2014 to *carrillo.oscar@epa.gov*.

FOR FURTHER INFORMATION CONTACT: Oscar Carrillo, Designated Federal Officer, U.S. Environmental Protection Agency (1601–M), Washington, DC 20460; telephone (202) 564–0347; fax (202) 564–8129; email *carrillo.oscar@epa.gov*.

SUPPLEMENTARY INFORMATION: The National Advisory Committee and the Governmental Advisory Committee advise the EPA Administrator in her capacity as the U.S. Representative to the CEC Council. The Committees are authorized under Articles 17 and 18 of the North American Agreement on Environmental Cooperation (NAAEC), the North American Free Trade Agreement (NAFTA) Implementation Act, Public Law 103–182, and as directed by Executive Order 12915, entitled ''Federal Implementation of the North American Agreement on Environmental Cooperation.'' The Committees are responsible for providing advice to the United States Representative on a wide range of strategic, scientific, technological, regulatory and economic issues related to implementation and further elaboration of the NAAEC. The National Advisory Committee consists of 15 representatives from environmental non-profit groups, business and industry, and educational institutions. The Governmental Advisory Committee consists of 14 representatives from state, local, and tribal governments. Members are appointed by the EPA Administrator for a two-year term. The committees usually meet 3 times per year and the average workload for committee members is approximately 10 to 15 hours per month. Members serve on the committees in a voluntary capacity. Although we are unable to provide compensation or an honorarium for your services, you may receive travel and per diem allowances, according to applicable federal travel regulations. EPA is seeking nominations from various sectors, i.e., for the NAC we are seeking nominees from academia and non-governmental organizations; for the GAC we are seeking nominees from state and local government sector. Nominees will be considered according to the mandates of FACA, which requires committees to maintain diversity across a broad range of constituencies, sectors, and groups. EPA values and welcomes diversity. In an effort obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups. The following criteria will be used to evaluate nominees:

- Professional knowledge of the subjects examined by the committees, including trade and environment issues, the NAFTA, the NAAEC, and the CEC.
- Represent a sector or group involved in trilateral environmental policy issues.
- Senior-level experience in the sectors represented on both committees.
- A demonstrated ability to work in a consensus building process with a wide range of representatives from diverse constituencies.

Nominations must include a resume and a short biography describing the professional and educational qualifications of the nominee, as well as the nominee's current business address, email address, and daytime telephone number. Interested candidates may self-nominate. Anyone interested in being considered for nomination is encouraged to submit their application materials by February 28, 2014. To help the Agency in evaluating the effectiveness of its outreach efforts, please tell us how you learned of this opportunity. Please be aware that EPA's policy is that, unless otherwise prescribed by statute, members generally are appointed for two-year terms.

Dated: January 16, 2014.

Oscar Carrillo,

Designated Federal Officer.

[FR Doc. 2014–01901 Filed 1–29–14; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2014–6001]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 10–03 Notice of Claim and Proof of Loss, Export Credit Insurance Policies.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This collection of information is necessary, pursuant to 12 U.S.C. 635 (a)(1), to determine if a claim complies with the terms and conditions of the relevant insurance policy. In the event that a buyer defaults on a transaction insured by Ex-Im Bank the insured exporter or lender may seek payment by the submission of a claim. The Notice of Claim and Proof of Loss, Export Credit Insurance Policies is used to determine compliance with the terms of the insurance policy and the appropriateness of paying a claim. Export-Import Bank customers are able to submit this form on paper or electronically.

The information collection tool can be reviewed at: *http://www.exim.gov/pub/pending/eib10–03.pdf.*

DATES: Comments must be received on or before March 31, 2014 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Michele Kuester, Export-Import Bank of the United States, 811 Vermont Ave. NW. Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 10–03 Notice of Claim and Proof of Loss, Export Credit Insurance Policies.

OMB Number: 3048–0033.

Type of Review: Regular.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant insurance policy.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 300.

Estimated Time per Respondent: 1 hour.

Annual Burden Hours: 300 hours.

Frequency of Reporting of Use: As needed to request claim payment.

Government Expenses:

Reviewing time per year: 300 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $12,750 (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $15,300.

Toya Woods,

Records Analyst, Records Management Division, Office of the Chief Information Officer.

[FR Doc. 2014–01862 Filed 1–29–14; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2014–6002]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 10–04 Notice of Claim and Proof of Loss, Working Capital Guarantee.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

By neutralizing the effect of export credit support offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. Under the Working Capital Guarantee Program, Ex-Im Bank provides repayment guarantees to lenders on secured, short-term working capital loans made to qualified exporters. The guarantee may be approved for a single loan or a revolving line of credit. In the event that a borrower defaults on a transaction guaranteed by Ex-Im Bank the guaranteed lender may seek payment by the submission of a claim.

This collection of information is necessary, pursuant to12 U.S.C. 635 (a)(1), to determine if such claim complies with the terms and conditions of the relevant working capital guarantee. The Notice of Claim and Proof of Loss, Working Capital Guarantee is used to determine compliance with the terms of the guarantee and the appropriateness of paying a claim. Export-Import Bank customers are able to submit this form on paper or electronically.

The information collection tool can be reviewed at: *http://www.exim.gov/pub/pending/eib10-04.pdf.*

DATES: Comments must be received on or before March 31, 2014 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Michele Kuester, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 10–04 Notice of Claim and Proof of Loss, Working Capital Guarantee.

OMB Number: 3048–0035.

Type of Review: Regular.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 20.

Estimated Time per Respondent: 1 hour.

Annual Burden Hours: 20 hours.

Frequency of Reporting of Use: As needed to request a claim payment.

Government Expenses:

Reviewing time per year: 20 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $850 (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $1,020.

Toya Woods,

Records Analyst, Records Management Division, Office of the Chief Information Officer.

[FR Doc. 2014–01863 Filed 1–29–14; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2014–6003]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 10–05 Notice of Claim and Proof of Loss, Medium Term Guarantee.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

Pursuant to the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635,

et seq.), the Export-Import Bank of the United States (Ex-Im Bank), facilitates the finance of the export of U.S. goods and services by providing insurance or guarantees to U.S. exporters or lenders financing U.S. exports. By neutralizing the effect of export credit insurance or guarantees offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. In the event that a borrower defaults on a transaction insured or guaranteed by Ex-Im Bank, the insured or guaranteed exporter or lender may seek payment from Ex-Im Bank by the submission of a claim.

This collection of information is necessary, pursuant to 12 U.S.C. 635 (a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee. The Notice of Claim and Proof of Loss, Medium Term Guarantee is used to determine compliance with the terms of the guarantee and the appropriateness of paying a claim. Export-Import Bank customers are able to submit this form on paper or electronically.

The information collection tool can be reviewed at *http://www.exim.gov/pub/pending/eib10-05.pdf.*

DATES: Comments must be received on or before March 31, 2014.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov.* or by mail to Michele Kuester, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 10–05 Notice of Claim and Proof of Loss, Medium Term Guarantee.

OMB Number: 3048–0034.

Type of Review: Regular.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 65.

Estimated Time per Respondent: 1½ hours.

Annual Burden Hours: 97.5 hours.

Frequency of Reporting of Use: As needed to request a claim payment.

Government Expenses:

Reviewing time per year: 65 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $2,762. (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $3,315.

Toya Woods,

Record Management Division, Office of the Chief Information Officer.

[FR Doc. 2014–01859 Filed 1–29–14; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Open Commission Meeting; Thursday, January 30, 2014

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, January 30, 2014. The meeting is scheduled to commence at 10:30 a.m. in Room TW–C305, at 445 12th Street SW., Washington, DC Due to the adverse weather conditions and closing of the Commission on Tuesday, January 21, 2014, the Commission is waiving the sunshine period prohibition contained in Section 1.1203 of the Commission's rules, 47 CFR 1.1203, until 11:59 p.m. on Friday, January 24, 2014. Thus, presentations with respect to the items listed below will be permitted until that time.

Item No.	Bureau	Subject
1	OFFICE OF GENERAL COUNSEL	TITLE: Technology Transitions (GN Docket No. 13–5); AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition (GN Docket No. 12–353); Connect America Fund (WC Docket No. 10–90); Structure and Practices of the Video Relay Service Program (CG Docket No. 10–51); Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities (CG Docket No. 03–123); Numbering Policies for Modern Communications (WC Docket No. 13–97) SUMMARY: The Commission will consider a Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry that invites diverse technology transitions experiments to examine how to best accelerate technology transitions by preserving and enhancing the values consumers have come to expect from communication networks.
2	PUBLIC SAFETY & HOMELAND SECURITY.	TITLE: Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications (PS Docket No. 11–153); Framework for Next Generation 911 Deployment (PS Docket No. 10–255) SUMMARY: The Commission will consider a Policy Statement and Further Notice of Proposed Rulemaking that sets forth the agency's policy goals regarding this critical public safety function, and seeks comment on proposals for widespread implementation and achievement of those goals.
3	INCENTIVE AUCTION TASK FORCE	PRESENTATION: The Commission will receive an update on the timeline and project plan for the broadcast television incentive auction.
4	WORKING GROUP ON PROCESS REFORM.	PRESENTATION: The Commission will receive a presentation from the Staff Working Group on Process Reform at the FCC.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an email to: *fcc504@fcc.gov mail to: fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Meribeth McCarrick, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC Live Web page at *www.fcc.gov/live http://www.fcc.gov/live.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *www.capitolconnection.gmu.edu http://www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by email at *FCC@BCPIWEB.com mailto:FCC@BCPIWEB.com.*

Dated: January 23, 2014.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2014–01984 Filed 1–28–14; 11:15 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request Re: Interagency Biographical and Financial Report

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. As part of its continuing effort to reduce paperwork and respondent burden, the FDIC invites the general public and other Federal agencies to take this opportunity to comment on renewal of its information collection entitled *Interagency Biographical and Financial Report* (OMB No. 3064–0006). At the end of the comment period, any comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval.

DATES: Comments must be submitted on or before March 31, 2014.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html*
- *Email: comments@fdic.gov.* Include the name of the collection in the subject line of the message.
- *Mail:* Leneta G. Gregorie (202–898–3719), Counsel, Room NYA–5050, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503. A copy of the form can be accessed via the following link: *http://www.fdic.gov/formsdocuments/Bio-FinReport.pdf.*

FOR FURTHER INFORMATION CONTACT: Leneta Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collections of information:

Title: Interagency Biographical and Financial Report.

OMB Number: 3064–0006.

Frequency of Response: On occasion.

Affected Public: Insured state nonmember banks and state savings associations.

Estimated Number of Respondents: 619.

Estimated Time per Response: 4 hours.

Total Estimated Annual Burden: 2476 hours.

General Description of Collection: The *Interagency Biographical and Financial Report* is submitted to the FDIC by each director or officer of a proposed or operating financial institution applying for federal deposit insurance as a state nonmember bank or state savings association. The FDIC uses the information to evaluate the general character of bank management as required by the Federal Deposit Insurance Act (12 U.S.C. 1828(c)).

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 24th day of January, 2014.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2014–01741 Filed 1–29–14; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: January 22, 2014.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10492	DuPage National Bank	West Chicago	IL	1/17/2014

[FR Doc. 2014–01799 Filed 1–29–14; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2014–N–2]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: 60-day Notice of submission of information collection for approval from the Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995, the Federal Housing Finance Agency (FHFA) is seeking public comments concerning the currently-approved information collection ''Monthly Survey of Rates and Terms on Conventional 1-Family Nonfarm Mortgage Loans,'' which has been assigned control number 2590–0004 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on March 31, 2014.

DATES: Interested persons may submit comments on or before March 31, 2014.

ADDRESSES: Submit comments to FHFA using any one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *Regcomments@fhfa.gov* to ensure timely receipt by the agency.
- *Email: Regcomments@fhfa.gov.* Please include Proposed Collection; Comment Request: ''Monthly Survey of Rates and Terms on Conventional 1-Family Nonfarm Mortgage Loans, (No. 2014–N–2)'' in the subject line of the message.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024, ATTENTION: Public Comments/Proposed Collection; Comment Request: ''Monthly Survey of Rates and Terms on Conventional 1-Family Nonfarm Mortgage Loans, (No. 2014–N–2).''

We will post all public comments we receive without change, including any personal information you provide, such as your name, address, email address, and telephone number, on the FHFA Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at 202–649–3804.

FOR FURTHER INFORMATION CONTACT: David L. Roderer, Senior Financial Analyst, 202–649–3206 (not a toll-free number), *david.l.roderer@fhfa.gov,* or by regular mail at the Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is 800–877–8339.

SUPPLEMENTARY INFORMATION:

A. Need For and Use of the Information Collection

FHFA's Monthly Survey of Rates and Terms on Conventional 1-Family Non-Farm Mortgage Loans, commonly referred to as the ''Monthly Interest Rate Survey'' or ''MIRS,'' is a monthly survey of mortgage lenders that solicits information on the terms and conditions on all conventional, single-family, fully amortized, purchase-money mortgage loans closed during the last five working days of the preceding month. The MIRS collects monthly information on interest rates, loan terms, and house prices by property type (*i.e.,* new or previously occupied), by loan type (*i.e.,* fixed- or adjustable-rate), and by lender type (*i.e.,* mortgage companies, savings associations, commercial banks, and savings banks), as well as information on 15-year and 30-year fixed-rate loans. In addition, the survey collects quarterly information on conventional loans by major metropolitan area and by Federal Home Loan Bank district. The MIRS does not collect information on loans insured by the Federal Housing Administration (FHA) or guaranteed by the Veterans Administration (VA), loans secured by multifamily property or manufactured housing, or loans created by refinancing another mortgage. The MIRS is the most comprehensive source of information on conventional mortgage rates and terms in the United States.

The MIRS originated with one of FHFA's predecessor agencies, the former Federal Home Loan Bank Board (FHLBB) in the 1960s. Among other things, the FHLBB used data collected through the MIRS to derive its National Average Contract Mortgage Rate for the Purchase of Previously Occupied Homes by Combined Lenders (ARM Index), which was used by lenders to set mortgage rates on adjustable rate mortgages (ARMs). No statutory or regulatory provision explicitly required the FHLBB to conduct the MIRS. However, for a period in the early 1980s, federally chartered savings institutions were required to use the MIRS-derived ARM Index in setting interest rates on ARMs. Few, if any, loans from that period remain. After 1981, an unknown but likely very small proportion of lenders used the ARM Index to set interest rates on their new ARMs.

In 1989, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act (FIRREA), which abolished the FHLBB and created the Federal Housing Finance Board (Finance Board) to assume many of the FHLBB's powers and responsibilities. FIRREA required the Chairperson of the Finance Board to ''take such actions as may be necessary'' to ensure that the ARM Index prepared by the FHLBB continued to be available.[1] Although there was no explicit reference in FIRREA to the continuation of the MIRS, the Finance Board viewed that statutory requirement to continue to produce the ARM Index as a mandate to

[1] *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Public Law 101–73, Title IV, § 402(e)(3), 103 Stat. 183, *codified at* 12 U.S.C. 1437 note. The statute permitted the Finance Board to substitute a different ARM index after notice and comment, but only if the new index was based upon data substantially similar to that of the original ARM Index and substitution of the new ARM index would result in an interest rate substantially similar to the rate in effect at the time the new ARM index replaced the existing ARM Index. *See* FIRREA § 402(e)(4).

continue also to conduct the MIRS, from which the data used to derive the ARM Index was obtained. The Finance Board conducted the MIRS and produced the ARM Index from 1989 through 2008, when Congress abolished that agency and transferred its responsibilities to the newly-created FHFA.[2]

Since 2008, FHFA has continued to conduct the MIRS and produce the ARM Index.[3] By statute, MIRS data is one of the factors that FHFA is required to consider in assessing the national average one-family house price for purposes of periodically adjusting the conforming mortgage loan limits of Fannie Mae and Freddie Mac.[4] In addition, statutes in several states and U.S. territories, including California, Michigan, Minnesota, New Jersey, Wisconsin, and the Virgin Islands, refer to, or rely upon, the MIRS.[5]

Many lenders use FHFA's ARM Index, derived from MIRS data, to set interest rates on fixed rate loans. In addition, businesses, trade associations, and government agencies at both the federal and state level rely upon the MIRS data for various business and regulatory purposes. For example, economic policy makers have used the MIRS data to determine trends in the mortgage markets, including interest rates, down payments, terms to maturity, terms on ARMs, and initial fees and charges on mortgage loans. Other federal banking agencies, such as the Board of Governors of the Federal Reserve System and the Council of Economic Advisors, have used the MIRS results for research purposes.

The OMB number for the information collection is 2590–0004, which is due to expire on March 31, 2014. The likely respondents are mortgage lenders in the United States.

B. Burden Estimate

FHFA estimates the total annual number of respondents at 70 with 6 responses per respondent (because not every respondent will have new mortgage loans to report every month). The estimate for the average time per response is 20 minutes. The combined estimate for the total annual hour burden is 140 hours (70 respondents × 6 responses × 0.33 hours).

C. Comment Request

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

Dated: January 23, 2014.

Kevin Winkler,

Chief Information Officer, Federal Housing Finance Agency.

[FR Doc. 2014–01742 Filed 1–29–14; 8:45 am]

BILLING CODE 8070–01–P

[2] *See* Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, Div. A, Title III, § 1312, 122 Stat. 2794, *codified at* 12 U.S.C. 4511 note.

[3] The MIRS and the ARM Index are described at 12 CFR 906.5.

[4] *See* 12 U.S.C. 4542.

[5] *See, e.g.,* Cal. Civ. Code §§ 1916.7 and 1916.8 (mortgage rates); Mich. Comp. Laws § 445.1621(d) (mortgage index rates); Minn. Stat. § 92.06 (payments for state land sales); N.J. Rev. Stat. 31:1–1 (interest rates); Wis. Stat. § 138.056 (variable loan rates); V.I. Code Ann. tit. 11, § 951 (legal rate of interest).

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 19, 2014.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1 *B. Scott White and Blaine Scott White, II,* both of Castlewood, Virginia, The B. Scott White Trust, the sole trustee of which is B. Scott White, and Tiffany C. White, Evergreen, Colorado; Sky Investments, LLC, Castlewood, Virginia, with its members Tiffany C. White, Blaine S. White II, and The B. Scott White Trust; SBTB, L.P., a proposed qualified family partnership, the partners of which are The B. Scott White Trust, Tiffany C. White and Blaine S. White, II; B. Scott White IRA and; the group acting in concert to control voting shares of New Peoples Bankshares, Inc., Honaker, Virginia, and thereby indirectly control New Peoples Bank, Inc., Honaker, Virginia.

Board of Governors of the Federal Reserve System, January 27, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–01857 Filed 1–29–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 26, 2014.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Aquesta Financial Holdings, Inc.,* Cornelius, North Carolina; to become a bank holding company through the acquisition of 100 percent of the voting shares of Aquesta Bank, Cornelius, North Carolina

Board of Governors of the Federal Reserve System, January 27, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–01856 Filed 1–29–14; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–21354–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: HHS/Office of the National Coordinator for Health Information Technology, (ONC).

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). The ICR is for extending the use of the approved information collection assigned OMB control number 0955–0006, which expires on March 31, 2014. Prior to submitting that ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before March 31, 2014.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–21354–60D for reference.

Information Collection Request Title: ARRA Section 3013 State Health Information Exchange Cooperative Agreement Program: State Plans.

OMB No.: 0955–0006.

Abstract: States and QSDEs will be required to submit annual update to the State Plans reflecting updates in legal, policy, or technical infrastructure changes, as well as expanded content on sustainability and business planning for the HIE services fostered through the cooperative agreement, evaluation of the project, and alignment with other Federal programs authorized in HITECH. ONC will issue future PINs to provide additional guidance to States and QSDEs on the annual updates to Plan content areas needed. Annual updates to the plan are required one-year from the approval date of the State Plan.

Need and Proposed Use of the Information: ONC program and grants staff will use project management timelines and milestones provided in the State Plans to monitor progress to expand health information capacity within the states. The development and provision of technical assistance on state, regional and national levels will be based on the State Plans' content. ONC intent to use the State Plans' content to highlight best practices, identify areas in need of technical assistance, and document progress to program goals.

Likely Respondents: State government or Qualified State Designated Entity.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
State Plans Strategic Operational	56	1	3341.3	187,113
Subsequent updates to the State Plan	56	1	500	28000
Total				215,113

OS specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Darius Taylor,

Deputy, Information Collection Clearance Officer.

[FR Doc. 2014–01846 Filed 1–29–14; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day–14–14HM]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these

requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery—NEW—Centers for Disease Control and Prevention (CDC), National Center for Injury Prevention and Control (NCIPC).

As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the CDC has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery '' to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*).

To request additional information, please contact Leroy A. Richardson, Centers for Disease Control and Prevention, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** on December 22, 2010 (75 FR 80542).

This is a new collection of information. Respondents will be screened and selected from Individuals and Households, Businesses, Organizations, and/or State, Local or Tribal Government. Below we provide CDC's projected annualized estimate for the next three years. There is no cost to respondents other than their time. The estimated annualized burden hours for this data collection activity are 18,750.

Type of collection	Average no. of respondents per activity	Annual frequency per response	Average no. of activities	Average hours per response
Focus Groups	5,000	1	1	1
Online Surveys	55,000	1	1	15/60

Leroy Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014–01822 Filed 1–29–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee on Immunization Practices (ACIP)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announce the following meeting of the aforementioned committee:

Times and Dates: 8:00 a.m.–6:00 p.m., February 26, 2014. 8:00 a.m.–3:00 p.m., February 27, 2014.

Place: CDC, Tom Harkin Global Communications Center, 1600 Clifton Road NE., Building 19, Kent ''Oz'' Nelson Auditorium, Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Purpose: The committee is charged with advising the Director, CDC, on the appropriate use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding the appropriate periodicity, dosage, and contraindications applicable to the vaccines. Further, under provisions of the Affordable Care Act, at section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been adopted by the Director, CDC must be covered by applicable health plans.

Matters To Be Discussed: The agenda will include discussions on: human papillomavirus vaccines, influenza, pneumococcal conjugate vaccine, safety of tetanus, diphtheria, and acellular pertussis vaccine/pregnancy, meningococcal vaccines, smallpox vaccine, yellow fever vaccine, adult immunization, and vaccine supply. Recommendation votes are scheduled for human papillomavirus vaccines and influenza. Time will be available for public comment.

Agenda items are subject to change as priorities dictate.

Contact Person For More Information: Felicia Betancourt, National Center for Immunization and Respiratory Diseases,

CDC, 1600 Clifton Road NE., MS–A27, Atlanta, Georgia 30333, telephone 404/639–8836; Email *ACIP@CDC.GOV.*

The meeting is webcast live via the World Wide Web; for instructions and more information on ACIP please visit the ACIP Web site: *http://www.cdc.gov/vaccines/acip/index.html.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2014–01823 Filed 1–29–14; 8:45 am]

BILLING CODE 4160–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Request for Nominations of Candidates to Serve on the World Trade Center Health Program Scientific/Technical Advisory Committee (the STAC or the Committee), Centers for Disease Control and Prevention, Department of Health and Human Services

The CDC is soliciting nominations for membership on the World Trade Center (WTC) Health Program Scientific/Technical Advisory Committee (STAC).

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347) was enacted on January 2, 2011, amending the Public Health Service Act (PHS Act) by adding Title XXXIII establishing the WTC Health Program within HHS (Title XXXIII of the PHS Act is codified at 42 U.S.C. 300mm to 300mm–61). Section 3302(a) of the PHS Act established the WTC Health Program Scientific/Technical Advisory Committee (STAC). The STAC is governed by the provisions of the Federal Advisory Committee Act, as amended (Pub. L. 92–463, 5 U.S.C. App.), which sets forth standards for the formation and use of advisory committees in the Executive Branch. PHS Act Section 3302(a)(1) establishes that the STAC will: Review scientific and medical evidence and make recommendations to the [WTC Program] Administrator on additional WTC Program eligibility criteria and on additional WTC-related health conditions. Section 3341(c) of the PHS Act requires the WTC Program Administrator to also consult with the STAC on research regarding certain health conditions related to the September 11 terrorist attacks. The STAC may also be consulted on other matters related to implementation and improvement of the WTC Health Program, as outlined in the PHS Act, at the discretion of the WTC Program Administrator. In accordance with Section 3302(a)(2) of the PHS Act, the WTC Program Administrator will appoint the members of the committee, which must include at least:

- 4 occupational physicians, at least two of whom have experience treating WTC rescue and recovery workers;
- 1 physician with expertise in pulmonary medicine;
- 2 environmental medicine or environmental health specialists;
- 2 representatives of WTC responders;
- 2 representatives of certified-eligible WTC survivors;
- 1 industrial hygienist;
- 1 toxicologist;
- 1 epidemiologist; and
- 1 mental health professional.

At this time the Administrator is seeking nominations for members fulfilling the following categories:

- occupational physician with experience treating WTC rescue and recovery workers;
- representative of WTC responders;
- representative of certified-eligible WTC survivors;
- industrial hygienist;
- mental health professional.

Other members may be appointed at the discretion of the WTC Program Administrator.

A STAC member's term appointment may last 3 years. If a vacancy occurs, the WTC Program Administrator may appoint a new member who fulfills the same membership category as the predecessor. STAC members may be appointed to successive terms. The frequency of committee meetings shall be determined by the WTC Program Administrator based on program needs. Meetings may occur up to four times a year. Members are paid the Special Government Employee rate of $250 per day, and travel costs and per diem are included and based on the Federal Travel Regulations.

Any interested person or organization may self-nominate or nominate one or more qualified persons for membership.

Nominations must include the following information:

- The nominee's contact information and current occupation or position;
- The nominee's resume or curriculum vitae, including prior or current membership on other National Institute for Occupational Safety and Health (NIOSH), CDC, or HHS advisory committees or other relevant organizations, associations, and committees;
- The category of membership (occupational physician with experience treating WTC rescue and recovery workers, representative of WTC responders or certified-eligible WTC survivors, industrial hygienist, or mental health professional) that the candidate is qualified to represent;
- A summary of the background, experience, and qualifications that demonstrates the nominee's suitability for the nominated membership category;
- Articles or other documents the nominee has authored that indicate the nominee's knowledge and experience in relevant subject categories; and
- A statement that the nominee is aware of the nomination, is willing to regularly attend and participate in STAC meetings, and has no known conflicts of interest that would preclude membership on the Committee.

STAC members will be selected upon the basis of their relevant experience and competence in their respective categorical fields. The information received through this nomination process, in addition to other relevant sources of information, will assist the WTC Program Administrator in appointing members to serve on the STAC. In selecting members, the WTC Program Administrator will consider individuals nominated in response to this **Federal Register** notice as well as other qualified individuals.

The CDC is committed to bringing greater diversity of thought, perspective, and experience to its advisory committees. Nominees from all races, genders, ages, and persons living with disabilities are encouraged to apply. Nominees must be U.S. citizens.

Candidates invited to serve will be asked to submit the ''Confidential Financial Disclosure Report,'' OGE Form 450. This form is used by CDC to determine whether there is a financial conflict between that person's private interests and activities and their public responsibilities as a Special Government Employee as well as any appearance of a loss of impartiality, as defined by Federal regulation. The form may be viewed and downloaded at *http://www.oge.gov/Forms-Library/OGE-Form-450-Confidential-Financial-Disclosure-Report/.* This form should not be submitted as part of a nomination.

DATES: Nominations must be submitted (postmarked or electronically received) by March 14, 2014.

Submissions must be electronic or by mail. Submissions should reference docket #229–B. Electronic submissions: You may electronically submit nominations, including attachments, to *nioshdocket@cdc.gov.* Attachments in Microsoft Word are preferred. Regular, Express, or Overnight Mail: Written nominations may be submitted (one original and two copies) to the following address only: NIOSH Docket 229–B, c/o Zaida Burgos, Committee Management Specialist, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1600 Clifton Rd. NE., MS: E–20, Atlanta, Georgia 30333. Telephone and facsimile submissions cannot be accepted. For further information contact: Paul Middendorf, Senior Health Scientist, 1600 Clifton Rd. NE., MS: E–20, Atlanta, GA 30333; telephone (404)498–2500 (this is not a toll-free number); email *pmiddendorf@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2014–01824 Filed 1–29–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Form OCSE–396–A, Child Support Enforcement Program Expenditure Report.

Form OCSE–34–A, Child Support Enforcement Program Collection Report.

OMB No.: 0970–0181.

Note: *This comment request republishes a similar request dated Dec 5, 2012.*

Description: Form OCSE–396–A and Form OCSE–34–A are financial reports submitted following the end of each fiscal quarter by grantees with an approved plan under title IV–D of the Social Security Act to administer the Child Support Enforcement Program. The purpose of these forms is to enable grantees to meet their statutory and regulatory requirement to report program expenditures and child support collections, respectively, from the previous fiscal quarter.

States use Form OCSE–396–A to report quarterly expenditures made in the previous quarter and to estimate program expenditures to be made and the incentive payments to be earned in the upcoming quarter. The Administration for Children and Families provides Federal funding to States for the Child Support Enforcement Program at the rate of 66 percent for all allowable and legitimate administrative costs of this program.

Tribes use OMB Form SF–425 to report quarterly expenditures made in the previous quarter. Form SF–425 is not included as part of this comment request.

States and Tribes use Form OCSE–34–A to report child support collection activity during the previous quarter, including collections received, the distribution and disbursement of collections and any collections remaining undistributed.

States and Tribes have used different and separate versions of Form OCSE–34–A to report child support collection activity. As part of this comment request, we are proposing that these separate reports be combined into a single document to be submitted quarterly by both States and Tribes.

The information collected in these reports is used by this agency to calculate quarterly Federal grant awards and incentive payments to States, to enable oversight of the financial management of the program for both States and Tribes and may be included in statistical and financial reports available to the public.

Respondents: States (including Puerto Rico, Guam, the Virgin Islands and the District of Columbia) and Tribes with approved title IV–D plans.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–396A	54	4	6	1,296
OCSE–34A	112	4	14	6,272

Estimated Total Annual Burden Hours: 7,568.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0451]

Food and Drug Administration Modernization Act of 1997: Modifications to the List of Recognized Standards, Recognition List Number: 034

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a publication containing modifications the Agency is making to the list of standards FDA recognizes for use in premarket reviews (FDA recognized consensus standards). This publication, entitled ''Modifications to the List of Recognized Standards, Recognition List Number: 034'' (Recognition List Number: 034), will assist manufacturers who elect to declare conformity with consensus standards to meet certain requirements for medical devices.

DATES: Submit written or electronic comments concerning this document at any time. See section VII for the effective date of the recognition of standards announced in this document.

ADDRESSES: Submit written requests for single copies of ''Modifications to the List of Recognized Standards, Recognition List Number: 034'' to the Division of Small Manufacturers, International and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993. Send two self-addressed adhesive labels to assist that office in processing your requests, or fax your request to 301–847–8149. Submit written comments concerning this document, or recommendations for additional standards for recognition, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). Submit electronic comments by email: *standards@cdrh.fda.gov.* This document may also be accessed on FDA's Internet site at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.* See section VI for electronic access to the searchable database for the current list of FDA recognized consensus standards, including Recognition List Number: 034 modifications and other standards related information.

FOR FURTHER INFORMATION CONTACT: Scott A. Colburn, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3632, Silver Spring, MD 20993, 301–796–6287.

I. Background

Section 204 of the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) amended section 514 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360d). Amended section 514 allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions or other requirements.

In a notice published in the **Federal Register** of February 25, 1998 (63 FR 9561), FDA announced the availability of a guidance entitled ''Recognition and Use of Consensus Standards.'' The notice described how FDA would implement its standard recognition program and provided the initial list of recognized standards.

Modifications to the initial list of recognized standards, as published in the **Federal Register**, can be accessed at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.*

These notices describe the addition, withdrawal, and revision of certain standards recognized by FDA. The Agency maintains hypertext markup language (HTML) and portable document format (PDF) versions of the list of FDA Recognized Consensus Standards. Both versions are publicly accessible at the Agency's Internet site. See section VI for electronic access information. Interested persons should review the supplementary information sheet for the standard to understand fully the extent to which FDA recognizes the standard.

II. Modifications to the List of Recognized Standards, Recognition List Number: 034

FDA is announcing the addition, withdrawal, correction, and revision of certain consensus standards the Agency will recognize for use in premarket submissions and other requirements for devices. FDA will incorporate these modifications in the list of FDA Recognized Consensus Standards in the Agency's searchable database. FDA will use the term ''Recognition List Number: 034'' to identify these current modifications.

In table 1 of this document, FDA describes the following modifications: (1) The withdrawal of standards and their replacement by others, if applicable; (2) the correction of errors made by FDA in listing previously recognized standards; and (3) the changes to the supplementary information sheets of recognized standards that describe revisions to the applicability of the standards.

In section III of this document, FDA lists modifications the Agency is making that involve the initial addition of standards not previously recognized by FDA.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
A. Anesthesia			
1–15		ISO 5361–4:1987, Tracheal tubes—Part 4: Cole type	Withdrawn. See 1–93.
1–18	1–94	ISO 8359 Second edition 1996–12–15, Oxygen concentrators for medical use—Safety requirements [Including: AMENDMENT 1 2012–07–01].	Withdrawn and replaced with newer version including amendment.
1–36	1–95	ISO 5366–3 Second edition 2001–08–15, Anaesthetic and respiratory equipment—Tracheostomy tubes—Part 3: Pediatric tracheostomy tubes [Including: TECHNICAL CORRIGENDUM 1 Published 2003–01–15].	Withdrawn and replaced with newer version including technical corrigendum.
1–44		ISO 5366–1 Fourth edition 2000–12–15, Anaesthetic and respiratory equipment—Tracheostomy tubes—Part 1: Tubes and connectors for use in adults.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
1–46		ISO 5367 Fourth edition 2000–06–01 Breathing tubes intended for use with anaesthetic apparatus and ventilators.	Extent of recognition.
1–47		AS 4259–1995 Ancillary devices for expired air resuscitation	Extent of recognition.
1–56	1–97	CGA V–7.1:2011 Standard Method of Determining Cylinder Valve Outlet Connections for Medical Gases.	Withdrawn and replaced with newer version.
1–57		ASTM F1101–90 (Reapproved 2003)$^{\varepsilon 1}$, Standard Specification for Ventilators Intended for Use During Anesthesia.	Extent of recognition.
1–58		ASTM G175–03 (Reapproved 2011), Standard Test Method for Evaluating the Ignition Sensitivity and Fault Tolerance of Oxygen Regulators Used for Medical and Emergency Applications.	Extent of recognition.
1–65		ISO 21647:2004 Medical electrical equipment—Particular requirements for the basic safety and essential performance of respiratory gas monitors.	Withdrawn. See 1–96.
1–69		ASTM F1464–93 (Reapproved 2005) Standard Specification for Oxygen Concentrators for Domiciliary Use.	Extent of recognition.
1–70		ASTM F1246–91 (Reapproved 2005) Standard Specification for Electrically Powered Home Care Ventilators, Part 1—Positive-Pressure Ventilators and Ventilator Circuits.	Extent of recognition.
1–78		ASME PVHO–1–2007 Safety Standard for Pressure Vessels for Human Occupancy.	Extent of recognition.
1–81		CGA V–5:2008 (Reaffirmed 2013), Diameter-Index Safety System (Noninterchangeable Low Pressure Connections for Medical Gas Applications).	Reaffirmation.
1–83		ISO 21647:2004 TECHNICAL CORRIGENDUM 1, Medical electrical equipment—Particular requirements for the basic safety and essential performance of respiratory gas monitors.	Withdrawn. See 1–96.
1–84		ISO 5366–3:2001 Anaesthetic and Respiratory Equipment—Tracheostomy Tubes—Part 3: Pediatric Tracheostomy Tubes TECHNICAL CORRIGENDUM 1.	Withdrawn. See 1–95.
1–86		ISO 8185 Third edition 2007–07–01 Corrected versions 2008–06–15 Respiratory tract humidifiers for medical use—Particular requirements for respiratory humidification systems.	Extent of recognition.
1–88	1–98	ISO 80601–2–12 First edition 2011–04–15 Medical electrical equipment—Part 2–12: Particular requirements for the safety of lung ventilators—Critical care ventilators [Including: TECHNICAL CORRIGENDUM 1 Published 2011–10–15].	Withdrawn and replaced with newer version including technical corrigendum.
1–89		ISO 80601–2–12 TECHNICAL CORRIGENDUM 1 Medical electrical equipment Part 2–12: Particular requirements for basic safety and essential performance of critical care ventilators.	Withdrawn. See 1–98.
1–90		ISO 8359 Second edition 1996–12–15 AMENDMENT 1 2012–07–01 Oxygen concentrators for medical use—Safety requirements.	Withdrawn. See 1–94.
1–92		ISO 17510–2 Second Edition 2007–10–01, Sleep apnoea breathing therapy—Part 2: Masks and application accessories.	Extent of recognition.
1–93	ISO 5361	Second edition 2012–10–01 Anaesthetic and respiratory equipment—Tracheal tubes and connectors.	Extent of recognition.
		B. Biocompatibility	
2–123	2–204	ASTM F720–13 Standard Practice for Testing Guinea Pigs for Contact Allergens: Guinea Pig Maximization Test.	Withdrawn and replaced with newer version.
2–182	2–205	ISO 14155 Second edition 2011–02–01 Clinical investigations of medical devices for human subjects—Good clinical practices [Including TECHNICAL CORRIGENDUM 1:2011].	Withdrawn and replaced with newer version including technical corrigendum.
2–183		ISO 14155:2011 and TECHNICAL CORRIGENDUM 1 Published 2011–07–15 Clinical investigation of medical devices for human subjects—Good clinical practice.	Withdrawn. See 2–205.
2–93		ASTM F763–04 (Reapproved 2010), Standard Practice for Short-Term Screening of Implant Materials.	Extent of recognition.
2–94		ASTM F981–04 (Reapproved 2010) Standard Practice for Assessment of Compatibility of Biomaterials for Surgical Implants with Respect to Effect of Materials on Muscle and Bone.	Extent of recognition.
2–114		ASTM F1877–05 (Reapproved 2010) Standard Practice for Characterization of Particles.	Extent of recognition.
2–118		ANSI/AAMI/ISO 10993–11:2006/(R) 2010 Biological evaluation of medical devices—Part 11: Tests for systemic toxicity.	Extent of recognition.
2–120		ANSI/AAMI/ISO 10993–6:2007/(R) 2010 Biological evaluation of medical devices—Part 06: Tests for local effects after implantation.	Extent of recognition.
2–126		ASTM F748–06 (Reapproved 2010) Standard Practice for Selecting Generic Biological Test Methods for Materials and Devices.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
2–133		ASTM F1408–97 (Reapproved 2008) Standard Practice for Subcutaneous Screening Test for Implant Materials.	Extent of recognition.
2–134		ASTM F2065–00 (Reapproved 2010) Standard Practice for Testing for Alternative Pathway Complement Activation in Serum by Solid Materials.	Extent of recognition.
2–136		ASTM E1262–88 (Reapproved 2008) Standard Guide for Performance of the Chinese Hamster Ovary Cell/Hypoxanthine Guanine Phosphoribosyl Transferase Gene Mutation Assay.	Extent of recognition.
2–137		ASTM E1263–97 (Reapproved 2008) Standard Guide for Conduct of Micronucleus Assays in Mammalian Bone Marrow Erythrocytes.	Withdrawn.
2–138		ASTM E1280–97 (Reapproved 2008) Standard Guide for Performing the Mouse Lymphoma Assay for Mammalian Cell Mutagenicity.	Withdrawn.
2–139		ASTM E1397–91 (Reapproved 2008) Standard Practice for the In Vitro Rat Hepatocyte DNA Repair Assay.	Withdrawn.
2–140		ASTM E1398–91 (Reapproved 2008) Standard Practice for the In Vivo Rat Hepatocyte DNA Repair Assay.	Withdrawn.
2–141		ASTM F1984–99 (Reapproved 2008) Standard Practice for Testing for Whole Complement Activation in Serum by Solid Materials.	Extent of recognition.
2–142		ASTM F1983–99 (Reapproved 2008) Standard Practice for Assessment of Compatibility of Absorbable/Resorbable Biomaterials for Implant Application.	Extent of recognition.
2–143		ASTM F1904–98 (Reapproved 2008) Standard Practice for Testing the Biological Responses to Particles in vivo.	Extent of recognition.
2–144		ASTMF619–03 (Reapproved 2008) Standard Practice for Extraction of Medical Plastics.	Extent of recognition.
2–145		ASTM F1439–03 (Reapproved 2008) Standard Guide for Performance of Lifetime Bioassay for the Tumorigenic Potential of Implant Materials.	Extent of recognition.
2–153		ANSI/AAMI/ISO 10993–5:2009, Biological evaluation of medical devices—Part 5: Tests for In Vitro cytotoxicity.	Extent of recognition.
2–154		ASTM F756–08 Standard Practice for Assessment of Hemolytic Properties of Materials.	Extent of recognition.
2–155		ASTM F2147–01 (Reapproved 2010) Standard Practice for Guinea Pig: Split Adjuvant and Closed Patch Testing for Contact Allergens.	Extent of recognition.
2–156		ANSI/AAMI/ISO 10993–1:2009 Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management.	Extent of recognition.
2–162		ASTM F1903–10 Standard Practice for Testing for Biological Responses to Particles in vitro.	Extent of recognition.
2–163		ANSI/AAMI/ISO 10993–9:2009 Biological evaluation of medical devices—Part 9: Framework for identification and quantification of potential degradation products.	Extent of recognition.
2–165		ANSI/AAMI/ISO 10993–14:2001/(R) 2011 Biological evaluation of medical devices—Part 14: Identification and quantification of degradation products from ceramics.	Extent of recognition.
2–167		ISO/TS 10993–19 First edition 2006–06–01 Biological evaluation of medical devices—Part 19: Physico-chemical, morphological, and topographical characterization of materials.	Extent of recognition.
2–168		ISO 10993–9 Second edition 2009–12–15 Biological evaluation of medical devices—Part 9: Framework for identification and quantification of potential degradation products.	Extent of recognition.
2–169		ISO 10993–13 Second edition 2010–06–15 Biological evaluation of medical devices—Part 13: Identification and quantification of degradation products from polymeric medical devices.	Extent of recognition.
2–170		ISO 10993–14 First edition 2001–11–15 Biological evaluation of medical devices—Part 14: Identification and quantification of degradation products from ceramics.	Extent of recognition.
2–171		ISO 10993–16 Second edition 2010–02–15 Biological evaluation of medical devices—Part 16: Toxicokinetic study design for degradation products and leachables.	Extent of recognition.
2–172		ANSI/AAMI/ISO TIR 10993–19:2006 Biological evaluation of medical devices—Part 19: Physicochemical, morphological, and topographical characterization of materials.	Extent of recognition.
2–173		ANSI/AAMI/ISO 10993–10:2010 Biological evaluation of medical devices—Part 10: Tests for irritation and skin sensitization.	Extent of recognition.
2–174		ISO 10993–10:2010 Biological evaluation of medical devices—Part 10: Tests for irritation and skin sensitization.	Extent of recognition.
2–175		ISO 10993–3 Second edition 2003–10–15 Biological evaluation of medical devices Part 3: Tests for genotoxicity, carcinogenicity and reproductive toxicity.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
2–176		ISO 10993–11 Second edition 2006–08–15 Biological evaluation of medical devices—Part 11: Tests for systemic toxicity.	Extent of recognition.
2–177		ISO 10993–06 Second edition 2007–04–15 Biological evaluation of medical devices—Part 6: Tests for local effects after implantation.	Extent of recognition.
2–179		ISO 10993–1 Fourth edition 2009–10–15 Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process.	Extent of recognition.
2–181		ANSI/AAMI/ISO 14155:2011, Clinical investigation of medical devices for human subjects—Good clinical practice.	Extent of recognition.
2–189		ASTM F895–11, Standard Test Method for Agar Diffusion Cell Culture Screening for Cytotoxicity.	Extent of recognition.
2–190		ANSI/AAMI/ISO 10993–13:2010, Biological evaluation of medical devices—Part 13: Identification and quantification of degradation products from polymeric medical devices.	Extent of recognition.
2–191		ISO 10993–12 Fourth edition 2012–07–01, Biological evaluation of medical devices—Part 12: Sample preparation and reference materials.	Extent of recognition.
		C. Cardiovascular	
3–41		ANSI/AAMI EC11:1991/(R)2007 Diagnostic electrocardiographic devices.	Withdrawn. See 3–106.
3–52		ANSI/AAMIEC12:2000/(R)2010 Disposable ECG electrodes	Extent of recognition.
3–54		ANSI/AAMI/ISO 7198:1998/2001/(R)2010 Cardiovascular implants—Tubular vascular prostheses.	Extent of recognition.
3–58		ANSI/AAMI/ISO 5840:2005/(R)2010 Cardiovascular implants—Cardiac valve prostheses.	Extent of recognition.
3–63		ISO 11318 Second edition 2002–08–01 Cardiac Defibrillators—Connector assembly DF–1 for implantable defibrillators—Dimensions and test requirements.	Extent of recognition.
3–72		ANSI/AAMI EC53:1995/(R) 2008 ECG cables and leadwires	Extent of recognition.
3–73	3–118	ANSI/AAMI EC57:2012 Testing and reporting performance results of cardiac rhythm and ST-segment measurement algorithms.	Withdrawn and replaced with newer version.
3–75		ANSI/AAMI SP10:2002/(R) 2008 & ANSI/AAMI SP10:2002/A1:2003, Manual, electronic or automated sphygmomanometers.	Withdrawn. See 3–80, 3–122 and 3–123.
3–76		ASTM F2129–08 Standard Test Method for Conducting Cyclic Potentiodynamic Polarization Measurements to Determine the Corrosion Susceptibility of Small Implant Devices.	Extent of recognition.
3–78		ANSI/AAMI/IEC 80601–2–30:2009 Medical electrical equipment—Part 2–30: Particular requirements for the basic safety and essential performance of automated noninvasive sphygmomanometers.	Extent of recognition.
3–80		ANSI/AAMI/ISO 81060–1:2007/(R) 2013 Non-invasive sphygmomanometers—Part 1: Requirements and test methods for non-automated measurement type.	Reaffirmation.
3–83		ANSI/AAMI/ISO 14708–5:2010 Implants for surgery—Active implantable medical devices—Part 5: Circulatory support devices.	Extent of recognition.
3–85	3–120	ANSI/AAMI/ISO 25539–2:2012 Cardiovascular implants—Endovascular devices—Part 2: Vascular stents.	Withdrawn and replaced with newer version.
3–88		ASTM F2514–08 Standard Guide for Finite Element Analysis (FEA) of Metallic Vascular Stents Subjected to Uniform Radial.	Extent of recognition.
3–90		ISO 7198 First edition 1998–08–01 Cardiovascular implants—Tubular vascular prostheses.	Extent of recognition.
3–93		ISO 25539–1:2003 First edition 2001–11–13 AMENDMENT 1 2005–07–15 Cardiovascular implants—Endovascular devices—Part 1: Endovascular prostheses Amendment 1: Test methods.	Withdrawn. See 3–121.
3–97	3–122	ISO 81060–2 Second edition 2013–05–01 Non-invasive sphygmomanometers—Part 2: Clinical validation of automated measurement type.	Withdrawn and replace with newer version.
3–98		ISO 81060–2:2009 TECHNICAL CORRIGENDUM Published 2011–02–15 Non-invasive sphygmomanometers—Part 2: Clinical validation of automated measurement type.	Withdrawn. See 3–122.
3–100		ANSI/AAMI/IEC 60601–2–27:2011 Medical electrical equipment—Part 2–27: Particular requirements for the basic safety and essential performance of electrocardiographic monitoring equipment.	Withdrawn. See 3–101.
3–107	3–123	IEC 80601–2–30 Edition 1.1 2013–07 Medical electrical equipment—Part 2–30: Particular requirements for the basic safety and essential performance of automated non-invasive sphygmomanometers.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
3–108		IEC 80601–2–30 (First edition 2009) Medical electrical equipment—Part 2–30: Particular requirements for the basic safety and essential performance of automated non-invasive sphygmomanometers CORRIGENDUM 1.	Withdrawn. See 3–123.
3–113	3–124	ISO 7199 Second edition 2009–04–15 Cardiovascular implants and artificial organs—Blood-gas exchangers (oxygenators) [Including: AMENDMENT 1 (2012)].	Withdrawn and replaced with newer version including amendment.
3–114	3–119	ISO 5841–3 Third edition 2013–40–15 Implants for surgery—Cardiac pacemakers—Part 3: Low-profile connectors (IS–1) for implantable pacemakers.	Withdrawn and replace with newer version.
		D. Dental/ENT	
4–50		ADA Specification No.18:1992 Alginate Impression Materials	Extent of recognition.
4–62		ISO 1563 Second edition 1990–09–01 Dental alginate impression material.	Withdrawn.
4–63		ISO 1564 Second edition 1995–11–01 Dental aqueous impression materials based on agar.	Withdrawn.
4–86		ANSI/ADA Specification No. 38 2000 (Reaffirmed 2010), Metal-Ceramic Dental Restorative Systems.	Extent of recognition.
4–89		ANSI/ADA Specification No. 53: 1999 (Reaffirmed 2008) Polymer-Based Crowns and Bridge Materials.	Extent of recognition.
4–91		ANSI/ADA Specification No. 80/ISO 7491:2000 (Reaffirmed 2013) Dental Materials—Determination of Color Stability.	Reaffirmation and extent of recognition.
4–92		ANSI/ADA Specification No. 88:2000 (Reaffirmed 2010) Dental Brazing Alloys.	Reaffirmation and extent of recognition.
4–96		ANSI/ADA Specification No. 30:2000 (Reaffirmed 2012) Dental Zinc Oxide-Eugenol and Zinc Oxide Non-Eugenol Cements.	Reaffirmation and extent of recognition.
4–97		ANSI/ADA Specification No. 57: (Reaffirmed 2012) Endodontic Sealing Materials.	Extent of recognition.
4–105		ANSI/ADA Specification No. 75:1997 (Reapproved 2003) Resilient Lining Materials for Removable Dentures—Part 1: Short-Term Materials.	Extent of recognition.
4–109		ISO 13716 First edition 1999–05–01 Dentistry—reversible-irreversible hydrocolloid impression material system.	Withdrawn.
4–126		ISO 10477 Second edition 2004–10–01 Dentistry—Polymer-based crown and bridge materials.	Extent of recognition.
4–130		ADA Specification No. 17:1983 (Reaffirmed 2006) Denture Base Temporary Relining Resins.	Extent of recognition.
4–134	4–207	ISO 7494–1 Second edition 2011–08–15 Dentistry—Dental units—Part 1: General requirements and test methods.	Withdrawn and replaced with newer version.
4–135	4–213	ISO 10139–1 Second edition 2005–02–15 Dentistry—Soft lining materials for removable dentures—Part 1: Materials for short-term use [Including: TECHNICAL CORRIGENDUM 1 (2006)].	Withdrawn and replaced with newer version including technical corrigendum.
4–137		ISO 6877 Second edition 2006–04–01 Dentistry—Root-canal obturating points.	Extent of recognition.
4–139		ANSI/ADA Specification No. 48 (Reaffirmed 2009) Visible Light Curing Units.	Reaffirmation and extent of recognition.
4–143	4–208	ANSI/ADA Specification No. 96:2012 Dental-Water-Based Cements	Withdrawn and replaced with newer version.
4–144	4–209	ISO 24234 First edition 2004–10–15 Dentistry—Mercury and alloys for dental amalgam [Including: AMENDMENT 1 (2011)].	Withdrawn and replaced with newer version including amendment.
4–146		ISO 22674 First edition 2006–11–15 Dentistry—Metallic materials for fixed and removable restorations and appliances.	Extent of recognition.
4–149		ANSI/ADA Specification No. 39/ISO 6874:2005 (Reaffirmed 2011) Pit and Fissure Sealants.	Reaffirmation and extent of recognition.
4–150		ANSI/ADA Specification No. 19:2004/ISO 4823:2000 Dental—Elastometric Impression Materials.	Extent of recognition.
4–151		ISO 22112 First edition 2005–11–01 Dentistry—Artificial teeth for dental prostheses.	Extent of recognition.
4–153		ISO 9917–1 Second edition 2007–10–01 Dentistry—Water-based cements—Part 1: Powder/liquid acid-base cements.	Extent of recognition.
4–154	4–210	ISO 4823 Third edition 2000–12–15 Dentistry—Elastometric impression materials [Including: AMENDMENT 1 (2000) TECHNICAL CORRIGENDUM 1(2004)].	Withdrawn and replaced with newer version including amendment and technical corrigendum.
4–155		ISO 4823: Technical Corrigendum 1 Published 2004–07–15—Dentistry—Elastometric impression materials—Third Edition.	Withdrawn. See 4–210.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
4–156		ISO 4823 Third edition 2000–12–15 Amendment 1 2007–07–01 Dentistry—Elastometric impression materials—Third Edition.	Withdrawn. See 4–210.
4–157		ISO 3107 Third edition 2004–10–01 Dentistry—Zinc oxide/Eugenol and zinc oxide/non-eugenol cements—Third edition.	Withdrawn. See 4–198.
4–159	4–211	ANSI/IEEE C63.19:2007 American National Standard Methods of Measurement of Compatibility between Wireless Communications Devices and Hearing Aids.	Withdrawn and replaced with newer version.
4–170	4–212	ANSI/ASA S3.36–2012 American National Standard Specification for a Manikin for Simulated in situ Airborne Acoustic Measurements.	Withdrawn and replaced with newer version.
4–178		ISO 6872 Third edition 2008–09–01 Dentistry—Ceramic materials ..	Extent of recognition.
4–179		ISO 7405 Second edition 2008–12–15 Dentistry—Evaluation of biocompatibility of medical devices used in dentistry.	Extent of recognition.
4–180		ISO 9168 Third edition 2009–07–15 Dentistry—Hose connectors for air driven dental handpieces.	Extent of recognition.
4–181		ISO 4049 Fourth edition 2009–10–01 Dentistry—Polymer-based restorative materials.	Extent of recognition.
4–182		ISO 10139–2 Second edition 2009–08–01 Dentistry—Soft lining materials for removable dentures—Part 2: Materials for long-term use.	Extent of recognition.
4–188		ISO 9917–2 Second edition 2010–04–15 Dentistry—Water-based cements—Part 2: Resin-modified cements.	Extent of recognition.
4–189		ISO 10139–1:2005 TECHNICAL CORRIGENDUM 1 2006–03–01 Dentistry—Soft lining materials for removable dentures—Part 1: Materials for short-term use.	Withdrawn. See 4–213.
4–195		ISO 14801 Second edition 2007–11–15 Dentistry—Implants-Dynamic fatigue test for endosseous dental implants.	Extent of recognition.
4–196		ANSI/ADA Specification No.69:2010/ISO 6872:2008 Dental Ceramic.	Extent of recognition.
4–198		ISO 3107 Fourth edition 2011–03–01 Dentistry—Zinc oxide/eugenol and zinc oxide/non-eugenol cements.	Extent of recognition.
4–199		ISO 6876 Third edition 2012–06–01 Dentistry—Root Canal Sealing Materials.	Extent of recognition.
4–200		ISO 24234 First edition 2004–10–15 Dentistry—Mercury and alloys for dental amalgam AMENDMENT 1.	Withdrawn. See 4–209.
4–201		ISO 9693–2012 Dentistry—Compatibility testing—Metal-ceramic systems.	Extent of recognition.
4–205		ISO 14457 First edition 2012–09–15 Dentistry—Handpieces and motors.	Withdrawn. See 4–206.
		E. General	
5–22		ISO 2768–1 First edition 1989–11–15 General tolerances—Part 1: Tolerances for linear and angular dimensions without individual tolerance indications.	Extent of recognition.
5–23		ISO 2768–2 First edition 1989–11–15 General Tolerances—Part 2: Geometrical tolerances for features without individual tolerance indications.	Extent of recognition.
5–36		ISO/TR 16142 Second edition 2006–01–15 Medical devices—Guidance on the selection of standards in support of recognized essential principles of safety and performance of medical devices.	Extent of recognition.
5–37	5–81	ISO 2859–1 Second edition 1999–11–15 Sampling procedures for inspection by attributes—Part 1: Sampling schemes indexed by acceptance quality limit (AQL) for lot-by-lot inspection [Including: TECHNICAL CORRIGENDUM 1 (2001)].	Withdrawn and replaced with newer version including technical corrigendum.
5–43		ANSI/ESD S20.20–2007 For the Development of an Electrostatic Discharge Control Program for Protection of Electrical and Electronic Parts, Assemblies and Equipment (Excluding Electrically Initiated Explosive Devices).	Extent of recognition.
5–45	5–79	ASTM D7386–12 Standard Practice for Performance Testing of Packages for Single Parcel Delivery Systems.	Withdrawn and replaced with new version.
5–46		ISO 2859–1:1999/Cor 1:2001 Sampling procedures for inspection by attributes—Part 1: Sampling schemes indexed by acceptance quality limit (AQL) for lot-by-lot inspection.	Withdrawn. See 5–81.
5–47		ISO 10012 First edition 2003–01–15 Measurement management systems—Requirements for measurement processes and measuring equipment.	Extent of recognition.
5–50		IEC 62366 Edition 1.0 2007–10 Medical devices—Application of usability engineering to medical devices.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
5–51	5–80	ASTM D–4332–13 Standard Practice for Conditioning Containers, Packages, or Packaging Components for Testing.	Withdrawn and replaced with new version.
5–53		IEC 60601–1–2 Edition 3.0 2007–03 Medical electrical equipment—Part 1–2: General requirements for basic safety and essential performance—Collateral standard: Electromagnetic compatibility—Requirements and tests.	Relevant guidance.
5–54		ANSI/AAMI/IEC 60601–1–2:2007/(R)2012 Medical electrical equipment—Part 1–2: General requirements for basic safety and essential performance—Collateral standard: Electromagnetic compatibility—Requirements and tests.	Reaffirmation and relevant guidance.
5–57		ANSI/AAMI HE75:2009 Human factors engineering—Design of medical devices.	Extent of recognition.
5–58	5–82	IEC 60601–1–11 Edition 1.0:2010 Medical electrical equipment—Part 1–11: General requirements for basic safety and essential performance—Collateral Standard: Requirements for medical electrical equipment and medical electrical systems used in the home healthcare environment [Including: TECHNICAL CORRIGENDUM 1 (2011)].	Withdrawn and replaced with newer version including technical corrigendum.
5–62		ANSI/ASQ Z1.4–2008 Sampling Procedures and Tables for Inspection by Attributes.	Extent of recognition.
5–66		IEC 60601–1–10 Edition 1.0: 2007–11 Medical electrical equipment—Part 1–10: General requirements for basic safety and essential performance—Collateral Standard: Requirements for the development of physiologic closed-loop controllers.	Extent of recognition.
5–67		ANSI/AAMI/IEC 62366:2007/(R)2013 Medical devices—Application of usability engineering to medical devices.	Reaffirmation and extent of recognition.
5–69		IEC 60601–1–11 (First edition 2010) April 2011 Medical electrical equipment—Part 1–11: General requirements for basic safety and essential performance—Collateral Standard: Requirements for medical electrical equipment and medical electrical systems used in the home healthcare environment CORRIGENDUM 1.	Withdrawn. See 5–82.
F. General Hospital/General Plastic Surgery			
6–13		ISO 595–1 First edition 1986–12–15 Reusable all-glass or metal-and-glass syringes for medical use—Part 1: Dimensions.	Withdrawn.
6–14		ISO 595–2 First edition 1987–12–15 Reusable all-glass or metal-and-glass syringes for medical use—Part 2: Design, performance requirements and tests.	Withdrawn.
6–117		ASTM F2172–02 (Reapproved 2011) Standard Specification for Blood/Intravenous Fluid/Irrigation Fluid Warmers.	Extent of recognition.
6–142		ANSI/AAMI II36:2004 Medical electrical equipment—Part 2: Particular requirements for safety of baby incubators.	Withdrawn. See 6–230.
6–143		ANSI/AAMI II51:2004 Medical electrical equipment—Part 2: Particular requirements for safety of transport incubators.	Withdrawn. See 6–231.
6–150		ASTM D7161–05 (Reapproved 2010) Standard Practice for Determination of Real Time Expiration Dating of Mature Medical Gloves Stored Under Typical Warehouse Conditions.	Withdrawn.
6–161	6–301	ISO 10555–1 Second edition 2013–06–15 Corrected version 2013–07–01 Intravascular catheters—Sterile and single-use catheters—Part 1: General requirements.	Withdrawn and replaced with newer version.
6–163		ISO 9626 First edition 1991–09–01 AMENDMENT 1 2001–06–01 Stainless steel needle tubing for the manufacture of medical devices.	Withdrawn. See 6–302.
6–164	6–303	ISO 10555–5 Second edition 2013–06–15 Intravascular catheters—Sterile and single-use catheters—Part 5: Over-needle peripheral catheters.	Withdrawn and replaced with newer version.
6–170	6–304	ISO 7886–1 First edition 1993–10–01 Sterile hypodermic syringes for single use—Part 1: Syringes for manual use [Including: TECHNICAL CORRIGENDUM 1 Published 1995–11–01].	Withdrawn and replaced with newer version including technical corrigendum.
6–171	6–305	ISO 10555–3 Second edition 2013–06–15 Intravascular catheters—Sterile and single-use catheters—Part 3: Central venous catheters.	Withdrawn and replaced with newer version.
6–176		ASTM D7103–06 (Reapproved 2013) Standard Guide for Assessment of Medical Gloves.	Extent of recognition.
6–187	6–306	ASTM F1671/F1671M–13 Standard Test Method for Resistance of Materials Used in Protective Clothing to Penetration by Blood-Borne Pathogens Using Phi-X174 Bacteriophage Penetration as a Test System.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
6–233		IEC 60601–2–52 Edition 1.0 2009–12 Medical electrical equipment—Part 2–52: Particular requirements for basic safety and essential performance of medical beds.	Withdrawn. See 6–321.
6–236	6–307	IEC 80601–2–59 Edition 1.0 2008–10 Medical Electrical Equipment—Part 2–59: Particular requirements for the basic safety and essential performance of screening thermographs for human febrile temperature screening [Including: CORRIGENDUM 1 (April 2009)].	Withdrawn and replaced with newer version including technical corrigendum.
6–237		IEC 80601–2–59 (First edition 2008) Medical Electrical Equipment—Part 2–59: Particular requirements for the basic safety and essential performance of screening thermographs for human febrile temperature screening CORRIGENDUM 1.	Withdrawn. See 6–307.
6–238	6–308	IEC 80601–2–35 Edition 2.0 2009–10 Medical electrical equipment—Part 2–35: Particular requirements for the basic safety and essential performance of heating devices using blankets, pads or mattresses and intended for heating in medical use [Including: CORRIGENDUM 1 (March 2012)].	Withdrawn and replaced with newer version including technical corrigendum.
6–245		ISO 8536–4 Fifth edition 2010–10–01 Infusion equipment for medical use—Part 4: Infusion sets for single use, gravity feed.	Withdrawn. See 6–318.
6–253		ISO 10535 Second edition 2006–12–15 Hoists for the transfer of disabled persons—Requirements and test methods.	Extent of recognition.
6–264		ISO 10555–1 First edition 1995–06–15 AMENDMENT 1 1999–07–15 Sterile, single-use intravascular catheters—Part 1: General requirements.	Withdrawn. See 6–301.
6–265		ISO 10555–1 First edition 1995–06–5 AMENDMENT 2 2004–05–15 Sterile, single-use intravascular catheters—Part 1: General requirements.	Withdrawn. See 6–301.
6–266		ISO 10555–5 First edition 1996–06–15 AMENDMENT 1 Sterile, single-use intravascular catheters—Part 5: Over-needle peripheral catheters.	Withdrawn. See 6–303.
6–267		ISO 10555–5 1996 TECHNICAL CORRIGENDUM 1 Published 2002–06–15 Sterile, single-use intravascular catheters—Part 5: Over-needle peripheral catheters.	Withdrawn. See 6–303.
6–273		ISO 23908 First edition 2011–06–11 Sharps injury protection—Requirements and test methods—Sharps protection features for single-use hypodermic needles, introducers for catheters and needles used for blood sampling.	Extent of recognition.
6–279		IEC 60601–2–19 (Second Edition 2009) Medical electrical equipment—Part 2–19: Particular requirements for the basic safety and essential performance of infant incubators CORRIGENDUM 1.	Withdrawn. See 6–319.
6–280		IEC 60601–2–20 (Second edition 2009) Medical electrical equipment—Part 2–20: Particular requirements for the basic safety and essential performance of infant transport incubators CORRIGENDUM 1.	Withdrawn. See 6–320.
6–281		IEC 80601–2–35 (Second edition 2009) Medical electrical equipment—Part 2–35: Particular requirements for the basic safety and essential performance of heating devices using blankets, pads or mattresses and intended for heating in medical use CORRIGENDUM 1.	Withdrawn. See 6–308.
6–283	6–309	USP 36–NF31:2013 Sodium Chloride Irrigation	Withdrawn and replaced with newer version.
6–284	6–310	USP 36–NF31:2013 Sodium Chloride Injection	Withdrawn and replaced with newer version.
6–285	6–311	USP 36–NF31:2013 Nonabsorbable Surgical Suture	Withdrawn and replaced with newer version.
6–286	3–312	USP 36–NF31:2013 <881> Tensile Strength	Withdrawn and replaced with newer version.
6–287	6–313	USP 36–NF31:2013 <861> Sutures—Diameter	Withdrawn and replaced with newer version.
6–288	6–314	USP 36–NF 31:2013 <871> Sutures—Needle Attachment	Withdrawn and replaced with newer version.
6–289	6–315	USP 36–NF31:2013 Sterile Water for Irrigation	Withdrawn and replaced with newer version.
6–290	6–316	USP 36–NF31:2013 Heparin Lock Flush Solution	Withdrawn and replaced with newer version.
6–291	6–317	USP 36–NF31:2013 Absorbable Surgical Suture	Withdrawn and replaced with newer version.
6–292		ISO 7886–1:1993 TECHNICAL CORRIGENDUM 1 Published 1995–11–01 Sterile hypodermic syringes for single-use—Part 1: Syringes for manual use.	Withdrawn. See 6–304.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
6–298	6–319	IEC 60601–2–19 Edition 2.0 2009–02 Medical electrical equipment—Part 2–19: Particular requirements for the basic safety and essential performance of infant incubators [Including: CORRIGENDUM 1 (2012)].	Withdrawn and replaced with newer version including technical corrigendum.
6–299		IEC 60601–2–20 Edition 2.0 2009–02 Medical electrical equipment—Part 2–20: Particular requirements for the basic safety and essential performance of infant transport incubators.	Withdrawn. See 6–320.
G. In Vitro Diagnostics			
7–100		ISO 15197 First edition 2003–05–01 In Vitro diagnostic test systems—Requirements for blood-glucose monitoring systems for self-testing in managing diabetes mellitus.	Withdrawn.
7–137	7–244	CLSI NBS01–A6 Blood Collection on Filter Paper for Newborn Screening Programs; Approved Standard—Sixth Edition.	Withdrawn and replaced with newer version.
7–239		CLSI EP32–R (Formerly X05–R) Metrological Traceability and Its Implementation; A Report.	Designation number.
7–226		CLSI QMS01–A4 (Formerly GP26–A4) Quality Management System: A Model for Laboratory Services; Approved Guideline—Fourth Edition.	Designation number.
7–224		CLSI EP28–A3c (Formerly C28–A3c) Defining, Establishing, and Verifying Reference Intervals in the Clinical Laboratory; Approved Guideline—Third Edition.	Designation number.
7–223		CLSI QSM06–A3 (Formerly GP22–A3) Quality Management System: Continual Improvement; Approved Guideline—Third Edition.	Designation number.
7–92	7–245	CLSI EP09–A3 Measurement Procedure Comparison and Bias Estimation Using Patient Samples; Approved Guideline—Third Edition.	Withdrawn and replaced with newer version.
7–210		CLSI H26–A2 Validation, Verification, and Quality Assurance of Automated Hematology Analyzers; Approved Standard—Second Edition.	Extent of recognition.
7–152		CLSI EP12–A2 User Protocol for Evaluation of Qualitative Test Performance; Approved Guideline—Second Edition.	Extent of recognition.
7–174		CLSI EP21–A Estimation of Total Analytical Error for Clinical Laboratory Methods; Approved Guideline.	Extent of recognition.
7–178		CLSI M22–A3 Quality Control for Commercially Prepared Microbiological Culture Media; Approved Standard—Third Edition.	Extent of recognition.
7–193		CLSI EP06–A Evaluation of the Linearity of Quantitative Measurement Procedures: A Statistical Approach; Approved Guideline.	Extent of recognition.
7–220		CLSI H59–A Quantitative D-dimer for the Exclusion of Venous Thromboembolic Disease; Approved Guideline.	Extent of recognition.
H. Materials			
8–67	8–344	ISO 7153–1 Second edition 1991–04–01 Surgical instruments—Metallic materials—Part 1: Stainless steel [Including: AMENDMENT 1(1999)].	Withdrawn and replaced with newer version including amendment.
8–138		ASTM F745–07 Standard Specification for 18 Chromium-12.5 Nickel-2.5 Molybdenum Stainless Steel for Cast and Solution-Annealed Surgical Implant Applications.	Withdrawn.
8–139	8–345	ASTM F1314–13 Standard Specification for Wrought Nitrogen Strengthened 22 Chromium-13 Nickel-5 Manganese-2.5 Molybdenum Stainless Steel Alloy Bar and Wire for Surgical Implants (UNS S20910).	Withdrawn and replaced with newer version.
8–140	8–346	ASTM F1813–13 Standard Specification for Wrought Titanium-12 Molybdenum-6 Zirconium-2 Iron Alloy for Surgical Implant (UNS R58120).	Withdrawn and replaced with newer version.
8–141	8–347	ASTM F2146–13 Standard Specification for Wrought Titanium-3 Aluminum-2.5 Vanadium Alloy Seamless Tubing for Surgical Implant Applications (UNS R56320).	Withdrawn and replaced with newer version.
8–169	8–348	ASTM F138–13 Standard Specification for Wrought 18 Chromium-14 Nickel-2.5 Molybendum Stainless Steel Bar and Wire for Surgical Implants (UNS S31673).	Withdrawn and replaced with newer version.
8–176	8–349	ASTM F2503–13 Standard Practice for Marking Medical Devices and Other Items for Safety in the Magnetic Resonance Environment.	Withdrawn and replaced with newer version.
8–149	8–350	ISO 5832–1 Fourth edition 2007–06–15 Implants for surgery—Metallic materials—Part 1: Wrought stainless steel [Including: TECHNICAL CORRIGENDUM 1(2008)].	Withdrawn and replaced with newer version including technical corrigendum.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
8–196		ISO 5832–1: 2007 Implants for surgery—Metallic materials—Part 1: Wrought stainless steel TECHNICAL CORRIGENDUM 1.	Withdrawn. See 8–350.
8–151	8–351	ISO 5832–12 Second edition 2007–05–01 Implants for surgery—Metallic materials—Part 12: Wrought cobalt-chromium-molybdenum alloy [Including: TECHNICAL CORRIGENDUM 1 2008].	Withdrawn and replaced with newer version including technical corrigendum.
8–197		ISO 5832–12:2007 TECHNICAL CORRIGENDUM 1 2008–09–05, Implants for surgery—Metallic materials—Part 12: Wrought cobalt-chromium-molybdenum alloy TECHNICAL CORRIGENDUM 1.	Withdrawn. See 8–351.
8–211	8–352	ISO 5834–1 Third edition 2005–06–01 Implants for surgery—Ultra-high-molecular-weight polyethylene—Part 1: Powder form [Including: TECHNICAL CORRIGENDUM 1 2007].	Withdrawn and replaced with newer version including technical corrigendum.
8–212		ISO 5834–1:2005 Technical Corrigendum 1 Published 2007–05–01 Implants for surgery—Ultra-high-molecular-weight polyethylene—Part 1: Powder form TECHNICAL CORRIGENDUM 1.	Withdrawn. See 8–352.
8–228	8–353	ASTM F86–13 Standard Practice for Surface Preparation and Marking of Metallic Surgical Implants.	Withdrawn and replaced with newer version.
8–175	8–354	ASTM F1377–13 Standard Specification for Cobalt-28 Chromium-6 Molybdenum Powder for Coating of Orthopedic Implants (UNS R30075).	Withdrawn and replaced with newer version.
8–163	8–355	ASTM F1586/F 1586M–13$^{\varepsilon 1}$ Standard Specification for Wrought Nitrogen Strengthened 21 Chromium-10 Nickel-3 Manganese-2.5 Molybdenum Stainless Steel Alloy Bar for Surgical Implants (UNS S31675).	Withdrawn and replaced with newer version.
8–129	8–356	ASTM F67–13 Standard Specification for Unalloyed Titanium, for Surgical Implant Applications (UNS R50250, UNS R50400, UNS R50550, UNS R50700).	Withdrawn and replaced with newer version.
8–208	8–357	ASTM F648–13 Standard Specification for Ultra-High-Molecular-Weight Polyethylene Powder and Fabricated Form for Surgical Implants.	Withdrawn and replaced with newer version.
8–103		ASTM F1801–97 (Reapproved 2009)$^{\varepsilon 1}$ Standard Practice for Corrosion Fatigue Testing of Metallic Implant Materials.	Extent of recognition.
8–107		ASTM F746–04 (Reapproved 2009)$^{\varepsilon 1}$ Standard Test Method for Pitting or Crevice Corrosion of Metallic Surgical Implant Materials.	Extent of recognition.
8–111		ASTM F1160–05 (Reapproved 2011)$^{\varepsilon 1}$ Standard Test Method for Shear and Bending Fatigue Testing of Calcium Phosphate and Metallic Medical and Composite Calcium Phosphate/Metallic Coatings.	Extent of recognition.
8–112		ASTM F1044–05 (Reapproved 2011)$^{\varepsilon 1}$ Standard Test Method for Shear Testing of Calcium Phosphate Coatings and Metallic Coatings.	Extent of recognition.
8–113		ASTM F1147–05 (Reapproved 2011) Standard Test Method for Tension Testing of Calcium Phosphate and Metal Coatings.	Extent of recognition.
8–114		ASTM F2255 (Reapproved 2010) Standard Test Method for Strength Properties of Tissue Adhesives in Lap Shear by Tension Loading.	Extent of recognition.
8–115		ASTM F2256–05 (Reapproved 2010) Standard Test Method for Strength Properties of Tissue Adhesives in T-Peel by Tension Loading.	Extent of recognition.
8–116		ASTM F2258–05 (Reapproved 2010) Standard Test Method for Strength Properties of Tissue Adhesives in Tension.	Extent of recognition.
8–121		ASTM F2005–05 (Reapproved 2010) Standard Terminology for Nickel-Titanium Shape Memory Alloys.	Extent of recognition.
8–123		ISO 5832–5 Third edition 2005–10–15 Implants for surgery—Metallic materials—Part 5: Wrought cobalt-chromium-tungsten-nickel alloy.	Extent of recognition.
8–124		ASTM F2052–06$^{\varepsilon}$ Standard Test Method for Measurement of Magnetically Induced Displacement Force on Medical Devices in the Magnetic Resonance Environment.	Extent of recognition.
8–125		ASTM F2004–05 (Reapproved 2010) Standard Test Method for Transformation Temperature of Nickel-Titanium Alloys by Thermal Analysis.	Extent of recognition.
8–126	8–370	ASTM F561–13 Standard Practice for Retrieval and Analysis of Medical Devices, and Associated Tissues and Fluids.	Withdrawn and replaced with newer version.
8–128		ASTM F2213–06 (Reapproved 2011) Standard Test Method for Measurement of Magnetically Induced Torque on Medical Devices in the Magnetic Resonance Environment.	Extent of recognition.
8–132		ASTM F1088–04a (Reapproved 2010) Standard Specification for Beta-Tricalcium Phosphate for Surgical Implantation.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
8–134		ASTM F2082–06 Standard Test Method for Determination of Transformation Temperature of Nickel-Titanium Shape Memory Alloys by Bend and Free Recovery.	Extent of recognition.
8–135		ASTM F2392–04 (Reapproved 2010) Standard Test Method for Burst Strength of Surgical Sealants.	Extent of recognition.
8–136		ASTM F2458–05 (Reapproved 2010) Standard Test Method for Wound Closure Strength of Tissue Adhesives and Sealants.	Extent of recognition.
8–150		ISO 5832–9 Second edition 2007–06–15 Implants for surgery—Metallic materials—Part 9: Wrought high nitrogen stainless steel.	Extent of recognition.
8–157		ISO 9583 First edition 1993–10–15 Implants for surgery—Non-destructive testing—Liquid penetrant inspection of metallic surgical implants.	Extent of recognition.
8–159		ISO 9584 First edition 1993–10–15 Implants for surgery—Non-destructive testing—Radiographic examination of cast metallic surgical implants.	Extent of recognition.
8–165		ASTM F1058–08$^{\varepsilon 1}$ Standard Specification for Wrought 40 Cobalt-20 Chromium-16 Iron-15 Nickel-7 Molybdenum Alloy Wire and Strip for Surgical Implant Applications (UNS R30003 and UNS R30008).	Extent of recognition.
8–167		ASTM F1350–08 Standard Specification for Wrought 18 Chromium-14 Nickel-2.5 Molybdenum Stainless Steel Surgical Fixation Wire (UNS S31673).	Extent of recognition.
8–168		ASTM F1472–08$^{\varepsilon 1}$ Standard Specification for Wrought Titanium-6 Aluminum-4 Vanadium Alloy for Surgical Implant Applications (UNS R56400).	Extent of recognition.
8–170		ASTM F961–08 Standard Specification for 35 Cobalt-35 Nickel-20 Chromium-10 Molybdenum Alloy Forgings for Surgical Implants (UNS R30035).	Extent of recognition.
8–171		ASTM F1609–08 Standard Specification for Calcium Phosphate Coatings for Implantable Materials.	Extent of recognition.
8–173		ASTM F601–03 (Reapproved 2008) Standard Practice for Fluorescent Penetrant Inspection of Metallic Surgical Implants.	Extent of recognition.
8–177		ASTM F2129–08 Standard Test Method for Conducting Cyclic Potentiodynamic Polarization Measurements to Determine the Corrosion Susceptibility of Small Implant Devices.	Extent of recognition.
8–179		ASTM F754–08 Standard Specification for Implantable Polytetrafluoroethylene (PTFE) Sheet, Tube, and Rod Shapes Fabricated from Granular Molding Powders.	Extent of recognition.
8–183		ASTM F560–08 Standard Specification for Unalloyed Tantalum for Surgical Implant Applications (UNS R05200, UNS R05400).	Extent of recognition.
8–184		ASTM F2516–07$^{\varepsilon 2}$ Standard Test Method for Tension Testing of Nickel-Titanium Superelastic Materials.	Extent of recognition.
8–185		ASTM F451–08 Standard Specification for Acrylic Bone Cement	Extent of recognition.
8–187		ISO 13779–1 Second edition 2008–10–01 Implants for surgery—Hydroxyapatite—Part 1: Ceramic hydroxyapatite.	Extent of recognition.
8–188		ISO 13779–2 Second edition 2008–10–01 Implants for surgery—Hydroxyapatite—Part 2: Coatings of hydroxyapatite.	Extent of recognition.
8–189		ASTM F 1108–04 (Reapproved 2009) Standard Specification for Titanium-6 Aluminum-4 Vanadium Alloy Castings for Surgical Implants (UNS R56406).	Extent of recognition.
8–190		ASTM F 90–09 Standard Specification for Wrought Cobalt-20 Chromium-15 Tungsten-10 Nickel Alloy for Surgical Implant Applications (UNS R30605).	Extent of recognition.
8–192		ASTM F1854–09 Standard Test Method for Stereological Evaluation of Porous Coatings on Medical Implants.	Extent of recognition.
8–193		ASTM F2754/F 2754M–09 Standard Test Method for Measurement of Camber, Cast, Helix and Direction of Helix of Coiled Wire.	Extent of recognition.
8–194		ISO 6474–1 First edition 2010–02–15 Implants for surgery—Ceramic materials—Part 1: Ceramic materials based on high purity alumina.	Extent of recognition.
8–195		ASTM F2024–10 Standard Practice for X-Ray Diffraction Determination of Phase Content of Plasma-Sprayed Hydroxyapatite Coatings.	Extent of recognition.
8–199		ASTM F2633–07 Standard Specification for Wrought Seamless Nickel-Titanium Shape Memory Alloy Tube for Medical Devices and Surgical Implants.	Extent of recognition.
8–204		ASTM F2118–10 Standard Test Method for Constant Amplitude of Force Controlled Fatigue Testing of Acrylic Bone Cement Materials.	Extent of recognition.
8–205		ASTM F1635–11 Standard Test Method for In Vitro Degradation Testing of Hydrolytically Degradable Polymer Resins and Fabricated Forms for Surgical Implants.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
8–206		ASTM F688–10 Standard Specification for Wrought Cobalt-35 Nickel-20 Chromium-10 Molybdenum Alloy Plate, Sheet, and Foil for Surgical Implants (UNS R30035).	Extent of recognition.
8–207		ASTM F1926/F1926M–10 Standard Test Method for Evaluation of the Environmental Stability of Calcium Phosphate Granules, Fabricated Forms, and Coatings.	Extent of recognition.
8–213		ISO 5834–3 First edition 2005–07–15 Implants for surgery—Ultra-high-molecular-weight polyethylene—Part 3: Accelerated ageing methods.	Extent of recognition.
8–214		ISO 5834–4 First edition 2005–05–01 Implants for surgery—Ultra-high-molecular-weight polyethylene—Part 4: Oxidation index measurement method.	Extent of recognition.
8–215		ISO 5834–5 First edition 2005–06–01 Implants for surgery—Ultra-high-molecular-weight polyethylene—Part 5: Morphology assessment method.	Extent of recognition.
8–216		ASTM F1295–11 Standard Specification for Wrought Titanium-6 Aluminum-7 Niobium Alloy for Surgical Implant Applications (UNS R56700).	Extent of recognition.
8–217		ASTM F620–11 Standard Specification for Alpha Plus Beta Titanium Alloy Forgings for Surgical Implants.	Extent of recognition.
8–218		ASTM F799–11 Standard Specification for Cobalt-28 Chromium-6 Molybdenum Alloy Forgings for Surgical Implants (UNS R31537, R31538, R31539).	Extent of recognition.
8–220		ASTM F629–11 Standard Practice for Radiography of Cast Metallic Surgical Implants.	Extent of recognition.
8–221		ASTM F2066–11 Standard Specification for Wrought Titanium-15 Molybdenum Alloy for Surgical Implant Applications (UNS R58150).	Extent of recognition.
8–224		ASTM F2102–06$^{\varepsilon 1}$ Standard Guide for Evaluating the Extent of Oxidation in Ultra-High-Molecular-Weight Polyethylene Fabricated Forms Intended for Surgical Implants.	Extent of recognition.
8–225		ASTM F2003–02 (Reapproved 2008) Standard Practice for Accelerated Aging of Ultra-High Molecular Weight Polyethylene after Gamma Irradiation in Air.	Extent of recognition.
8–226		ASTM F603–12 Standard Specification for High-Purity Dense Aluminum Oxide for Medical Application.	Extent of recognition.
8–229		ASTM F75–12 Standard Specification for Cobalt-28 Chromium-6 Molybdenum Alloy Castings and Casting Alloy for Surgical Implants (UNS R30075).	Extent of recognition.
8–330		ASTM F1978–12 Standard Test Method for Measuring Abrasion Resistance of Metallic Thermal Spray Coatings by Using the Taber Abraser.	Extent of recognition.
8–331		ASTM F1580–12 Standard Specification for Titanium and Titanium-6 Aluminum-4 Vanadium Alloy Powders for Coatings of Surgical Implants.	Extent of recognition.
8–333		ASTM F2393–12 Standard Specification for High-Purity Dense Magnesia Partially Stabilized Zirconia (Mg-PSZ) for Surgical Implant Applications.	Extent of recognition.
8–334		ASTM F2459–12 Standard Test Method for Extracting Residue from Metallic Medical Components and Quantifying via Gravimetric Analysis.	Extent of recognition.
		I. Nanotechnology	
18–1		ASTM E2490–09 Standard Guide for Measurement of Particle Size Distribution of Nanomaterials in Suspension by Photon Correlation Spectroscopy (PCS).	Extent of recognition.
18–2		ASTM E2535–07 (Reapproved 2013) Standard Guide for Handling Unbound Engineered Nanoscale Particles in Occupational Settings.	Reaffirmation and extent of recognition.
		J. Neurology	
17–3	17–12	ISO 7197 Third edition 2006–06–01 Neurosurgical Implants—Sterile, single-use hydrocephalus shunts and components [Including TECHNICAL CORRIGENDUM 1 (2007)].	Withdrawn and replaced with newer version including technical corrigendum.
17–7		ISO 7197: 2006 Neurosurgical implants—Sterile, single-use hydrocephalus shunts and components TECHNICAL CORRIGENDUM 1.	Withdrawn. See 17–12.
17–1		ANSI/AAMI NS28:1988/(R) 2010 Intracranial pressure monitoring devices.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
17–4		ASTM F647–94 (Reapproved 2006) Standard Practice for Evaluating and Specifying Implantable Shunt Assemblies for Neurosurgical Application.	Extent of recognition.
17–9		ASTM F2129–08 Standard Test Method for Conducting Cyclic Potentiodynamic Polarization Measurements to Determine the Corrosion Susceptibility of Small Implant Devices.	Extent of recognition.
K. OB–GYN/Gastroenterology/Urology			
9–34	9–82	ISO 4074 First edition 2002–02–15 Corrected version 2002–12–01 Natural latex rubber condoms—Requirements and test methods [Including TECHNICAL CORRIGENDUM 1 (2002), TECHNICAL CORRIGENDUM 2 (2002)].	Withdrawn and replaced with newer version including technical corrigendum.
9–57		ISO 4074:2002 TECHNICAL CORRIGENDUM 2, Natural latex rubber condoms—Requirements and test methods TECHNICAL CORRIGENDUM 2.	Withdrawn. See 9–82.
9–75	9–84	ISO 8600–3 First edition 1997–07–01 Optics and Optical instruments—Medical endoscopes and endoscopic accessories—Part 3: Determination of field of view and direction of view of endoscopes with optics [Including AMENDMENT 1 (2003)].	Withdrawn and replaced with newer version including amendment.
9–36	9–90	ISO 8009 First edition 2004–10–01 Mechanical contraceptives—Reusable natural and silicone rubber contraceptive diaphragms—Requirements and tests [Including AMENDMENT 1(2012)].	Withdrawn and replaced with newer version including amendment.
9–37	9–83	ISO 8600–1 Third edition 2013–03–01 Endoscopes—Medical endoscopes and endotherapy devices—Part 1: General requirements.	Withdrawn and replaced with newer version.
9–38		ISO 8600–3 First edition 1997–07–01 AMENDMENT 1, Optics and optical instruments—Medical endoscopes and endoscopic accessories Part 3: Determination of field of view and direction of view of endoscopes with optics.	Withdrawn. See 9–84.
9–44		ASTM F623–99 (Reapproved 2006) Standard Performance Specification for Foley Catheter.	Extent of recognition.
9–54	9–85	ASTM D6976–13 Standard Specification for Rubber Contraceptives—Vaginal Diaphragms.	Withdrawn and replaced with a newer version.
9–56		ASTM D3492–08 Standard Specification for Rubber Contraceptives (Male Condoms).	Extent of recognition.
9–65	9–91	ANSI/AAMI/ISO 8637:2010 Cardiovascular implants and extracorporeal systems—Hemodialyzers, hemodiafilters, hemofilters, and hemoconcentrators [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
9–66		ANSI/AAMI/ISO 8638:2010 Cardiovascular implants and Extracorporeal blood circuit for hemodialyzers, hemodiafilters, and hemofilters.	Extent of recognition.
9–67		ASTM D7661–10 Standard Test Method for Determining Compatibility of Personal Lubricants with Natural Rubber Latex Condoms.	Extent of recognition.
9–68		ISO 23409 First edition 2011–02–15 Male Condoms—Requirements and test methods for condoms made from synthetic materials.	Extent of recognition.
9–73		ANSI/AAMI/ISO 13958:2009 Concentrates for hemodialysis and related therapies.	Extent of recognition.
9–74		ISO 13958 Second edition 2009–04–15 Concentrates for haemodialysis and related therapies.	Extent of recognition.
9–79		ISO 26722 First edition 2009–04–15 Water treatment equipment for haemodialysis applications and related therapies.	Extent of recognition.
L. Ophthalmic			
10–41	10–81	ISO 11979–7 Second edition 2006–05–01 Ophthalmic implants—Intraocular lenses—Part 7: Clinical investigations [Including Amendment 1:2012].	Withdrawn and replaced with newer version including amendment.
10–75		ISO 11979–7/Amendment 1:2012 Ophthalmic implants—Intraocular lenses—Part 7: Clinical investigations.	Withdrawn. See 10–81.
10–42	10–82	ISO 11979–2 First edition 1999–12–15 Ophthalmic implants—Intraocular lenses—Part 2: Optical properties and test methods [Including TECHNICAL CORRIGENDUM 1 (2003)].	Withdrawn and replaced with newer version including technical corrigendum.
10–53	10–83	ISO 18369–1 First edition 2006–08–15 Ophthalmic optics—Contact lenses—Part 1: Vocabulary, classification system and recommendations for labeling specifications [Including AMENDMENT 1 2009].	Withdrawn and replaced with newer version including amendment.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
10–61		ISO 18369–1:2006 Ophthalmic optics—Contact lenses Part 1: Vocabulary, classification system and recommendations for labeling specifications. ISO 18369–1 First edition 2006–08–05 AMENDMENT 1 2009–02–15.	Withdrawn. See 10–83.
10–58	10–84	ANSI Z80.11–2012 American National Standard for Ophthalmics—Laser Systems for Corneal Reshaping.	Withdrawn and replaced with newer version.
10–59	10–85	ISO 11980 Third edition 2012–11–15 Corrected version 2013–12–01 Ophthalmic optics—Contact lenses and contact lens care products—Guidance for clinical investigations.	Withdrawn and replaced with newer version.
10–71	10–86	ISO 14729 First edition 2001–04–15 Ophthalmic optics—Contact lens care products—Microbiological requirements and test methods for products and regimens for hygienic management of contact lenses [Including: AMENDMENT 1 2010].	Withdrawn and replaced with newer version including amendment.
10–43		ISO 11979–8 Second edition 2006–07–01 Ophthalmic implants—Intraocular lenses—Part 8: Fundamental requirements.	Extent of recognition.
10–54		ISO 18369–4 First edition 2006–08–15 Ophthalmic optics—contact lenses—Part 4: Physicochemical properties of contact lens materials.	Extent of recognition.
10–55		ISO 11979–6 Second edition 2007–07–15 Ophthalmic implants—Intraocular lenses—Part 6: Shelf-life and transport stability.	Extent of recognition.
10–56		ANSI Z80.12–2007 (R2012) American National Standard for Ophthalmics—Multifocal Intraocular Lenses.	Reaffirmation and extent of recognition.
10–57		ANSI Z80.13–2007 (R2012) American National Standard for Ophthalmics—Phakic Intraocular Lenses.	Reaffirmation and extent of recognition.
10–60		ISO 11981 Second edition 2009–07–01 Ophthalmic optics—Contact lenses and contact lens care products—Determination of physical compatibility of contact lens care products with contact lenses.	Extent of recognition.
10–62		ANSI Z80.10–2009 Ophthalmic Instruments—Tonometers	Extent of recognition.
10–64	10–89	ANSI Z80.7–2013 Ophthalmics—Intraocular Lenses	Withdrawn and replaced with newer version.
10–68		ISO 13212 Second edition 2011–05–15 Ophthalmic optics—Contact lens care products—Guidelines for determination of shelf-life.	Extent of recognition.
10–69		ANSI Z80.18–2010 American National Standard for Ophthalmics—Contact Lens Care Products—Vocabulary, Performance Specifications and Test Methodology.	Extent of recognition.
10–74		ISO 10940 Second edition 2009–08–01 Ophthalmic instruments—Fundus Cameras.	Extent of recognition.
		M. Orthopedic	
11–190	11–256	ISO 14243–3 First edition 2004–09–15 Implants for surgery—Wear of total knee-joint prostheses—Part 3: Loading and displacement parameters for wear-testing machines with displacement control and corresponding environmental conditions for test [Including: TECHNICAL CORRIGENDUM 1(2006)].	Withdrawn and replaced with newer version including technical corrigendum.
11–218		ISO 14243–3:2004 TECHNICAL CORRIGENDUM 1 Implants for surgery—Wear of total knee-joint prostheses—Part 3: Loading and displacement parameters for wear-testing machines with displacement control and corresponding environmental conditions for test.	Withdrawn. See 11–256.
11–210	11–257	ASTM F543–13 Standard Specification and Test Methods for Metallic Medical Bone Screws.	Withdrawn and replaced with a newer version.
11–212		ASTM F1440–92 (Reapproved 2008) Standard Practice for Cyclic Fatigue Testing of Metallic Stemmed Hip Arthroplasty Femoral Components Without Torsion.	Withdrawn.
11–241		ASTM F543–07 Standard Specification and Test Methods for Metallic Medical Bone Screws.	Withdrawn duplicate. See 11–257.
11–244	11–258	ASTM F2083–12 Standard Specification for Knee Replacement Prosthesis.	Withdrawn and replaced with a newer version.
11–74		ISO 5838–2 First edition 1991–01–15 Implants for surgery—Skeletal pins and wires—Part 2: Steinmann skeletal pins—Dimensions.	Extent of recognition.
11–75		ISO 5838–3 First edition 1993–09–15 Implants for surgery—Skeletal pins and wires—Part 3: Kirschner skeletal wires.	Extent of recognition.
11–80		ISO 8828 First edition 1988–10–15 Implants for surgery—Guidance on care and handling of orthopaedic implants.	Extent of recognition.
11–83		ISO 13402 First edition 1995–08–01 Surgical and dental hand instruments—Determination of resistance against autoclaving, corrosion and thermal exposure.	Extent of recognition.
11–168		ASTM F1781–03 (Reapproved 2009) Standard Specification for Elastomeric Flexible Hinge Finger Total Joint Implants.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
11–171		ASTM F1814–97a (Reapproved 2009) Standard Guide for Evaluating Modular Hip and Knee Joint Components.	Extent of recognition.
11–183		ASTM F1875–98 (Reapproved 2009) Standard Practice for Fretting Corrosion Testing of Modular Implant Interfaces: Hip Femoral Head-bore and Cone Taper Interface.	Extent of recognition.
11–184		ISO 8827 First edition 1988–10–15 Implants for surgery—Staples with parallel legs for orthopaedic use—General requirements.	Extent of recognition.
11–185		ASTM F2267–04 (Reapproved 2011) Standard Test Method for Measuring Load Induced Subsidence of Intervertebral Body Fusion Device Under Static Axial Compression.	Extent of recognition.
11–191		ISO 14879–1 First edition 2000–06–01 Implants for surgery—Total knee-joint prostheses—Part 1: Determination of endurance properties of knee tibial trays.	Extent of recognition.
11–196		ASTM F1672–95 (Reapproved 2011) Standard Specification for Resurfacing Patellar Prosthesis.	Extent of recognition.
11–197		ASTM F983–86 (Reapproved 2013) Standard Practice for Permanent Marking of Orthopaedic Implant Components.	Reaffirmation and extent of recognition.
11–199		ASTM F565–04 (Reapproved 2013) Standard Practice for Care and Handling of Orthopedic Implants and Instruments.	Reaffirmation and extent of recognition.
11–203		ASTM F1541–02 (Reapproved 2011) [1] Standard Specification and Test Methods for External Skeletal Fixation Devices.	Extent of recognition.
11–207		ASTM F2193–02 (Reapproved 2007) Standard Specifications and Test Methods for Components Used in the Surgical Fixation of the Spinal Skeletal System.	Extent of recognition.
11–211		ASTM F1798–97 (Reapproved 2008) Standard Guide for Evaluating the Static and Fatigue Properties of Interconnection Mechanisms and Subassemblies Used in Spinal Arthrodesis Implants.	Extent of recognition.
11–214		ASTM F382–99 (Reapproved 2008) [1] Standard Specification and Test Method for Metallic Bone Plates.	Extent of recognition.
11–216		ASTM F1264–03 (Reapproved 2012) Standard Specification and Test Methods for Intramedullary Fixation Devices.	Extent of recognition.
11–220		ASTM F2068–09 Standard Specification for Femoral Prostheses—Metallic Implants.	Extent of recognition.
11–222		ISO 14243–1 Second edition 2009–11–15 Implants for surgery—Wear of total knee-joint prostheses—Part 1: Loading and displacement parameters for wear-testing machines with load control and corresponding environmental conditions for test.	Extent of recognition.
11–223		ISO 14243–2 Second edition 2009–11–15 Implants for surgery—Wear of total knee-joint prostheses—Part 2: Methods of measurement.	Extent of recognition.
11–224		ASTM F2706–08 Standard Test Methods for Occipital-Cervical and Occipital-Cervical-Thoracic Spinal Implant Constructs in a Vertebrectomy Model.	Extent of recognition.
11–225		ISO 7206–4 Third edition 2010–06–15 Implants for surgery—Partial and total hip-joint prostheses—Part 4: Determination of endurance properties and performance of stemmed femoral components.	Extent of recognition.
11–226		ASTM F1089–10 Standard Test Method for Corrosion of Surgical Instruments.	Extent of recognition.
11–227		ASTM F366–10 Standard Specification for Fixation Pins and Wires ..	Extent of recognition.
11–228		ASTM F564–10 Standard Specification and Test Methods for Metallic Bone Staples.	Extent of recognition
11–231		ISO 7207–2 Second edition 2011–07–01 Implants for surgery—Components for partial and total knee joint prostheses—Part 2: Articulating surfaces made of metal, ceramic and plastics materials.	Extent of recognition.
11–232		ISO 7207–1 Third edition 2007–02–01 Implants for surgery—Components for partial and total knee joint prostheses—Part 1: Classification, definitions and designation of dimensions.	Extent of recognition.
11–234		ASTM F732–00 (Reapproved 2011) Standard Test Method for Wear Testing of Polymeric Materials Used in Total Joint Prostheses.	Extent of recognition.
11–235		ASTM F2077–11 Test Methods for Intervertebral Body Fusion Devices.	Extent of recognition.
11–237		ISO 7206–6 First edition 1992–03–15 Implants for surgery—Partial and total hip joint prostheses—Part 6: Determination of endurance properties of head and neck region of stemmed femoral components.	Extent of recognition.
11–238		ASTM F2033–12 Standard Specification for Total Hip Joint Prosthesis and Hip Endoprosthesis Bearing Surfaces Made of Metallic, Ceramic, and Polymeric Materials.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
11–239		ASTM F 2345–03 (Reapproved 2013) Standard Test Methods for Determination of Static and Cyclic Fatigue Strength of Ceramic Modular Femoral Heads.	Extent of recognition. Reaffirmation.
11–240		ASTM F382–99 (Reapproved 2008) [1] Standard Specification and Test Method for Metallic Bone Plates.	Extent of recognition.
11–243		ASTM F2346–05 (Reapproved 2011) Standard Test Methods for Static and Dynamic Characterization of Spinal Artificial Discs.	Extent of recognition.
11–245		ASTM F384–12 Standard Specifications and Test Methods for Metallic Angled Orthopedic Fracture Fixation Devices.	Extent of recognition.
11–247		ASTM F2789–10 Standard Guide for Mechanical and Functional Characterization of Nucleus Devices.	Extent of recognition.
11–248		ISO 14242–1 Second edition 2012–01–15 Implants for surgery—Wear of total hip-joint prostheses—Part 1: Loading and displacement parameters for wear-testing machines and corresponding environmental conditions for test.	Extent of recognition.
11–249		ISO 14242–2 First edition 2000–09–15 Implants for surgery—Wear of total hip-joint prostheses—Part 2: Methods of measurement.	Extent of recognition.
11–250		ISO 14242–3 First edition 2009–03–15 Implants for surgery—Wear of total hip-joint prostheses—Part 3: Loading and displacement parameters for orbital bearing type wear testing machines and corresponding environmental conditions for test.	Extent of recognition.
		N. Physical Medicine	
16–25		ISO 7176–13 First edition 1989–08–01 Wheelchairs—Part 13: Determination of coefficient of friction of test surfaces.	Extent of recognition.
16–27		ISO 7176–15 First edition 1996–11–15 Wheelchairs—Part 15: Requirements for information disclosure, documentation and labeling.	Extent of recognition.
16–29		ISO 7176–6 Second edition 2001–10–01 Wheelchairs—Part 6: Determination of maximum speed, acceleration and deceleration of electric wheelchairs.	Extent of recognition.
16–158		ISO 7176–1 Second edition 1999–10–01 Wheelchairs—Part 1: Determination of static stability.	Extent of recognition.
16–159		ISO 7176–2 Second edition 2001–06–15 Wheelchairs—Part 2: Determination of dynamic stability of electric wheelchairs.	Extent of recognition.
16–162		ISO 7176–4 Third edition 2008–10–01 Wheelchairs—Part 4: Energy consumption of electric wheelchairs and scooters for determination of theoretical distance range.	Extent of recognition.
16–163		ISO 7176–5 Second edition 2008–06–01 Wheelchairs—Part 5: Determination of overall dimensions, mass and manoeuvring space.	Extent of recognition.
16–164		ISO 7176–10 Second edition 2008–11–01 Wheelchairs—Part 10: Determination of obstacle-climbing ability of electrically powered wheelchairs.	Extent of recognition.
16–165		ISO 7176–14 Second edition 2008–02–15 Wheelchairs—Part 14: Power and control systems for electrically powered wheelchairs and scooters—Requirements and test methods.	Extent of recognition.
16–166		ISO 7176–21 Second edition 2009–04–01 Wheelchairs—Part 21: Requirements and test methods for electromagnetic compatibility of electrically powered wheelchairs and scooters, and battery chargers.	Extent of recognition.
16–167		ISO 7176–9: Third edition 2009–11–15 Wheelchairs—Part 9: Climatic tests for electric wheelchairs.	Extent of recognition.
16–168		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 1: Determination of static stability.	Extent of recognition.
16–169		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 2: Determination of dynamic stability of electrically powered wheelchairs.	Extent of recognition.
16–170		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 3: Determination of effectiveness of brakes.	Extent of recognition.
16–171		ANSI/RESNA WC–2:2009 Section 4: Energy consumption of electrically powered wheelchairs and scooters for determination of theoretical distance range.	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
16–172		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 5: Determination of dimensions, mass and maneuvering space.	Extent of recognition.
16–173		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 6: Determination of maximum speed, acceleration and deceleration of electrically powered wheelchairs.	Extent of recognition.
16–174		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 7: Method of Measurement of Seating and Wheel Dimensions.	Extent of recognition.
16–175		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 8: Requirements and test methods for static, impact and fatigue strengths.	Extent of recognition.
16–176		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 9: Climatic tests for electrically powered wheelchairs.	Extent of recognition.
16–177		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 10: Determination of obstacle-climbing ability of electrically powered wheelchairs.	Extent of recognition.
16–178		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 11: Test dummies.	Extent of recognition.
16–179		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 13: Determination of coefficient of friction of test surfaces.	Extent of recognition.
16–180		ANSI/RESNA WC–2:2009 American National Standard for Wheelchairs—Volume 2: Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 14: Power and control systems for electrically powered wheelchairs—Requirements and test methods.	Extent of recognition.
16–181		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 15: Requirements for information disclosure, documentation and labeling.	Extent of recognition.
16–182		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 16: Resistance to ignition of upholstered parts—Requirements and test methods.	Extent of recognition.
16–183		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 20: Determination of the performance of stand-up type wheelchairs.	Extent of recognition
16–184		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 22: Set-up procedures.	Extent of recognition.
16–185		ANSI/RESNA WC–2:2009,American National Standard for Wheelchairs—Volume 2, Additional Requirements for Wheelchairs (including Scooters) with Electrical Systems Section 21: Requirements and test methods for electromagnetic compatibility of electrically powered wheelchairs and motorized scooters.	Extent of recognition.
16–187		ANSI/RESNA WC–1:2009 American National Standard for Wheelchairs—Volume 1: Requirements and Test Methods for Wheelchairs (including Scooters) Section 26: Vocabulary.	Extent of recognition.
		O. Radiology	
12–53	12–257	ISO 2919 Third edition 2012–02–15 Radiological protection—Sealed radioactive sources—General requirements and classification.	Withdrawn and replaced with newer version.
12–59		IEC 61168 First edition 1993–12 Radiotherapy simulators—Functional performance characteristics.	Extent of recognition.
12–66		AIUM MUS, Medical Ultrasound Safety	Extent of recognition.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
12–139		AIUM AOMS–2004, Acoustic Output Measurement Standard for Diagnostic Ultrasound Equipment.	Extent of recognition.
12–140		AIUM RTD2–2004 Standard for Real-Time Display of Thermal and Mechanical Acoustic Output Indices on Diagnostic Ultrasound Equipment Revision 2.	Withdrawn. See 12–209 and 12–258.
12–145	12–259	IEC 61674 Edition 2.0 2012–11 Medical electrical equipment—Dosimeters with ionization chambers and/or semiconductor detectors as used in X-ray diagnostic imaging.	Withdrawn and replaced with newer version.
12–149	12–260	IEC 60336 Fourth edition 2005–04 Medical electrical equipment—X-ray tube assemblies for medical diagnosis—Characteristics of focal spots [Including: Technical Corrigendum 1 (2006)].	Withdrawn and replaced with newer version including technical corrigendum.
12–150		ISO/IEC 10918–1:1994 TECHNICAL CORRIGENDUM 1:2005 Information technology—Digital compression and coding of continuous-tone still image—Part 1: Requirements and guidelines.	Withdrawn. See 12–261.
12–156		ISO 11670:2003 TECHNICAL CORRIGENDUM 1:2004 Lasers and laser-related equipment—Test methods for laser beam parameters—Beam positional stability.	Withdrawn. See 12–262.
12–157		ISO 13694:2000 TECHNICAL CORRIGENDUM 1:2005 Optics and optical instruments—Lasers and laser-related equipment—Test methods for laser beam power (energy) density distribution.	Withdrawn. See 12–263.
12–159	12–264	NEMA MS 11–2010 Determination of Gradient-Induced Electric Fields In Diagnostic Magnetic Resonance Imaging.	Withdrawn and replaced with newer version.
12–167	12–265	NEMA NU 2–2012 Performance Measurements of Positron Emission Tomographs (PETs).	Withdrawn and replaced with newer version.
12–179		ANSI/IESNA RP–27.3–2007, Recommended Practice for Photobiological Safety for Lamps—Risk Group Classification and Labeling.	Extent of recognition.
12–180	12–266	IEC 61689 Edition 3.0 2013–02 Ultrasonic-Physiotherapy systems—Field specifications and methods of measurement in the frequency range 0. 5 MHz to 5 MHz.	Withdrawn and replaced with newer version.
12–190	12–267	IEC 61217 Edition 2.0 2011–12 Radiotherapy equipment—Coordinates, movements and scales.	Withdrawn and replaced with newer version.
12–194		ANSI/HPS N43.6–2007, Sealed Radioactive Sources—Classification	Extent of recognition.
12–207	12–271	IEC 60601–2–33 Edition 3.1 2013–04 Medical electrical equipment—Part 2–33: Particular requirements for the basic safety and essential performance of magnetic resonance equipment for medical diagnosis.	Withdrawn and replaced with newer version.
12–208	12–268	IEC 60601–2–22 Edition 3.1 2012–10 Medical electrical equipment—Part 2–22: Particular requirements for basic safety and essential performance of surgical, cosmetic, therapeutic and diagnostic laser equipment.	Withdrawn and replaced with newer version.
12–210	12–269	IEC 60601–1–3 Edition 2.1 2013–04 Medical electrical equipment—Part 1–3: General requirements for basic safety and essential performance—Collateral Standard: Radiation protection in diagnostic X-ray equipment.	Withdrawn and replaced with newer version.
12–219		IEC 60336 (2005) Medical electrical equipment—X-ray tube assemblies for medical diagnosis—Characteristics of focal spots.	Withdrawn. See 12–260.
12–222	12–270	IEC 61223–3–5 First edition 2004–08 Evaluation and routine testing in medical imaging departments—Part 3–5: Acceptance tests—Imaging performance of computed tomography X-ray equipment [Including: TECHNICAL CORRIGENDUM 1 (2006)].	Withdrawn and replaced with newer version including technical corrigendum.
12–223		IEC 61223–3–5 (First edition 2004) Evaluation and routine testing in medical imaging departments—Part 3–5: Acceptance tests—Imaging performance of computed tomography X-ray equipment CORRIGENDUM 1.	Withdrawn. See 12–270.
12–227		IEC 61391–1 First edition 2006–07 Ultrasonics—Pulse-echo scanners—Part 1: Techniques for calibrating spatial measurement systems and measurement of system point-spread function response.	Extent of recognition.
12–228		IEC 61391–2 Edition 1.0 2010–01 Ultrasonics—Pulse-echo scanners—Part 2: Measurement of maximum depth of penetration and local dynamic range.	Extent of recognition.
12–233	12–262	ISO 11670 Second edition 2003–04–01 Lasers and laser-related equipment—Test methods for laser beam parameters—Beam positional stability [Including: TECHNICAL CORRIGENDUM 1 (2004)].	Withdrawn and replaced with newer version including technical corrigendum.
12–237	12–258	IEC 62359 Edition 2.0 2010–10 Ultrasonics—Field characterization—Test methods for the determination of thermal and mechanical indices related to medical diagnostic ultrasonic fields [Including TECHNICAL CORRIGENDUM 1 (2011)].	Withdrawn and replaced with newer version including technical corrigendum.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
12–243	12–263	ISO 13694 First edition 2000–04–01 Optics and optical instruments—Lasers and laser-related equipment—Test methods for laser beam power [energy] density distribution [Including: TECHNICAL CORRIGENDUM 1 (2005)].	Withdrawn and replaced with newer version including technical corrigendum.
12–244		IEC 62359 (Second edition 2010) March 2011 Ultrasonics—Field characterization—Test methods for the determination of thermal and mechanical indices related to medical diagnostic ultrasonic fields CORRIGENDUM 1.	Withdrawn. See 12–258.
12–247		ISO 11990–1 First edition 2011–08–01, Lasers and laser-related equipment—Determination of laser resistance of tracheal tubes—Part 1: Tracheal tube shaft.	Extent of recognition.
P. Software/Informatics			
13–4		ANSI/UL 1998 Standards for Safety Software in Programmable Components, Second Edition. [This Standard contains revisions through and including October 28, 2008.]	Extent of recognition.
Q. Sterility			
14–143	14–395	ISO 14698–2 First edition 2003–09–15 Cleanrooms and associated controlled environments—Biocontamination control—Part 2: Evaluation and interpretation of biocontamination data. [Including: TECHNICAL CORRIGENDUM 1 Published 2004–11–01].	Withdrawn and replaced with newer version including technical corrigendum.
14–193		ANSI/AAMI/ISO 11607–1:2006/(R)2010 Packaging for terminally sterilized medical devices—Part 1: Requirements for materials, sterile barrier systems and packaging systems.	Extent of recognition and relevant guidance.
14–194		ANSI/AAMI/ISO 11607–2:2006/(R)2010 Packaging for terminally sterilized medical devices—Part 2: Validation requirements for forming, sealing and assembly processes.	Extent of recognition and relevant guidance.
14–195		ANSI/AAMI/ISO 11140–1:2005(R)2010 Sterilization of health care products—Chemical indicators—Part 1: General requirements.	Extent of recognition.
14–201	14–396	ANSI/AAMI ST77:2013 Containment devices for reusable medical device sterilization.	Withdrawn and replaced with newer version.
14–214	14–397	AOAC 6.2.04:2013 Official Method 955.15 Testing Disinfectants Against Staphylococcus aureus, Use-Dilution Method.	Withdrawn and replaced with newer version.
14–218	14–398	AOAC 6.3.05:2013 Official Method 966.04 Sporicidal Activity of Disinfectants Method I.	Withdrawn and replaced with newer version.
14–219	14–399	AOAC 6.3.06:2012 Official Method 965.12 Tuberculocidal Activity of Disinfectants.	Withdrawn and replaced with newer version.
14–230	14–400	ASTM F2203–13 Standard Test Method for Linear Measurement Using Precision Steel Rule.	Withdrawn and replaced with newer version.
14–231	14–401	ASTM F2217/F2217M–13 Standard Practice for Coating/Adhesive Weight Determination.	Withdrawn and replaced with newer version.
14–235	14–402	ASTM F1140/F1140M–13 Standard Test Methods for Internal Pressurization Failure Resistance of Unrestrained Packages.	Withdrawn and replaced with newer version.
14–236	14–403	ASTM F2054/F2054M–13 Standard Test Method for Burst Testing of Flexible Package Seals Using Internal Air Pressurization Within Restraining Plates.	Withdrawn and replaced with newer version.
14–241	14–424	ISO 13408–6 First edition 2005–06–15 Aseptic processing of health care products—Part 6: Isolator systems [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
14–258	14–404	ASTM F2250–13 Standard Practice for Evaluation of Chemical Resistance of Printed Inks and Coatings on Flexible Packaging Materials.	Withdrawn and replaced with newer version.
14–260	14–405	ASTM F2252/F2252M–13$^{\varepsilon 1}$ Standard Practice for Evaluating Ink or Coating Adhesion to Flexible Packaging Materials Using Tape.	Withdrawn and replaced with newer version.
14–264	14–406	ANSI/AAMI ST8:2013 Hospital steam sterilizers	Withdrawn and replaced with newer version.
14–274		ANSI/AAMI/ISO 15882:2008 Sterilization of health care products—Chemical indicators—Guidance for selection, use, and interpretation of results.	Extent of recognition and relevant guidance.
14–285		ANSI/AAMI/ISO 14161:2009 Sterilization of health care products—Biological indicators—Guidance for the selection, use and interpretation of results.	Extent of recognition.
14–289		ISO 14698–2:2003 TECHNICAL CORRIGENDUM Cleanrooms and associated controlled environments—Biocontamination control—Part 2: Evaluation and interpretation of biocontamination data.	Withdrawn. See 14–395.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
14–296		ANSI/AAMI/ISO 11138–1:2006/(R)2010, Sterilization of health care products—Biological indicators—Part 1: General requirements.	Relevant guidance.
14–300		ASTM D4169–09 Standard Practice for Performance Testing of Shipping Containers and Systems.	Extent of recognition.
14–326	14–407	ISO 11737–1 Second edition 2006–04–01, Sterilization of medical devices—Microbiological methods—Part 1: Determination of a population of microorganisms on products [Including: TECHNICAL CORRIGENDUM 1 Published 2007–05–15].	Withdrawn and replaced with newer version including technical corrigendum.
14–328	14–428	ISO 11137–1 First edition 2006–04–15 Sterilization of health care products—Radiation—Part 1: Requirements for development, validation and routine control of a sterilization process for medical devices [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
14–334		ISO 15882 Second edition 2008–09–01 Sterilization of health care products—Chemical indicators—Guidance for selection, use and interpretation of results.	Extent of recognition, title.
14–335	14–408	ISO 10993–7 Second edition 2008–10–15 Biological evaluation of medical devices—Part 7: Ethylene oxide sterilization residuals [Including: TECHNICAL CORRIGENDUM 1 Published 2009–11–15].	Withdrawn and replaced with newer version including technical corrigendum.
14–336		ISO 14161 Second edition 2009–09–15 Sterilization of health care products—Biological indicators—Guidance for the selection, use and interpretation of results.	Extent of recognition.
14–338		ISO 11138–1 Second edition 2006–07–01, Sterilization of health care products—Biological indicators—Part 1: General requirements.	Relevant guidance.
14–352	14–425	ANSI/AAMI/ISO 13408–6:2005 Aseptic processing of health care products—Part 6: Isolator systems [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
14–353		ISO 11140–1 Second edition 2005–07–15 Sterilization of health care products—Chemical indicators—Part 1: General requirements.	Extent of recognition.
14–355		ISO 11607–1 First edition 2006–04–15 Packaging for terminally sterilized medical devices—Part 1: Requirements for materials, sterile barrier systems and packaging systems.	Extent of recognition and relevant guidance.
14–356		ISO 11607–2 First edition 2006–04–15 Packaging for terminally sterilized medical devices—Part 2: Validation requirements for forming, sealing and assembly processes.	Extent of recognition.
14–357		ISO 11737–1:2006 TECHNICAL CORRIGENDUM 1 Published 2007–05–15 Sterilization of medical devices—Microbiological methods—Part 1: Determination of a population of microorganisms on products.	Withdrawn. See 14–407.
14–360		ANSI/AAMI ST72:2011, Bacterial endotoxins—Test methods, routine monitoring, and alternatives to batch testing.	Relevant guidance.
14–362	14–412	AOAC 6.2.01:2013 Official Method 955.14, Testing Disinfectants Against Salmonella choleraesuis, Use-Dilution Method.	Withdrawn and replaced with newer version.
14–363	14–413	AOAC 6.2.06:2013 Official Method 964.02, Testing Disinfectants Against Pseudomonas aeruginosa, Use-Dilution Method.	Withdrawn and replaced with newer version.
14–365	14–409	ISO 11137–2 Third edition 2013–06–01 Sterilization of health care products—Radiation—Part 2: Establishing the sterilization dose.	Withdrawn and replaced with newer version.
14–366	14–414	USP 36–NF31:2013 <61> Microbiological Examination of Nonsterile Products: Microbial Enumeration Tests.	Withdrawn and replaced with newer version.
14–367	14–415	USP 36–NF31:2013 <71> Sterility Tests	Withdrawn and replaced with newer version.
14–368	14–416	USP 36–NF31:2013 <85> Bacterial Endotoxins Test	Withdrawn and replaced with newer version.
14–369	14–417	USP 36–NF31:2013 <151> Pyrogen Test (USP Rabbit Test)	Withdrawn and replaced with newer version.
14–370	14–418	USP 36–NF31:2013 <161> Transfusion and Infusion Assemblies and Similar Medical Devices.	Withdrawn and replaced with newer version.
14–371	14–419	USP 36–NF31:2013 Biological Indicator for Steam Sterilization, Self-Contained.	Withdrawn and replaced with newer version.
14–372	14–420	USP 36–NF31:2013 Biological Indicator for Dry-Heat Sterilization, Paper Carrier.	Withdrawn and replaced with newer version.
14–373	14–421	USP 36–NF31:2013 Biological Indicator for Ethylene Oxide Sterilization, Paper Carrier.	Withdrawn and replaced with newer version.
14–374	14–422	USP 36–NF31:2013 Biological Indicator for Steam Sterilization, Paper Carrier.	Withdrawn and replaced with newer version.
14–375	14–423	USP 36–NF31:2013 <62> Microbiological Examination of Nonsterile Products: Tests for Specified Microorganisms.	Withdrawn and replaced with newer version.
14–380	14–410	ASTM F17–13 Standard Terminology Relating to Flexible Barrier Packaging.	Withdrawn and replaced with newer version.

TABLE 1—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old recognition No.	Replacement recognition No.	Title of standard [1]	Change
14–384		ISO 10993–7:2008 TECHNICAL CORRIGENDUM 1, Published 2009–11–15 Biological evaluation of medical devices—Part 7: Ethylene oxide sterilization residuals.	Withdrawn. See 14–408.
14–385	14–426	ANSI/AAMI/ISO 13408–1:2008 (R2011) Aseptic processing of health care products—Part 1: General requirements [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
14–386	14–427	ISO 13408–1 Second edition 2008–06–15 Aseptic processing of health care products—Part 1: General requirements [Including AMENDMENT 1 (2013)].	Withdrawn and replaced with newer version including amendment.
14–393	14–411	ISO/ASTM 51818 Third edition 2013–06–01 Practice for dosimetry in an electron beam facility for radiation processing at energies between 80 and 300 keV.	Withdrawn and replaced with newer version.

[1] All standard titles in this table conform to the style requirements of the respective organizations.

III. Listing of New Entries

In table 2 of this document, FDA provides the listing of new entries and consensus standards added as modifications to the list of recognized standards under Recognition List Number: 034.

TABLE 2.—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS

Recognition No.	Title of standard [1]	Reference No. and date
	A. Anesthesia	
1–96	Medical electrical equipment—Part 2–55: Particular requirements for the basic safety and essential performance of respiratory gas monitors.	ISO 80601–2–55 First edition 2011–12–15.
	B. Cardiovascular	
3–121	Cardiovascular implants—Endovascular devices—Part 1: Endovascular prostheses [Including: Amendment 1 (2005)].	ISO 25539–1 First edition 2003–03–01.
	C. General	
5–83	MEDICAL ELECTRICAL EQUIPMENT—Part 1–11: General requirements for basic safety and essential performance—Collateral Standard: Requirements for medical electrical equipment and medical electrical systems used in the home healthcare environment (IEC 60601–1–11:2010, MOD).	ANSI/AAMI HA60601–1–1:2011.
5–84	Design of training and instructional materials for medical devices used in non-clinical environments.	AAMI TIR49:2013.
5–85	Medical electrical equipment—Part 1–6: General requirements for basic safety and essential performance—Collateral standard: Usability.	IEC 60601–1–6 Edition 3.0 2010–01.
5–86	Medical electrical equipment—Part 1–8: General requirements for basic safety and essential performance—Collateral Standard: General requirements, tests and guidance for alarm systems in medical electrical equipment and medical electrical systems.	IEC 60601–1–8 Edition 2.0 2006–10.
	D. General Hospital/General Plastic Surgery	
6–302	Stainless steel needle tubing for the manufacture of medical devices [Including: AMENDMENT 1 2001–06–01].	ISO 9626 First edition 1991–09–01.
6–318	Infusion equipment for medical use—Part 4: Infusion sets for single use, gravity feed [Including: AMENDMENT 1 2013–03–01].	ISO 8536–4 Fifth edition 2010–10–01.
6–320	Medical electrical equipment—Part 2–20: Particular requirements for the basic safety and essential performance of infant transport incubators [Including: CORRIGENDUM 1 (February 2012) and CORRIGENDUM 2 (February 2013)].	IEC 60601–2–20 Edition 2.0 2009–02.
6–321	Medical electrical equipment—Part 2–52: Particular requirements for basic safety and essential performance of medical beds [Including: CORRIGENDUM 1 (September 2010)].	IEC 60601–2–52 Edition 1.0 2009–12.
6–322	Intravascular catheters—Sterile and single-use catheters—Part 4: Balloon dilatation catheters.	ISO 10555–4 Second edition 2013–06–15.
	E. Material	
8–358	Standard Specification for Polyoxymethylene (Acetal) for Medical Applications	ASTM F1855–00 (Reapproved 2011).
8–359	Standard Guide for Silicone Elastomers, Gels, and Foams Used in Medical Applications Part I—Formulations and Uncured Materials.	ASTM F2038–00 (Reapproved 2011).

TABLE 2.—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS—Continued

Recognition No.	Title of standard [1]	Reference No. and date
8–360	Standard Guide for Silicone Elastomers, Gels, and Foams Used in Medical Applications Part II—Cross-Linking and Fabrication.	ASTM F2042–00 (Reapproved 2011).
8–361	Standard Specification for Selection of Porous Polyethylene for Use in Surgical Implants.	ASTM F755–99 (Reapproved 2011).
8–362	Standard Specification for Metal Injection Molded Unalloyed Titanium Components for Surgical Implant Applications.	ASTM F2989–13.
8–363	Standard Test Method for Tensile Properties of Plastics	ASTM D638–10.
8–364	Standard Test Methods for Density and Specific Gravity (Relative Density) of Plastics by Displacement.	ASTM D792–08.
8–365	Standard Test Method for Density of Plastics by the Density-Gradient Technique	ASTM D1505–10.
8–366	Ultra-high-molecular-weight polyethylene (PE–UHMW) moulding and extrusion materials—Part 2: Preparation of test specimens and determination of properties.	ISO 11542–2 First edition 1998–11–15.
8–367	Standard Test Method for Measurement of Fatigue Crack Growth Rates	ASTM E647–13$^{\varepsilon 1}$.
8–368	Standard Test Method for Measurement of Enthalpy of Fusion, Percent Crystallinity, and Melting Point of Ultra-High-Molecular Weight Polyethylene by Means of Differential Scanning Calorimetry.	ASTM F2625–10.
8–369	Standard Practice for Accelerated Aging of Ultra-High Molecular Weight Polyethylene after Gamma Irradiation in Air.	ASTM F2003–02 (Reapproved 2008).
F. OB–GYN/Gastroenterology/Urology		
9–86	Rubber condoms for clinical trials—Measurement of physical properties Including [AMENDMENT 1 2011–02–15)].	ISO 16037 First Edition 2002–05–15.
9–87	Female condoms—Requirements and test methods	ISO 25841 First Edition 2011–07–15.
9–88	Prophylactic dams—Requirements and test methods	ISO 29942 First Edition 2011–07–01.
9–89	Cardiovascular implants and extracorporeal blood circuit for haemodialysers, haemodiafilters, and haemofilters.	ISO 8638 Third edition 2010–07–01.
9–92	Cardiovascular implants and extracorporeal systems—Haemodialysers, haemodiafilters, haemofilters and haemoconcentrators Including [AMENDMENT 1 2013–04–01)].	ISO 8637 Third edition 2010–07–01.
G. Ophthalmics		
10–87	Standard Test Method for Tensile Properties of Thin Plastic Sheeting	ASTM D882–12.
10–88	Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical Insulating Materials.	ASTM D790–10.
H. Orthopedics		
11–259	Standard Specification For Total Elbow Prostheses	ASTM F2887–12.
11–260	Standard Guide for Presentation of End User Labeling Information for Orthopedic Implants Used in Joint Arthroplasty.	ASTM F2943–13.
11–261	Standard Specification for Shoulder Prostheses	ASTM F1378–12
11–262	Standard Specification for Acetabular Prostheses	ASTM F2091–01 (Reapproved 2012).
11–263	Standard Test Methods for Dynamic Evaluation of Glenoid Loosening or Disassociation.	ASTM F2028–08 (Reapproved 2012) [1].
11–264	Standard Test Method for Determining the Forces for Disassembly of Modular Acetabular Devices.	ASTM F1820–13.
11–265	Standard Practice for Evaluation of Modular Connection of Proximally Fixed Femoral Hip Prosthesis.	ASTM F2580–13.
11–266	Standard Specification for Total Ankle Replacement Prosthesis	ASTM F2665–09.
11–267	Standard Test Method for Determining the Axial Disassembly Force of Taper Connections of Modular Prostheses.	ASTM F2009–00 (Reapproved 2011).
11–268	Standard Test Method for Static Evaluation of Glenoid Locking Mechanism in Shear.	ASTM F1829–98 (Reapproved 2009).
11–269	Standard Guide for Functional, Kinematic, and Wear Assessment of Total Disc Prostheses.	ASTM F2423–11.
11–270	Standard Specification and Test Methods for Absorbable Plates and Screws for Internal Fixation Implants.	ASTM F2502–11.
11–271	Standard Specification for Metallic Implantable Strands and Cables	ASTM F2180–02 (Reapproved 2011).
11–272	Standard Guide for Gravimetric Wear Assessment of Prosthetic Hip Designs in Simulator Devices.	ASTM F1714–96 (Reapproved 2013).
11–273	Implants for surgery—Wear of total intervertebral spinal disc prostheses—Part 1 Loading and displacement parameters for wear testing and corresponding environmental conditions for test.	ISO 18192–1 Second edition 2011–03–01.
11–274	Implants for surgery—Wear of total intervertebral spinal disc prostheses—Part 2: Nucleus replacements.	ISO 18192–2 First edition 2010–06–15.
11–275	Standard Test Method for Evaluating Trans-Vinylene Yield in Irradiated Ultra-High Molecular Weight Polyethylene Fabricated Forms Intended for Surgical Implants by Infrared Spectroscopy.	ASTM F2381–10.

TABLE 2.—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS—Continued

Recognition No.	Title of standard [1]	Reference No. and date
	I. Radiology	
12–261	Information technology—Digital compression and coding of continuous-tone still images: Requirements and guidelines [Including: TECHNICAL CORRIGENDUM 1 (2005)].	ISO/IEC 10918–1 First edition 1994–02–15.
	J. Software/Informatics	
13–63	Application of risk management for IT-networks incorporating medical devices—Part 2–4: Application guidance—General implementation guidance for healthcare delivery organizations.	IEC/TR 80001–2–4 Edition 1.0 2012–11.
13–64	Application of risk management for IT-networks incorporating medical devices—Part 2–4: General implementation guidance for healthcare delivery organizations.	ANSI/AAMI/IEC TIR80001–2–4:2012.
	K. Sterility	
14–429	Practice for use of a radiochromic film dosimetry system	ISO/ASTM 51275 Third edition 2013–06–01.
14–430	Practice for use of an alanine-EPR dosimetry system	ISO/ASTM 51607 Third edition 2013–06–01.
14–431	Guide for estimating uncertainties in dosimetry for radiation processing	ISO/ASTM 51707 Second edition 2005–05–15.

[1] All standard titles in this table conform to the style requirements of the respective organizations.

IV. List of Recognized Standards

FDA maintains the Agency's current list of FDA recognized consensus standards in a searchable database that may be accessed directly at FDA's Internet site at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfStandards/search.cfm.* FDA will incorporate the modifications and revisions described in this notice into the database and, upon publication in the **Federal Register**, this recognition of consensus standards will be effective. FDA will announce additional modifications and revisions to the list of recognized consensus standards, as needed, in the **Federal Register** once a year, or more often, if necessary. Beginning with recognition list 033, FDA no longer announces minor revisions to the list of recognized consensus standards such as technical contact person, relevant guidance, processes affected, CFR citations, and product codes.

V. Recommendation of Standards for Recognition by FDA

Any person may recommend consensus standards as candidates for recognition under section 514 of the FD&C Act by submitting such recommendations, with reasons for the recommendation, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). To be properly considered, such recommendations should contain, at a minimum, the following information: (1) The title of the standard, (2) any reference number and date, (3) the name and address of the national or international standards development organization, (4) a proposed list of devices for which a declaration of conformity to this standard should routinely apply, and (5) a brief identification of the testing or performance or other characteristics of the device(s) that would be addressed by a declaration of conformity.

VI. Electronic Access

You may obtain a copy of ''Guidance on the Recognition and Use of Consensus Standards'' by using the Internet. The Center for Devices and Radiological Health (CDRH) maintains a site on the Internet for easy access to information including text, graphics, and files that you may download to a personal computer with access to the Internet. Updated on a regular basis, the CDRH home page includes the guidance as well as the current list of recognized standards and other standards-related documents. After publication in the **Federal Register**, this notice announcing ''Modification to the List of Recognized Standards, Recognition List Number: 034'' will be available on the CDRH home page. You may access the CDRH home page at *http://www.fda.gov/MedicalDevices.*

You may access ''Guidance on the Recognition and Use of Consensus Standards,'' and the searchable database for ''FDA Recognized Consensus Standards'' at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards.*

This **Federal Register** document on modifications in FDA's recognition of consensus standards is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Standards/ucm123792.htm.*

VII. Submission of Comments and Effective Date

Interested persons may submit to the contact person (see **FOR FURTHER INFORMATION CONTACT**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Comments are to be identified with the docket number found in brackets in the heading of this document. FDA will consider any comments received in determining whether to amend the current listing of modifications to the list of recognized standards, Recognition List Number: 034. These modifications to the list of recognized standards are effective upon publication of this notice in the **Federal Register**.

Dated: January 23, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–01847 Filed 1–29–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Pregnancy in Women with Disabilities.
Date: February 17, 2014.
Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Priscah Mujuru, RN, MPH, DRPH, COHNS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, 301–594–6594, *mujurup@mail.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Pathogenic Eukaryotes Study Section.
Date: February 20–21, 2014.
Time: 8:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.
Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, 301 435–2306, *boundst@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function A Study Section.
Date: February 25–26, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.
Contact Person: Nitsa Rosenzweig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.
Date: February 26–27, 2014.
Time: 8:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Lorien Hotel & Spa, 1600 King Street, Alexandria, VA 22314.
Contact Person: Joanne T Fujii, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4184, MSC 7850, Bethesda, MD 20892, (301) 435–1178, *fujiij@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Mechanisms of Emotion, Stress and Health Study Section.
Date: February 27, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz Carlton Hotel, 1150 22nd Street NW., Washington, DC 20037
Contact Person: Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, (301) 594–3163, *champoum@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Risk, Prevention and Health Behavior.
Date: February 27–28, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Imperial Hotel and Convention Center, 4700 Emperor Boulevard, Durham, NC 27703.
Contact Person: Claire E Gutkin, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3106, MSC 7808, Bethesda, MD 20892, 301–594–3139, *gutkincl@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Rehabilitation Sciences Study Section.
Date: February 27–28, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.
Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative Physiology of Obesity and Diabetes Study Section.
Date: February 27–28, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Reed A Graves, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Sensory Technologies
Date: February 27–28, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: The Westin Riverwalk Hotel, 420 W. Market Street, San Antonio, TX 78205.
Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry A Study Section.
Date: February 27–28, 2014.
Time: 8:30 a.m. to 12:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.
Contact Person: Mike Radtke, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, *radtkem@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 24, 2014.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01774 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, March 06, 2014, 11:00 a.m. to March 06, 2014, 12:30 p.m., National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD, 20892 which was published in the **Federal Register** on January 21, 2014, 69 FR 03392.

The meeting will be held on March 14, 2014 from 11:00 a.m. until 12:30

p.m. The meeting is closed to the public.

Dated: January 23, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01771 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Support of Competitive Research (SCORE).

Date: February 26, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: DoubleTree by Hilton Hotel Bethesda-Washington, DC 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Nina Sidorova, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3 An.22, Bethesda, MD 20892, 301–402–2783, *sidorova@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS).

Dated: January 23, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01773 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Image-Guided Drug Delivery In Cancer.

Date: February 20, 2014.

Time: 11:45 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mehrdad Mohseni, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7854, Bethesda, MD 20892, 301–435–0484, *mohsenim@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Molecular Targets for Cancer Intervention.

Date: February 24, 2014.

Time: 7:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Careen K Tang-Toth, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 435–3504, *tothct@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Hypertension and Microcirculation Study Section.

Date: February 24–25, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza River Oaks, 2712 Southwest Freeway, Houston, TX 77098.

Contact Person: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9497, *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Genes, Genomes and Genetics.

Date: February 24–25, 2014.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Marie-Jose Belanger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7804, Bethesda, MD 20892, *belangerm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Pain and Chemosensory Mechanisms.

Date: February 25–26, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Oncological Sciences.

Date: February 26–27, 2014.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Inese Z. Beitins, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7892, Bethesda, MD 20892, 301–435–1034, *beitinsi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: High Throughput Screening Assays for Probe Discovery.

Date: February 27, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: Kee Hyang Pyon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7806, Bethesda, MD 20892, *pyonkh2@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

Date: February 27–28, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Torrance Marriott South Bay, 3635 Fashion Way, Torrance, CA 90503.

Contact Person: Leonid V Tsap, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Stem Cell Differentiation.

Date: February 27–28, 2014.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Maria DeBernardi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7892, Bethesda, MD 20892, 301–435–1355, *debernardima@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Pathophysiology and Clinical Studies of Osteonecrosis of the Jaw.

Date: February 27, 2014.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Rajiv Kumar, Ph.D., Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4216, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Mechanisms of Neurodegeneration.

Date: February 27, 2014.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Toby Behar, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4136, MSC 7850, Bethesda, MD 20892, (301) 435–4433, *behart@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Biomedical Sensing, Measurement and Instrumentation.

Date: February 28, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Torrance Marriott South Bay, 3635 Fashion Way, Torrance, CA 90503.

Contact Person: Guo Feng Xu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, 301–237–9870, *xuguofen@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular and Surgical Devices.

Date: February 28, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Torrance Marriott South Bay, 3635 Fashion Way, Torrance, CA 90503.

Contact Person: John Firrell, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, 301–435–2598, *firrellj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846- 93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: January 24, 2014.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01770 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Bioengineering and Diabetes T32 Review.

Date: February 20, 2014.

Time: 6:30 p.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 23, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01772 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Basic Mechanisms of Cancer Therapeutics Study Section.

Date: February 17–18, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street NW., Washington, DC 20037.

Contact Person: Lambratu Rahman Sesay, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, 301–451–3493, *rahman-sesayl@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Biology Structure and Regeneration Study Section.

Date: February 20–21, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn San Antonio Riverwalk, 217 N. St. Mary's Street, San Antonio, TX 78205.

Contact Person: Daniel F McDonald, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4110, MSC 7814, Bethesda, MD 20892, (301) 435–1215, *mcdonald@csr.nih.gov*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Biochemistry and Biophysics of Membranes Study Section.

Date: February 20–21, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Villa Florence Hotel, 225 Powell Street, San Francisco, CA 94102.
Contact Person: Nuria E Assa-Munt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Health Disparities and Equity Promotion Study Section.
Date: February 20–21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites Hotel, 4300 Military Road, Washington, DC 20015.
Contact Person: Delia Olufokunbi Sam, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–0684, *olufokunbisamd@csr.nih.gov*.

Name of Committee: Immunology Integrated Review Group; Immunity and Host Defense Study Section.
Date: February 20–21, 2014
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Torrance Marriott South Bay, 3635 Fashion Way, Torrance, CA 90503.
Contact Person: Patrick K Lai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, 301–435–1052, *laip@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Community Influences on Health Behavior Study Section.
Date: February 20–21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Handlery Union Square Hotel, 351 Geary Street, San Francisco, CA 94102.
Contact Person: Wenchi Liang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7770, Bethesda, MD 20892, 301–435–0681, *liangw3@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Auditory System Study Section.
Date: February 20–21, 2014
Time: 8:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.
Contact Person: Lynn E Luethke, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5166, MSC 7844, Bethesda, MD 20892, (301) 806–3323, *luethkel@csr.nih.gov*.

Name of Committee: Cell Biology Integrated Review Group; Development—2 Study Section.
Date: February 20–21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Residence Inn Washington DC/Downtown, 1199 Vermont Avenue, Washington, DC 20005.
Contact Person: Rass M Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Gastrointestinal Mucosal Pathobiology Study Section.
Date: February 20–21, 2014.
Time: 8:00 a.m. to 1:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, 1 Bethesda Metro Center, Bethesda, MD 20814.
Contact Person: Peter J Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov*.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biodata Management and Analysis Study Section.
Date: February 20–21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Best Western Tuscan Inn, 425 North Point Street, San Francisco, CA 94133.
Contact Person: Mark Caprara, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7844, Bethesda, MD 20892, 301–435–1042, *capraramg@mail.nih.gov*.

Name of Committee: Immunology Integrated Review Group; Vaccines Against Microbial Diseases Study Section.
Date: February 20–21, 2014.
Time: 8:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Torrance Marriott South Bay, 3635 Fashion Way, Torrance, CA 90503.
Contact Person: Jian Wang, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, MSC 7812, Bethesda, MD 20892, (301) 435–2778, *wangjia@csr.nih.gov*.

Name of Committee: Immunology Integrated Review Group; Cellular and Molecular Immunology—A Study Section.
Date: February 20–21, 2014.
Time: 8:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Torrance Marriott South Bay, Torrance, CA 90503.
Contact Person: David B Winter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–435–1152, *dwinter@mail.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.
Date: February 21, 2014.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW., Washington, DC 20036.
Contact Person: Ronald Adkins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, 301–435–4511, *ronald.adkins@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–13–094: Differentiation and Integration od Stem Cells (Embryonic and Induced-Pluripotent) Into Developing or Damaged Tissues.
Date: February 21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Residence Inn Washington, DC Downtown, 1199 Vermont Avenue, Washington, DC 20005.
Contact Person: Rass M Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Biostatistical Methods and Research Design Study Section.
Date: February 21, 2014.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.
Contact Person: Tomas Drgon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, 301–435–1017, *tdrgon@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Collaborative Applications: Social processes in Schizophrenia.
Date: February 21, 2014.
Time: 11:00 a.m. to 11:30 a.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Crystal City Hotel, 1800 Jefferson Davis Highway, Arlington, VA 22202.
Contact Person: Serena Chu, Ph.D., Scientific Review Officer, BBBP IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, 301–500–5829, *sechu@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 13–137: Bioengineering Research.
Date: February 21, 2014.
Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: January 23, 2014.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–01776 Filed 1–29–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Public Availability of DHS Fiscal Year 2013 Service Contract Inventory

AGENCY: Office of the Chief Procurement Officer, DHS.

ACTION: Notice of availability.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the Department of Homeland Security (DHS) is publishing this notice to advise the public of the availability of the FY 2013 Service Contract inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2013. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 and December 19, 2011 available at *http://www.whitehouse.gov/omb/procurement-service-contract-inventories* by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). The guidance for preparing and analyzing FY 2013 inventories is unchanged from OFFP's November 5, 2010 and December 19, 2011 guidance for preparing the inventories. DHS has posted its FY 2013 inventory for public review at: *http://www.dhs.gov/acquisition-reports-and-notices#2* under ''Acquisition Reports and Notices.''

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Gail Carter at *Gail.Carter@hq.dhs.gov*, or telephone 202–447–5302.

Laura Auletta,

Director, Policy and Acquisition Workforce.

[FR Doc. 2014–01737 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2014–0003]

Notice of Adjustment of Statewide Per Capita Indicator for Recommending a Cost Share Adjustment

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: FEMA gives notice that the statewide per capita indicator for recommending cost share adjustments for major disasters declared on or after January 1, 2014, through December 31, 2014, is $135.

DATES: This notice applies to major disasters declared on or after January 1, 2014.

FOR FURTHER INFORMATION CONTACT: William Roche, Recovery Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: Pursuant to 44 CFR 206.47, the statewide per capita indicator that is used to recommend an increase of the Federal cost share from seventy-five percent (75%) to not more than ninety percent (90%) of the eligible cost of permanent work under section 406 and emergency work under section 403 and section 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act is adjusted annually. The adjustment to the indicator is based on the Consumer Price Index for All Urban Consumers published annually by the U.S. Department of Labor. For disasters declared on January 1, 2014, through December 31, 2014, the qualifying indicator is $135 per capita of State population.

This adjustment is based on an increase of 1.5 percent in the Consumer Price Index for All Urban Consumers for the 12-month period that ended December 2013. The Bureau of Labor Statistics of the U.S. Department of Labor released the information on January 16, 2014.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2014–01790 Filed 1–29–14; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA FEMA–2014–0001; OMB No. 1660–NEW]

Agency Information Collection Activities: Proposed Collection; Comment Request; Emergency Notification System (ENS)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a new information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Emergency Notification System (ENS).

DATES: Comments must be submitted on or before March 3, 2014.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2014–0001. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., Room 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all

submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Shaffer, IT Specialist, Office of Response & Recovery (ORR), Federal Emergency Management Agency at (540) 665–6293 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or email address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: FEMA's Office of Response & Recovery (ORR) owns and operates the Emergency Notification System (ENS), which has been designated by FEMA Directive 262–3 as the agency solution for all notification and alerts activities, sends electronic notifications and relays messages, whether critical in nature, routine, or for testing purposes with appropriate authorization, to DHS employees and contractors, as well as emergency response personnel. In accordance with Executive Order 12656, National Security Presidential Directive (NSPD)–51, Homeland Security Presidential Directive (HSPD)–20, and Federal Continuity Directive (FCD)–1, all DHS organizational components shall have in place a viable Continuity of Operations Planning (COOP) capability and plan that ensures the performance of their essential functions during any emergency or situation that could disrupt normal operations. An effective ENS solution is a critical part of this plan.

Collection of Information

Title: Emergency Notification System (ENS).

OMB Number: 1660–NEW.

Type of Information Collection: New information collection.

FEMA Forms: None.

Abstract: The ENS contains contact information for FEMA emergency team members. The ENS uses this information to send email, call cell, home, work phones and SMS devices to inform team members they have been activated. Teams include FEMA HQ COOP, Hurricane Liaison Team (HLT), Urban Search & Rescue (US&R), Emergency Response Group (ERG), etc. The system can only be accessed via DHS OneNet.

Affected Public: State, Local or Tribal Government; Federal Government.

Number of Respondents: 500.

Number of Responses: 500.

Estimated Total Annual Burden Hours: 8 hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form No.	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
State, Local or Tribal Government; Federal Government.	Emergency Notification System (ENS)/No Form.	500	1	500	1 minute (0.01666).	8	$18.27	$146.16
Total	.....	500	.....	500	.....	8	.....	146.16

• Note: The "Avg. Hourly Wage Rate" for each respondent includes a 1.4 multiplier to reflect a fully-loaded wage rate.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $146.16. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $173,401.85.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. 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.

Dated: January 10, 2014.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2014–01789 Filed 1–29–14; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The effective date of March 3, 2014 which has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *www.msc.fema.gov* by the effective date indicated above.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Adminstrator for Mitigation has resolved any appeals resulting from this notification.

This final notice 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 new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

Community	Community Map Repository Address
Ohio County, Indiana, and Incorporated Areas Docket No.: FEMA–B–1275	
City of Rising Sun	City Hall, 200 North Walnut Street, Rising Sun, IN 47040.
Unincorporated Areas of Ohio County	Ohio County Courthouse, 413 Main Street, Rising Sun, IN 47040.
Owen County, Indiana, and Incorporated Areas Docket No.: FEMA–B–1275	
Town of Gosport	Town Hall, 13 South 3rd Street, Gosport, IN 47433.
Town of Spencer	Building Department, Municipal Building, 90 North West Street, Spencer, IN 47460.
Unincorporated Areas of Owen County	Owen County Building Department, Owen County Courthouse, 60 South Main Street, Spencer, IN 47460.
Campbell County, Kentucky, and Incorporated Areas Docket No.: FEMA–B–1287	
City of Alexandria	City Building, 8236 West Main Street, Alexandria, KY 41001.
City of Bellevue	City Building, 616 Poplar Street, Bellevue, KY 41073.
City of California	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Cold Spring	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Crestview	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Dayton	City Building, 514 Sixth Avenue, Dayton, KY 41074.
City of Fort Thomas	Government Building/Mayor's Office, 130 North Fort Thomas Avenue, Fort Thomas, KY 41075.
City of Highland Heights	City Building, 175 Johns Hill Road, Highland Heights, KY 41076.
City of Melbourne	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Mentor	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Newport	Government Building, 998 Monmouth Street, Newport, KY 41071.
City of Silver Grove	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
City of Southgate	City Building, 122 Electric Avenue, Southgate, KY 41071.
City of Wilder	City Building, 520 Licking Pike, Wilder, KY 41071.
City of Woodlawn	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
Unincorporated Areas of Campbell County	Campbell County Fiscal Court Building, 1098 Monmouth Street, Suite 343, Newport, KY 41071.
Lexington-Fayette Urban County Government, Kentucky Docket No.: FEMA–B–1287	
Lexington-Fayette Urban County Government	Government Center, 200 East Main Street, 12th floor, Lexington, KY 40507.

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01798 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The effective date of April 2, 2014 which has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *www.msc.fema.gov* by the effective date indicated above.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Adminstrator for Mitigation has resolved any appeals resulting from this notification.

This final notice 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 new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

I. Non-watershed-based studies:

Community	Community map repository address
City of Baltimore, Maryland (Independent City) Docket No.: FEMA–B–1299	
City of Baltimore	Department of Planning, 417 East Fayette Street, 8th Floor, Baltimore, MD 21202.
Brazos County, Texas, and Incorporated Areas Docket No.: FEMA–B–1276	
City of Bryan	City Hall, 300 South Texas Avenue, Bryan, TX 77803.
City of College Station	City Hall, 1101 Texas Avenue, College Station, TX 77840.
Unincorporated Areas of Brazos County	Brazos County Road and Bridge Department, 2617 Highway 21 West, Bryan, TX 77803.
Albemarle County, Virginia, and Incorporated Areas Docket No.: FEMA–B–1299	
Town of Scottsville	Town Office, Victory Hall, Town Manager's Office, 401 Valley Street, Scottsville, VA 24590.
Unincorporated Areas of Albemarle County	Albemarle County Engineering Office, 401 McIntire Road, Charlottesville, VA 22902.

II. Watershed-based studies:

Community	Community map repository address
Baraboo Watershed	
Columbia County, Wisconsin, and Incorporated Areas Docket No.: FEMA–B–1299	
City of Portage	City Hall, 115 West Pleasant Street, Portage, WI 53901.
Unincorporated Areas of Columbia County	Carl C. Frederick Administration Building, 400 DeWitt Street, Portage, WI 53901.

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01800 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The effective date of March 17, 2014 which has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *www.msc.fema.gov* by the effective date indicated above.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Adminstrator for Mitigation has resolved any appeals resulting from this notification.

This final notice 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 new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

Community	Community map repository address
Fairbanks North Star Borough, Alaska, and Incorporated Areas Docket No.: FEMA–B–1287	
Fairbanks North Star Borough	Department of Community Planning, Borough Administrative Center, 809 Pioneer Road, Fairbanks, AK 99701.
Marin County, California, and Incorporated Areas Docket No.: FEMA–B–1287	
City of Larkspur	Planning Department, 400 Magnolia Avenue, Larkspur, CA 94939.
City of Mill Valley	Public Works Department, 26 Corte Madera Avenue, Mill Valley, CA 94941.
City of San Rafael	Public Works Department, 111 Morphew Street, San Rafael, CA 94901.
Town of Tiburon	Planning Department, 1505 Tiburon Boulevard, Tiburon, CA 94920.
Town of Corte Madera	Engineering Department, 233 Tamalpais Drive, Corte Madera, CA 94976.
Town of Fairfax	Department of Planning and Building Services, 142 Bolinas Road, Fairfax, CA 94930.

Community	Community map repository address
Town of Ross	Public Works Department, 31 Sir Frances Drake Boulevard, Ross, CA 94957.
Town of San Anselmo	Public Works Department, 525 San Anselmo Avenue, San Anselmo, CA 94960.
Unincorporated Areas of Marin County	Department of Public Works, 3501 Civic Center Drive, Room 304, San Rafael, CA 94913.
Brevard County, Florida, and Incorporated Areas Docket No.: FEMA–B–1241	
Cape Canaveral Port Authority	Station Director's Office, 200 George King Boulevard, Cape Canaveral, FL 32920.
City of Cape Canaveral	City Hall, 105 Polk Avenue, Cape Canaveral, FL 32920.
City of Cocoa	City Hall, 65 Stone Street, Cocoa, FL 32922.
City of Cocoa Beach	City Hall, Building Department, 2 South Orlando Avenue, Cocoa Beach, FL 32931.
City of Indian Harbour Beach	City Hall 2055 South Patrick Drive, Indian Harbour Beach, FL 32937.
City of Melbourne	City Hall, 900 East Strawbridge Avenue, Melbourne, FL 32901.
City of Palm Bay	City Hall, 120 Malabar Road Southeast, Palm Bay, FL 32907.
City of Rockledge	City Hall, Building Department, 1600 Huntington Lane, Rockledge, FL 32956.
City of Satellite Beach	City Hall, Building and Zoning Department, 565 Cassia Boulevard, Satellite Beach, FL 32937.
City of Titusville	City Hall, Department of Planning and Zoning, 555 South Washington Avenue, Titusville, FL 32796.
City of West Melbourne	City Hall, 2240 Minton Road, West Melbourne, FL 32904.
Town of Grant-Valkaria	Town Hall, 4240 U.S. Route 1, Grant-Valkaria, FL 32949.
Town of Indialantic	Town Hall, 216 5th Avenue, Indialantic, FL 32903.
Town of Malabar	Town Hall, 2725 Malabar Road, Malabar, FL 32950.
Town of Melbourne Beach	Town Hall, 507 Ocean Avenue, Melbourne Beach, FL 32951.
Town of Melbourne Village	Town Hall, 555 Hammock Road, Melbourne Village, FL 32904.
Town of Palm Shores	Town Clerk's Office, 151 Palm Circle, Palm Shores, FL 32940.
Unincorporated Areas of Brevard County	Brevard County Public Works Department, Brevard County Government Center, 2725 Judge Fran Jamieson Way, Viera, FL 32940.
Clay County, Florida, and Incorporated Areas Docket No.: FEMA–B–1276	
City of Green Cove Springs	City Hall, 321 Walnut Street, Green Cove Springs, FL 32043.
City of Keystone Heights	City Hall, 555 South Lawrence Boulevard, Keystone Heights, FL 32656.
Town of Orange Park	Town Hall, Economic and Community Development Department, 2042 Park Avenue, Orange Park, FL 32073.
Town of Penney Farms	Town Hall, 4100 Clark Avenue, Penney Farms, FL 32079.
Unincorporated Areas of Clay County	Clay County Public Works Department, 5 Esplande Avenue, Green Cove Springs, FL 32043.
Manatee County, Florida, and Incorporated Areas Docket No.: FEMA–B–1261 and B–1275	
City of Anna Maria	City Hall, 10005 Gulf Drive, Anna Maria, FL 34216.
City of Bradenton	City Hall, 101 Old Main Street, West Bradenton, FL 34205.
City of Bradenton Beach	City Hall, 107 Gulf Drive, North Bradenton Beach, FL 34217.
City of Holmes Beach	City Hall, 5801 Marina Drive, Holmes Beach, FL 34217.
Town of Longboat Key	Town Hall, 501 Bay Isles Road, Longboat Key, FL 34228.
City of Palmetto	City Hall, 516 8th Avenue, West Palmetto, FL 34221.
Unincorporated Areas of Manatee County	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, Bradenton, FL 34205.
Newton County, Georgia, and Incorporated Areas Docket No.: FEMA–B–1283	
City of Covington	City Hall, 2194 Emory Street, Covington, GA 30015.
City of Oxford	City Hall, 110 West Clark Street, Oxford, GA 30054.
City of Porterdale	City Hall, 2400 Main Street, Porterdale, GA 30070.
Unincorporated Areas of Newton County	Newton County GIS Department, 1113 Usher Street, Suite 302, Covington, GA 30014.
Hancock County, Indiana, and Incorporated Areas Docket No.: FEMA–B–1276	
Town of Cumberland	Municipal Building, 11501 East Washington Street, Cumberland, IN 46229.
Town of Fortville	Municipal Building, 714 East Broadway, Fortville, IN 46040.

Community	Community map repository address
Unincorporated Areas of Hancock County	Hancock County Annex, 111 South American Legion Place, Greenfield, IN 46140.
Jay County, Indiana, and Incorporated Areas Docket No.: FEMA–B–1282	
City of Portland	Jay County Department of Building and Planning, Community Resource Center, Suite E, 118 South Meridian Street, Portland, IN 47371.
Town of Pennville	Town Hall, 110 North Washington Street, Pennville, IN 47369.
Town of Redkey	Town Hall, 8922 West State Road 67, Redkey, IN 47373.
Town of Salamonia	Jay County Department of Building and Planning, Community Resource Center, Suite E, 118 South Meridian Street, Portland, IN 47371.
Unincorporated Areas of Jay County	Jay County Department of Building and Planning, Community Resource Center, Suite E 118 South Meridian Street, Portland, IN 47371.
Coos County, Oregon, and Incorporated Areas Docket No.: FEMA–B–1282	
City of Bandon	Planning Department, 555 Highway 101, Bandon, OR 97411.
City of Coos Bay	Public Works and Development Department, 500 Central Avenue, Coos Bay, OR 97420.
City of Coquille	City Hall, 851 North Central Boulevard, Coquille, OR 97423.
City of Lakeside	City Hall, 915 North Lake Road, Lakeside, OR 97449.
City of Myrtle Point	City Hall, 424 5th Street, Myrtle Point, OR 97458.
City of North Bend	City Hall, 835 California Street, North Bend, OR 97459.
City of Powers	City Hall, 275 Fir Street, Powers, OR 97466.
Unincorporated Areas of Coos County	Coos County Courthouse, 225 North Adams Street, Coquille, OR 97423.
Kleberg County, Texas, and Incorporated Areas Docket No.: FEMA–B–1282	
City of Kingsville	City Hall 200, East Kleberg Avenue, Kingsville, TX 78363.
Unincorporated Areas of Kleberg County	Kleberg County Courthouse, Floodplain Administrator's, Office 700 East Kleberg Avenue, Kingsville, TX 78363.
Brown County, Wisconsin, and Incorporated Areas Docket No.: FEMA–B–1310	
The Oneida Nation of Wisconsin	Norbert Hill Center, North 7210 Seminary Road, Oneida, WI 54155.
Village of Hobart	Hobart Village Hall, 2990 South Pine Tree Road, Hobart, WI 54155.
Rusk County, Wisconsin, and Incorporated Areas Docket No.: FEMA–B–1293	
City of Ladysmith	City Hall, 120 Miner Avenue West, Ladysmith, WI 54848.
Unincorporated Areas of Rusk County	Rusk County Courthouse, 311 East Miner Avenue, Ladysmith, WI 54848.
Village of Bruce	Village Hall, 100 West River Avenue, Bruce, WI 54819.
Village of Conrath	Village Post Office, W7101 Main Street, Conrath, WI 54731.
Village of Glen Flora	Village Hall, N5746 Cedar Street, Glen Flora, WI 54526.
Village of Hawkins	Village Hall, 509 Main Street, Hawkins, WI 54530.
Village of Ingram	Village Hall, N5970 State Highway 73, Ingram, WI 54526.
Village of Sheldon	Village Office, W5594 Main Street, Sheldon, WI 54766.
Village of Tony	Village Hall, N5377 Maple Street, Tony, WI 54563.
Village of Weyerhauser	Village Hall, N3840 Second Street, Weyerhaeuser, WI 54895.

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01801 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: New or modified Base (1% annual-chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or the regulatory floodway (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective date for each LOMR is indicated in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

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

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

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

These new or modified flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

These new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Texas:					
Collin (FEMA Docket No.: B–1338).	City of Plano (12–06–4168P).	The Honorable Harry LaRosiliere, Mayor, City of Plano, P.O. Box 860358, Plano, TX 75086.	City Hall, 1520 Avenue K, Plano, TX 75074.	September 20, 2013	480140
Dallas (FEMA Docket No.: B–1349).	City of Coppell (13–06–1839P).	The Honorable Karen Hunt, Mayor, City of Coppell, P.O. Box 9478, Coppell, TX 75019.	Department of Engineering, 265 Parkway Boulevard, Coppell, TX 75019.	November 4, 2013	480170
Dallas (FEMA Docket No.: B–1349).	City of Dallas (13–06–1839P).	The Honorable Mike Rawlings, Mayor, City of Dallas, 1500 Marilla Street, Room 5EN, Dallas, TX 75201.	Department of Public Works, 320 East Jefferson Boulevard, Room 307, Dallas, TX 75203.	November 4, 2013	480171
Dallas (FEMA Docket No.: B–1338).	City of Grand Prairie (13–06–1633P).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, P.O. Box 534045, Grand Prairie, TX 75053.	City Development Center, 206 West Church Street, Grand Prairie, TX 75050.	September 9, 2013	485472
Dallas (FEMA Docket No.: B–1349).	City of Irving (13–06–1839P).	The Honorable Beth Van Duyne, Mayor, City of Irving, 825 West Irving Boulevard, Irving, TX 75060.	Department of Public Works, 825 West Irving Boulevard, Irving, TX 75060.	November 4, 2013	480180
Fort Bend (FEMA Docket No.: B–1324).	City of Katy (12–06–1798P).	The Honorable Fabol R. Hughes, Mayor, City of Katy, P.O. Box 617, Katy, TX 77493.	Public Works Department, 910 Avenue C, Katy, TX 77493.	August 2, 2013	480301
Gillespie (FEMA Docket No.: B–1349).	Unincorporated areas of Gillespie County (13–06–0803P).	The Honorable Mark Stroeher, Gillespie County Judge, 101 West Main Street, Room 101, Fredericksburg, TX 78624.	Gillespie County, 101 West Main Street, Fredericksburg, TX 78624.	October 31, 2013	480696
Tarrant (FEMA Docket No.: B–1355).	City of Fort Worth (12–06–1456P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, 1000 Throckmorton Street, Fort Worth, TX 76102.	October 31, 2013	480596
Tarrant (FEMA Docket No.: B–1355).	City of Saginaw (12–06–1456P).	The Honorable Gary Brinkley, Mayor, City of Saginaw, 333 West McLeroy Boulevard, Saginaw, TX 76179.	City Hall, 333 West McLeroy Boulevard, Saginaw, TX 76179.	October 31, 2013	480610

State and county	Location and case No.	Chief executive officer of community	Community map repository	Effective date of modification	Community No.
Virginia: Fairfax (FEMA Docket No.: B–1355).	Unincorporated areas of Fairfax County (12–03–2453P).	The Honorable Sharon Bulova, Chairman-at-Large, Fairfax County Board of Supervisors, 12000 Government Center Parkway, Suite 530, Fairfax, VA 22035.	Fairfax County Department of Public Works and Environmental Services, 12000 Government Center Parkway, Suite 449, Fairfax, VA 22035.	October 31, 2013	515525

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01787 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4159–DR; Docket ID FEMA–2014–0003]

Texas; 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 Texas (FEMA–4159–DR), dated December 20, 2013, and related determinations.

DATES: *Effective Date:* January 17, 2014.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas 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 December 20, 2013.

Freestone 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.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2014–01791 Filed 1–29–14; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4160–DR; Docket ID FEMA–2014–0003]

Arkansas; 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 Arkansas (FEMA–4160–DR), dated January 6, 2014, and related determinations.

DATES: *Effective Date:* January 22, 2014.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas 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 January 6, 2014.

Fulton 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.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2014–01796 Filed 1–29–14; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0002; Internal Agency Docket No. FEMA–B–1359]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before April 30, 2014.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1359, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

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

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

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *http://floodsrp.org/pdfs/srp_fact_sheet.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

I. Non-watershed-based studies:

Community	Community map repository address
Cecil County, Maryland, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Town of Charlestown	Town Hall, 241 Market Street, Charlestown, MD 21914.
Town of Chesapeake City	Town Hall, 108 Bohemia Avenue, Chesapeake City, MD 21915.
Town of Elkton	Town Hall, 100 Railroad Avenue, Elkton, MD 21921.
Town of North East	Town Hall, 106 South Main Street, North East, MD 21901.
Town of Perryville	Town Hall, 515 Broad Street, Perryville, MD 21903.
Town of Port Deposit	Town Hall, 64 South Main Street, Port Deposit, MD 21904.
Unincorporated Areas of Cecil County	Cecil County Office Administrative Building, 200 Chesapeake Boulevard, Elkton, MD 21921.
Dorchester County, Maryland, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
City of Cambridge	Department of Public Works, 1025 Washington Street, Cambridge, MD 21613.
Town of Brookview	Brookview Town Council Office, 5649 Indian Town Road, Rhodesdale, MD 21659.
Town of Church Creek	Fire Hall, 1902 Church Creek Road, Church Creek, MD 21622.
Town of Eldorado	Eldorado Town Commission Office, 5753 Eldorado Road, Rhodesdale, MD 21659.
Town of Galestown	Town Hall, 5538 Old Schoolhouse Road, Galestown, MD 19973.
Town of Hurlock	Town Council Office, 311 Charles Street, Hurlock, MD 21643.
Town of Secretary	Town Commission Office, 122 Main Street, Secretary, MD 21664.
Town of Vienna	Town Hall, 214 Market Street, Vienna, MD 21869.
Unincorporated Areas of Dorchester County	Dorchester County Office Building, 501 Court Lane, Cambridge, MD 21613.
Talbot County, Maryland, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	

Community	Community map repository address
Town of Easton	Town Hall, 14 South Harrison Street, Easton, MD 21601.
Town of Oxford	Municipal Building, 101 Market Street, Oxford, MD 21654.
Town of St. Michaels	Edgar M. Bosley, Jr. Municipal Building, 300 Mill Street, St. Michaels, MD 21663.
Unincorporated Areas of Talbot County	Talbot County Office of Planning and Permits, 215 Bay Street, Suite 2, Easton, MD 21601.
Worcester County, Maryland, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
City of Pocomoke City	City Hall, 101 Clarke Avenue, Pocomoke City, MD 21851.
Town of Berlin	Town Hall, 10 William Street, Berlin, MD 21811.
Town of Ocean City	City Hall, 301 Baltimore Avenue, Ocean City, MD 21842.
Town of Snow Hill	Municipal Building, 103 Bank Street, Snow Hill, MD 21863.
Unincorporated Areas of Worcester County	Worcester County Government Center, 1 West Market Street, Room 1201, Snow Hill, MD 21863.
Mercer County, New Jersey (All Jurisdictions)	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Borough of Hightstown	Clerk's Office, 156 Bank Street, Hightstown, NJ 08520.
Borough of Hopewell	Clerk's Office, 88 Broad Street, Hopewell, NJ 08525.
Borough of Pennington	Borough Hall, 30 North Main Street, Pennington, NJ 08534.
Borough of Princeton	Office of Engineering, 400 Witherspoon Street, Princeton, NJ 08540.
City of Trenton	Trenton Fire Department, 244 Perry Street, Trenton, NJ 08618.
Township of East Windsor	Engineering Department, 16 Lanning Boulevard, East Windsor, NJ 08520.
Township of Ewing	Construction Office, 2 Jake Garzio Drive, Ewing, NJ 08628.
Township of Hamilton	Municipal Building, 2090 Greenwood Avenue, Room 307, Hamilton, NJ 08609.
Township of Hopewell	Hopewell Township Zoning Office, 201 Washington Crossing Pennington Road, Titusville, NJ 08560.
Township of Lawrence	Engineering Office, 2207 Lawrence Road, Lawrence, NJ 08648.
Township of Robbinsville	Planning and Zoning Department, 1 Washington Boulevard, Robbinsville, NJ 08691.
Township of West Windsor	Community Development Department, 271 Clarksville Road, West Windsor, NJ 08550.
King and Queen County, Virginia, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Unincorporated Areas of King and Queen County	King and Queen County Complex Building, County Administrator's Office, 242 Allens Circle, Suite L, King and Queen Courthouse, VA 23085.
King George County, Virginia (All Jurisdictions)	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
King George County (All Jurisdictions)	King George Community Development Department, 10459 Courthouse Drive, Suite 104, King George, VA 22485.
Northampton County, Virginia, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Town of Cape Charles	Town Hall, 2 Plum Street, Cape Charles, VA 23310.
Town of Cheriton	Northampton County Department of Planning and Zoning, 16404 Courthouse Road, Eastville, VA 23347.
Unincorporated Areas of Northampton County	Northampton County Department of Planning and Zoning, 16404 Courthouse Road, Eastville, VA 23347.
Stafford County, Virginia (All Jurisdictions)	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
Stafford County (All Jurisdictions)	Stafford County Administration Center, Department of Code Administration, 1300 Courthouse Road, Stafford, VA 22554.

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01802 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket No. FEMA–2013–0002; Internal Agency Docket No. FEMA–B–1344]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency; DHS.

ACTION: Notice; correction.

SUMMARY: On August 12, 2013, FEMA published in the **Federal Register** a proposed flood hazard determination notice that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at 78 FR 48888. The table provided here represents the proposed flood hazard determinations and communities affected for Chambers County, Texas, and Incorporated Areas.

DATES: Comments are to be submitted on or before April 30, 2014.

ADDRESSES: The Preliminary Flood Insurance Rate Map (FIRM), and where applicable, the Flood Insurance Study (FIS) report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–1344, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (email) *Luis.Rodriguez3@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed in the table below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

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

The communities affected by the flood hazard determinations are provided in the table below. Any request for reconsideration of the revised flood hazard determinations shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations will also be considered before the FIRM and FIS report are made final.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP may only be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *http://www.fema.gov/pdf/media/factsheets/2010/srp_fs.pdf.*

The communities affected are listed in the table below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

Correction

In the proposed flood hazard determination notice published at 78 FR 48888 in the of August 12, 2013, issue of the **Federal Register**, FEMA published a table titled ''Chamber County, Texas, and Incorporated Areas.'' The table contained an inaccurate address for the Community Map Repository for the Unincorporated Areas of Chambers County. In this notice, FEMA is publishing a table containing the accurate information. The information provided below should be used in lieu of the table previously published.

Community	Community map repository address
Chambers County, Texas, and Incorporated Areas	
Maps Available for Inspection Online at: *http://www.fema.gov/preliminaryfloodhazarddata*	
City of Anahuac	City Hall, 501 Miller Street, Anahuac, TX 77514.
City of Baytown	City Hall, 2401 Market Street, Baytown, TX 77522.
City of Beach City	Community Building, 12723 Farm to Market 2354, Beach City, TX 77523.
City of Cove	City Hall, 7911 Cove Road, Cove, TX 77523.
City of Mont Belvieu	City Hall, 11607 Eagle Drive, Mont Belvieu, TX 77580.
City of Old River-Winfree	City Hall, 4818 North Farm to Market 565 Road, Old River-Winfree, TX 77523.

Community	Community map repository address
Unincorporated Areas of Chambers County	Chambers County Road and Bridge, 201 Airport Road, Anahuac, TX 77514.

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

Dated: December 18, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014–01803 Filed 1–29–14; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0069]

Agency Information Collection Activities: Application by Refugee for Waiver of Grounds of Excludability, Form I–602; Extension, Without Change, of a Currently Approved Collection

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (i.e. the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until March 31, 2014.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0069 in the subject box, the agency name and Docket ID USCIS–2006–0042. To avoid duplicate submissions, please use only one of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at www.regulations.gov under e-Docket ID number USCIS–2006–0042;

(2) *Email.* Submit comments to *USCISFRComment@uscis.dhs.gov;*

(3) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW, Washington, DC 20529–2140.

SUPPLEMENTARY INFORMATION:

Comments: Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov*.

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do*, or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application by Refugee for Waiver of Grounds of Excludability.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–602; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–602 is necessary to establish eligibility for waiver of excludability based on humanitarian, family unity, or public interest.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,500 responses at 0.25 hours (15 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 625 annual burden hours.

If you need a copy of the information collection instrument with instructions, or additional information, please visit the Federal eRulemaking Portal site at: *http://www.regulations.gov*. We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, Telephone number 202–272–8377.

Dated: January 24, 2014.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2014–01764 Filed 1–29–14; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–R–2013–N246; FXRS12650900000–145–FF09R20000]

Draft Strategic Growth Policy for the National Wildlife Refuge System

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose a

policy to implement a strategic approach to the growth of the National Wildlife Refuge System (Refuge System, System). The National Wildlife Refuge System Administration Act (Administration Act), as amended by the National Wildlife Refuge System Improvement Act, requires that we ''plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System.'' This draft policy instructs the Refuge System to focus its protection measures on priority conservation features in order to ensure that our limited resources are directed to make the greatest contribution to the conservation of species in a strategic, cost-effective, and transparent manner. It ensures the growth of the System reflects our vision towards managing functional landscapes, enhancing our scientific rigor, improving our effectiveness, and involving our partners and the American people. We propose to incorporate this draft policy as Part 602, chapter 5 of the Fish and Wildlife Service Manual.

DATES: To ensure consideration, please send your written comments by March 3, 2014.

ADDRESSES: You may submit comments on this draft policy by any of the following methods:

U.S. Mail or Hand Delivery: Sarena Selbo, Division of Natural Resources and Conservation Planning, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 600A, Arlington, VA 22203;

Email: nwrsstrategicgrowthpolicy@fws.gov.

FOR FURTHER INFORMATION CONTACT: Sarena Selbo, at the address above, or telephone: (703) 358–2664.

SUPPLEMENTARY INFORMATION: The draft guidance document which is the subject of this notice is available at: *http://www.fws.gov/refuges/planning/StrategicGrowth.html.*

Background

The National Wildlife Refuge System Improvement Act of 1997 amends the Administration Act (16 U.S.C. 668dd–ee) and provides an organic act for the Refuge System. It states that the Refuge System mission is to ''administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats for the benefit of present and future generations of Americans.'' It requires us to ''plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System'', ''to fulfill the mission of the System, as well as the specific purposes for which [the] refuge was established'', and to ''ensure timely and effective cooperation and collaboration with Federal agencies and State fish and wildlife agencies during the course of acquiring and managing refuges.'' We cannot fulfill our mission in the face of unparalleled challenges related to climate and non-climate stressors unless we provide consistent direction for adding lands and waters to the System in a science-based, cost-effective, and transparent manner. Based on statutory requirements, we developed a draft policy for Strategic Growth of the Refuge System.

Draft Policy

The purpose of the draft policy is to provide guidance for the U.S. Fish and Wildlife Service to implement a strategic approach to the growth of the National Wildlife Refuge System including: national wildlife refuges and other areas managed by the Refuge System. It prioritizes acquisitions within existing refuge boundaries, expanding existing refuges, and establishing new refuges. As well, the draft policy focuses protection measures on priority conservation features to ensure our limited resources make the greatest contribution to the conservation of species in a strategic, cost-effective, and transparent manner. This policy ensures strategic growth of the System and reflects our vision towards managing for functional landscapes, enhancing our scientific rigor, improving our effectiveness, and involving our partners and the American people.

This draft policy is consistent with the biological planning and conservation design components of *Strategic Habitat Conservation,* the Service's science-based, adaptive management framework for determining where and how to deliver conservation efficiently to achieve specific biological outcomes. The draft policy identifies threatened and endangered species, migratory birds of conservation concern, waterfowl, or the surrogate species that represent them, as priority conservation features.

The draft policy requires application of the best available science to incorporate elements of conservation design in the identification of priority conservation areas, which support priority conservation features, to contribute in achieving measurable conservation targets such as population objectives. This draft policy ensures projects discuss vulnerability to climate change and other non-climate stressors (e.g. habitat fragmentation, invasive species, etc.), describe how the Refuge System will mitigate stressors to ensure the project's resiliency, are arranged in a geographically efficient manner to safeguard ecological processes across the landscape, and complement the resilience of other conservation areas.

This draft policy identifies how the Service Director will receive project proposals, potential outcomes of Director project review, and how designated representatives at the local level, the refuge managers, must interact, coordinate, cooperate, and collaborate with State fish and wildlife agencies in the acquisition and management of refuges.

Request for Public Comments

We seek public comments on the draft Strategic Growth policy, and will consider comments and any additional information we receive during the comment period (see **DATES**). You may submit comments to any of the places cited in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 9, 2014.

Dan Ashe,

Director, Fish and Wildlife Service.

[FR Doc. 2014–01849 Filed 1–29–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5A211.IA000414]

Final Determination Against Federal Acknowledgment of the Tolowa Nation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final determination.

SUMMARY: The Department of the Interior (Department) gives notice that the Assistant Secretary—Indian Affairs (AS–IA) declines to acknowledge the petitioner known as the Tolowa Nation (Petitioner #85) as an Indian tribe within the meaning of Federal law. The AS–IA makes this final determination

(FD) because the petitioner does not satisfy one of the seven mandatory criteria in the applicable regulations (25 CFR 83.7), specifically criterion 83.7(b), and therefore, does not meet the requirements for a government-to-government relationship with the United States. Based on the limited nature and extent of comment, and consistent with previous practices, the Department did not produce a separate detailed report or other summary under the criteria pertaining to this FD. This notice is the FD.

DATES: This determination is final and will become effective on April 30, 2014, pursuant to section 83.10(1)(4), unless a request for reconsideration is filed pursuant to section 83.11.

ADDRESSES: Requests for a copy of the **Federal Register** notice should be addressed to the Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, 951 Constitution Avenue NW., MS: 34B–SIB, Washington, DC 20240. The **Federal Register** notice is also available through *www.bia.gov/WhoWeAre/AS-IA/OFA/RecentCases/index.htm*.

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513–7650.

SUPPLEMENTARY INFORMATION: On November 18, 2010, the Department issued a proposed finding (PF) that the Tolowa Nation was not an Indian tribe within the meaning of Federal law because the petitioner did not meet one of the seven mandatory criteria for Federal acknowledgment as an Indian tribe, criterion 83.7(b). This criterion requires that a predominant portion of the petitioner comprises a distinct community and has existed as a community since historical times to the present. The evidence for the PF was insufficient to demonstrate that the petitioner met criterion 83.7(b) from first sustained contact in 1853 to the present. The Department issued a PF denying acknowledgment under that one criterion, 83.7(b). This FD affirms the PF and concludes that the Tolowa Nation does not satisfy criterion 83.7(b).

The acknowledgment process is based on the regulations at 25 CFR Part 83. Under these regulations, the petitioner has the burden to present evidence that it meets the seven mandatory criteria in section 83.7. Failure to meet any one of the mandatory criteria results in a determination that the petitioning group is not an Indian tribe within the meaning of Federal law. The Department issues this determination under 25 CFR 83.10(m) and the Guidance and Direction notice (73 FR 30148) published by the AS–IA on May 23, 2008, which permit decisions against acknowledgment based on failure to meet fewer than seven criteria.

The Department published a notice of the PF in the **Federal Register** on November 24, 2010 (75 FR 71732). Publishing notice of the PF initiated a 180-day comment period during which time the petitioner, and interested and informed parties, could submit arguments and evidence to support or rebut the PF. The initial comment period ended May 23, 2011. At the petitioner's request, the comment period was extended 180 days to November 21, 2011. The petitioner submitted 267 pages of documents on that same day by express service, which the Department received on the following day. None of the interested parties submitted comments. Two third parties, however, submitted comments. Wesley D. Taukchiray submitted a five-page letter on February 9, 2011, and Gordon Bonser submitted a two-page letter on May 17, 2011. The petitioner submitted no response to these third-party comments.

On June 21, 2013, the AS–IA announced a ''preliminary discussion draft of potential revisions to Part 83.'' By letter dated May 31, 2013, the Department provided the petitioner the option to request a suspension of consideration of its petition during the process of revising the regulations or to continue under the existing Part 83 regulations. By letter postmarked July 23, 2013, received at OFA on July 29, Petitioner #85 requested to proceed with a FD under the existing regulations. The Department started active consideration of the FD on September 3, 2013.

Criterion 83.7(b) requires that ''[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.'' As stated in the PF, the petitioner contends its membership and its ancestors lived as a continuously existing tribe of Indians descended from the Tolowa, a group of Indians residing in Del Norte County, California at first sustained contact. The petitioner also claims its members are the descendants of those Tolowa who were not enrolled at the Smith River and the Elk Valley Rancherias (''Tribe'' or ''Tribes''), two federally-recognized Indian tribes from that region. The Federal Government set aside land for the Smith River Rancheria and the Elk Valley Rancheria in 1906 and 1908, respectively. The PF, however, concluded that the evidence in the record was insufficient to show the petitioner's ancestors existed as a distinct community from first sustained contact in the early 1850s to the early 1900s before lands for the Smith River and the Elk Valley Rancherias were set aside. The evidence in the record was not sufficient to show that the petitioner's ancestors constituted an entity distinct within, or from, the Smith River and the Elk Valley Tribes. The evidence in the record was insufficient to show the petitioner's ancestors evolved as a distinct community after the lands for the Smith River and the Elk Valley Rancherias were set aside, or from any other Tolowa entity that may have existed before 1908. The evidence in the record was not sufficient to show that the Del Norte Indian Welfare Association (DNIWA) was a distinct community or provided leadership over an evolving entity that included both the petitioner's ancestors and the Smith River or the Elk Valley Tribes from the 1930s to the 1980s. The evidence in the record did not show that petitioner's ancestors were distinct within the DNIWA or that the DNIWA evolved into the petitioner as a community after the 1980s. Noting the shortcomings in the evidence in the record, the PF requested the petitioner to provide a list of its ancestors, their locations, and an analysis of their relations with others in a community to determine whether the petitioner evolved from one or several villages. The analysis also needed to show how those ancestors evolved as a community to become the current petitioner with its specific membership (PF 12). The PF encouraged the petitioner to submit evidence that its ancestors constituted a distinct community from the time of sustained contact in 1853 to the setting aside of land for the Rancherias from 1903–1915, that it was distinct from or evolved from the tribes inhabiting the Rancherias, and that its present-day activities involve the broader membership on a consistent basis (PF 41). The comments the petitioner submitted, however, do not provide evidence that changes the analysis or conclusions in the PF that the petitioner's ancestors did not form a distinct community.

Many of the petitioner's submissions are brief excerpts from both old and recent secondary sources covering the pre-contact period, the Spanish Colonial era, or the very early years of American settlement in northern California in the 1850s and 1860s. These documents did not provide any new evidence because they discussed the Tolowa Indians or northern California Indians in very general terms and provided little evidence about the petitioner's ancestors.

Many of the petitioner's documents for the period from the 1900s to the 1980s were secondary sources that dealt

with individual Tolowa Indians associated with the Smith River Tribe. These documents do not show the petitioner or its ancestors were a community distinct within, or from, the Smith River Tribe during those years. Other documents from this period were marriage and death certificates or land records from the first three decades of the 20th century. These documents dealt with just a few of the petitioner's ancestors, particularly the Fred Charles family, who were Elk River Rancheria members. While these records provided some evidence of genealogical connections or residence and land ownership for some of the group's ancestors, they did not demonstrate any social interaction among those ancestors as a distinct group. Nor did they show the petitioner was part of a community of Indians separate from the Smith River and the Elk Valley Tribes. The petitioner also submitted Indian censuses from around the 1920s for the Hoopa Valley Reservation of northern California. These same censuses were evaluated and cited in the PF and did not provide evidence that the petitioner's ancestors formed a distinct social community.

The petitioner submitted some articles from unidentified newspapers from the 1950s and 1960s that dealt with the Smith River Tribe and not the petitioner. A few articles, some already referenced in the PF, discussed activities related to the DNIWA. These documents also did not show the DNIWA later evolved into the petitioner or that petitioner's ancestors were distinct within the DNIWA.

Given that Petitioner has failed to satisfy 83.7(b) for the period from 1930 to 1980, petitioner has failed to satisfy this criterion. The petitioner's evidence for the 1980s to the present is also insufficient to demonstrate criterion 83.7(b). For example, some documents dealt with the activities of the Smith River Tribe, while others, like portions of the Advisory Council on California Indian Policy Recognition Report (1997), dealt with recommendations for revising the Federal acknowledgment regulations as they applied to California Indian groups in general. Two letters from 1982 concerned a group much broader than the petitioner and did not provide evidence of community for the petitioner. Other documents included flyers from the 1990s and 2000s announcing gatherings the petitioner sponsored. These events, such as the ''National Indian Observance Day,'' ''Drums on the Beach,'' or ''California Indian Observance Day,'' without more information, appeared pan-Indian in orientation and standing alone did not provide sufficient evidence that the petitioner was a distinct community. Other evidence, such as photographs, minutes of limited meetings attended by some council members, and environmental efforts attended by the general public and a few of petitioner's members were insufficient evidence to demonstrate significant social relationships.

Comments on the PF by two third parties added no significant information on community. Wesley Taukchiray detailed his analysis of the location or composition of the Tolowa Indian villages in the late 19th century. He believes that the modern-day petitioner's ancestors are ''successors in interest'' to these villages. Mr. Taukchiray did not provide any documentation with his submission to support his arguments. None of his analysis shows the petitioner's ancestors were a community distinct within or from the Smith River and the Elk Valley Tribes, or that the petitioner evolved out of those two Tribes.

Gordon Bonser wrote that he had lived in the Crescent City area since the early 1990s and had many friends among the petitioning group. Based on his personal experience, he attested to the fact the petitioner's members viewed ''themselves as being both Native American and Tolowa'' and as ''separate from the Smith River or Elk Valley people.'' He provided no documentation to support this opinion and contrary evidence in the record outweighs his claims.

In summary, the evidence for the PF and the FD does not demonstrate that the petitioner's ancestors evolved as a community distinct either from the Smith River and Elk Valley Tribes or from any other Tolowa entity that may have existed before 1908. The evidence does not demonstrate that the group's claimed precursor, the DNIWA, was an entity that constituted a community distinct from the membership of the Smith River and the Elk Valley Tribes from the 1930s to the 1980s, or that petitioner's ancestors were distinct within it. Finally, the evidence of the petitioner's activities since the 1980s does not satisfy the regulations or change the conclusion that the evidence was insufficient between 1930 and the 1980s. Thus, the evidence in the record is insufficient to demonstrate that the petitioner constituted a distinct community.

The evidence in the record for the PF and the FD is insufficient to change the conclusions in the PF. Thus, the Department declines to acknowledge the petitioner known as the Tolowa Nation as an Indian tribe within the meaning of Federal law. The Department will provide a copy of this **Federal Register** Notice to the petitioner and interested parties, and is available to other parties upon written request or as posted on the BIA Web site. Those parties wishing a paper copy of the FD should address their requests to the Assistant Secretary as instructed in the **ADDRESSES** section of this notice. After the publication of this notice in the **Federal Register**, the petitioner or any interested party may file a request for reconsideration with the Interior Board of Indian Appeals (IBIA) under the procedures in section 83.11 of the regulations. The IBIA must receive this request no later than 90 days after the publication of this notice in the **Federal Register**. The FD will become effective, as provided in the regulations, 90 days after the **Federal Register** publication unless the IBIA receives a request for reconsideration within that time.

Dated: January 24, 2014.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2014–01831 Filed 1–29–14; 8:45 am]

BILLING CODE 4310–G1–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14X LLUT980300–L11100000–PH0000–24–1A]

Cancellation of Utah Resource Advisory Council Meeting/Conference Call

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of cancellation of meeting/conference call.

SUMMARY: The Jan. 23, 2014, Utah Resource Advisory Council Meeting/Conference Call is cancelled because a quorum cannot be met. If you have any questions, please contact Sherry Foot, Special Programs Coordinator, Bureau of Land Management, Utah State Office, Suite 500, 440 West 200 South, Salt Lake City, Utah 84101; phone (801) 539–4195; or, *sfoot@blm.gov.*

Authority: 43 CFR 1784.4–1.

Jenna Whitlock,

Associate State Director.

[FR Doc. 2014–01911 Filed 1–29–14; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–KAHO–14800; PPPWKAHOS0, PPMPSPD1Z.YM0000]

Notice of 2014 Meeting Schedule of the Na Hoa Pili O Kaloko-Honokohau Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: This notice sets forth the dates of meetings of the Na Hoa Pili O Kaloko-Honokohau Advisory Commission occurring in 2014.

DATES: The schedule for future public meetings of the Commission will be held on Fridays as follows: March 7, 2014 at 9:30 a.m. (HAWAII STANDARD TIME). June 20, 2014 at 9:30 a.m. (HAWAII STANDARD TIME). September 5, 2014 at 9:30 a.m. (HAWAII STANDARD TIME). December 5, 2014 at 9:30 a.m. (HAWAII STANDARD TIME).

ADDRESSES: The March 7, 2014, and the September 5, 2014, meetings will be held at the Kaloko-Honokohau National Historical Park Halau at the southern end of the park, located north of Honokohau Harbor with access through the Honokohau pedestrian entrance. Parking is available at Honolohau Harbor. The June 20, 2014, and the December 5, 2014, meetings will be held at the Kaloko-Honokohau National Historical Park Kaloko Picnic Area. Kaloko-Honokohau National Historical Park is located in Kailua Kona, HI 96740.

Agenda: Commission meeting will consist of the following:

1. Approval of Agenda
2. Chairman's Report
3. Superintendent's Report
4. Subcommittee Report
5. Commission Recommendations
6. Public Comment

FOR FURTHER INFORMATION CONTACT: Jeff Zimpfer, Environmental Protection Specialist, Kaloko-Honokohau National Historical Park, 73–4786 Kanalani Street, #14, Kailua Kona, Hawaii 96740, at (808) 329–6881, ext. 1500, or email: *jeff_zimpfer@nps.gov.*

SUPPLEMENTARY INFORMATION: The Na Hoa Pili O Kaloko-Honokohau Advisory Commission scope and objectives are as follows: the Kaloko-Honokohau National Historical Park was established by Section 505(a) of the Public Law 95–625, November 10, 1978, as amended. Section 505(f) of that law, as amended, established the Na Hoa Pili O Kaloko-Honokohau (The Friends of Kaloko-Honokohau), an advisory commission for the park. The Commission was re-established by Title VII, Subtitle E, Section 7401 of Public Law 111–11, the Omnibus Public Land Management Act of 2009. The Commission's new termination date is December 18, 2018.

The meetings are open to the public. Interested persons may make oral presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting. Before including your address, telephone number, email address 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. While you may ask us in your comment to withhold your identifying information from public view, we cannot guarantee we will be able to do so.

Dated: January 23, 2014.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2014–01752 Filed 1–29–14; 8:45 am]

BILLING CODE 4312–FF–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–908]

Certain Soft-Edged Trampolines and Components Thereof Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 24, 2013, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Springfree Trampoline, Inc. of Canada; Springfree Trampoline USA Inc. of Canada; and Spring Free Limited Partnership of Canada. Supplements to the complaint were filed on December 31, 2013 and January 14, 2014. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain soft-edged trampolines and components thereof by reason of infringement of certain claims of U.S. Patent No. 6,319,174 (''the '174 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of the Secretary, U.S. International Trade Commission, telephone (202) 205–1802.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2013).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on January 24, 2014, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain soft-edged trampolines and components thereof by reason of infringement of one or more of claims 1 and 13 of the '174 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Springfree Trampoline, Inc., 151 Whitehall Drive, Unit 2, Markham, Ontario L3R 9T1, Canada;

Springfree Trampoline USA Inc., 151 Whitehall Drive, Unit 2, Markham, Ontario L3R 9T1, Canada;

Spring Free Limited Partnership, 151 Whitehall Drive, Unit 2, Markham, Ontario L3R 9T1, Canada.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served: Vuly Trampolines Pty. Ltd., 95 Ingleston Road, Wakerly, Brisbane, Queensland 4154, Australia.

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Dated: January 24, 2014.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2014–01804 Filed 1–29–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0019]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Federal Firearms License (FFL) RENEWAL Application

ACTION: 60-day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This notice requests comments from the public and affected agencies concerning the proposed information collection. Comments are encouraged and will be accepted for ''sixty days'' until March 31, 2014. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tracey Robertson, *tracey.robertson@atf.gov* Chief, Federal Firearms Licensing Center, 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection:

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Federal Firearms License (FFL) RENEWAL Application.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 8 (5310.11) Part 11. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individual or households.

Need for Collection:

The form is filed by the licensee desiring to renew a Federal firearms license. It is used to identify the applicant, locate the business/collection premises, identify the type of business/collection activity, and determine the eligibility of the applicant.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 30,000 respondents will complete a 30 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 15,000 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 27, 2014.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2014–01844 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0039]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Federal Firearms Licensee Firearms Inventory Theft/Loss Report

ACTION: 60-day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget

(OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until March 31, 2014. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact April Carroll, Chief, Law Enforcement Support Branch, National Tracing Center, 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Federal Firearms Licensee Firearms Inventory Theft/Loss Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3310.11. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Business or other for-profit.

Need for Collection:

Authorization of this form is requested as the Violent Crime Control and Law Enforcement Act requires Federal firearms licensees to report to the Bureau of Alcohol,Tobacco, Firearms and Explosives and to the appropriate local authorities any theft or loss of a firearm from the licensee's inventory or collection, within a specific time frame after the theft or loss is discovered.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 4,000 respondents will complete a 24 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,600 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 27, 2014.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2014–01845 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–387P]

Controlled Substances: 2014 Proposed Aggregate Production Quota for Three Temporarily Controlled Synthetic Phenethylamines

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice of a proposed 2014 aggregate production quota for three synthetic phenethylamines.

SUMMARY: Three synthetic phenethylamines 2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I-NBOMe; 2C-I-NBOMe; 25I; Cimbi-5), 2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C-NBOMe; 2C-C-NBOMe; 25C; Cimbi-82), and 2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B-NBOMe; 2C-B-NBOMe; 25B; Cimbi-36) were temporarily placed in schedule I of the Controlled Substances Act (CSA) by a final order published by the Drug Enforcement Administration (DEA) on November 15, 2013 (78 FR 68716). This means that any manufacturer that wishes to manufacture 25I-NBOMe, 25C-NBOMe, or 25B-NBOMe after November 15, 2013, must be registered with the DEA and have obtained a manufacturing quota for 25I-NBOMe, 25C-NBOMe, or 25B-NBOMe pursuant to 21 CFR part 1303. The DEA cannot issue individual manufacturing quotas for 25I-NBOMe, 25C-NBOMe, or 25B-NBOMe unless and until it establishes an aggregate production quota. Therefore, this notice proposes a 2014 aggregate production quota for 25I-NBOMe, 25C-NBOMe, and 25B-NBOMe.

DATES: Comments or objections should be received on or before March 3, 2014.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–387P'' on all electronic and written correspondence. The DEA encourages that all comments be submitted electronically through *www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at *www.regulations.gov* for easy reference. Paper comments that duplicate the electronic submission are not necessary as all comments submitted to *www.regulations.gov* will be posted for public review and are part of the official docket record. Written comments submitted via regular or express mail should be sent to the Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/ODW, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Ruth A. Carter, Acting Chief, Policy Evaluation and Analysis Section, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

The Freedom of Information Act applies to all comments received. All comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov* and in the DEA's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the

phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted, and the comment, in redacted form, will be posted online and placed in the DEA's public docket file.

If you wish to inspect the DEA's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background

Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II each year. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to 28 CFR 0.104.

The DEA established the 2014 aggregate production quotas for substances in schedules I and II on September 9, 2013 (78 FR 55099). Subsequently, on October 10, 2013, the DEA published in the **Federal Register** a notice of intent to temporarily place three synthetic phenethylamines (25I-NBOMe, 25C-NBOMe, and 25B-NBOMe) in schedule I of the CSA (78 FR 61991). On November 15, 2013, the DEA published in the **Federal Register** a final order to temporarily place these three synthetic phenethylamines in schedule I of the CSA (78 FR 68716), making all regulations pertaining to schedule I controlled substances applicable to the manufacture of these three synthetic phenethylamines, including the establishment of an aggregate production quota pursuant to 21 CFR 1303.11.

25I-NBOMe, 25C-NBOMe, and 25B-NBOMe were non-controlled substances when the aggregate production quotas for schedule I and II substances were established, therefore, no aggregate production quotas for 25I-NBOMe, 25C-NBOMe, and 25B-NBOMe were established at that time.

In determining the 2014 aggregate production quotas of these three phenethylamines, the Deputy Administrator considered the following factors in accordance with 21 U.S.C. 826(a) and 21 CFR 1303.11: (1) Total estimated net disposal of each substance by all manufacturers; (2) estimated trends in the national rate of net disposal; (3) total estimated inventories of the basic class and of all substances manufactured from the class; (4) projected demand for each class as indicated by procurement quotas requested pursuant to 21 CFR 1303.12; and (5) other factors affecting medical, scientific, research, and industrial needs of the United States and lawful export requirements, as the Deputy Administrator finds relevant. These quotas do not include imports of controlled substances for use in industrial processes.

The Deputy Administrator, therefore, proposes that the year 2014 aggregate production quotas for the following temporarily controlled schedule I controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

Basic class–schedule I	Proposed 2014 quota
2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B-NBOMe; 2C-B-NBOMe; 25B; Cimbi-36)	15 g
2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C-NBOMe; 2C-C-NBOMe; 25C; Cimbi-82)	15 g
2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I-NBOMe; 2C-I-NBOMe; 25I; Cimbi-5)	15 g

Comments

Pursuant to 21 CFR 1303.11, any interested person may submit written comments on or objections to these proposed determinations. Based on comments received in response to this Notice, the Deputy Administrator may hold a public hearing on one or more issues raised. In the event the Deputy Administrator decides in his sole discretion to hold such a hearing, the Deputy Administrator will publish a notice of any such hearing in the **Federal Register**. After consideration of any comments and after a hearing, if one is held, the Deputy Administrator will publish in the **Federal Register** a Final Order establishing the 2014 aggregate production quota for 25I-NBOMe, 25C-NBOMe, and 25B-NBOMe.

Dated: January 17, 2014.

Thomas M. Harrigan,

Deputy Administrator.

[FR Doc. 2014–01778 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 13–40]

House of Medicine; Decision and Order

On October 2, 2013, Administrative Law Judge (ALJ) Christopher B. McNeil issued the attached Recommended Decision (R.D.). Therein, the ALJ found that there was no dispute over the material fact that Respondent does not possess authority under the laws of California, the State in which it has applied for a DEA Certificate of Registration as a Retail Pharmacy, to dispense controlled substances. R.D. at 5–6. Accordingly, the ALJ held that Applicant does not meet the statutory definition of a practitioner, *see* 21 U.S.C. 802(21), and therefore is not entitled to be registered under 21 U.S.C. 823(f). *Id.* at 6. The ALJ thus granted the Government's Motion for Summary Disposition and recommended that the Administrator deny Respondent's application. *Id.* at 7. Neither party filed exceptions to the Recommended Decision.

Having reviewed the record, I have decided to adopt the ALJ's Recommended Decision in its entirety except as discussed below.[1]

[1] In the R.D., the ALJ found that the Order to Show Cause was issued on August 6, 2013. R.D. at 2. The ALJ then found that ''[o]n December 26, 2012, Respondent . . . filed a timely request for

Continued

Accordingly, I deny Respondent's application.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the application of House of Medicine for a DEA Certificate of Registration as a Retail Pharmacy be, and it hereby is, denied. This Order is effective immediately.

Dated: January 17, 2014.

Thomas M. Harrigan,

Deputy Administrator.

Brian Bayly, Esq., for the Government

Jahangir S. Janfaza, Pro Se, for the Respondent

Order Granting the Government's Motion for Summary Disposition and Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

Nature of the Case and Procedural History

Christopher B. McNeil, Administrative Law Judge. On June 16, 2009, House of Medicine, the respondent in this case, submitted an application to the Drug Enforcement Administration seeking a new DEA retail pharmacy registration.[1] Respondent, acting through its owner and apparent sole proprietor, Jahangir S. Janfaza, sought this registration for use at 9025 Wilshire Boulevard, Suite 200, Beverly Hills, California.[2] The pending DEA application number for this application is W09156272A.[3]

On August 6, 2013, the Deputy Administrator of the Drug Enforcement Administration, Office of Diversion Control, filed an Order to Show Cause proposing to deny the application pursuant to 21 U.S.C. 823(f). As grounds for revocation, the Government alleges that Respondent does not have the authority to handle controlled substances in the State of California and it alleges that Respondent's registration would be inconsistent with the public interest.[4]

On December 26, 2012, Respondent, through its sole owner, Jahangir S. Janfaza, filed a timely request for hearing.[5] Respondent does not dispute that the required professional license that had permitted House of Medicine to provide retail pharmacy services in California expired effective March 13, 2013, and does not dispute that it has not submitted a renewal or new application for such license.[6] He argues, however, he has provided pharmacy services to the community for 50 years, that he is attempting to resolve a pending dispute with the California pharmacy licensing authority, that such a resolution requires that he pay $57,900 in fines and other costs to that licensing authority, and that due to financial hardship due to medical conditions he has not been able to reach a resolution with that licensing authority.[7]

In my order of September 6, 2013, I directed the Government to provide evidence to support the allegation that Respondent lacks state authority to handle controlled substances. I received the Government's Motion for Summary Disposition on September 19, 2013, with proof of service upon Respondent, accompanied by supporting documentation. The factual premise relied upon by the Government in support of its motion is that Respondent does not have a pharmacy license issued by the California State Board of Pharmacy, the state in which Respondent seeks to be registered.[8]

In my Order of September 6, 2013, I provided to Respondent the opportunity to respond to the Government's Motion for Summary Disposition. That response was due by September 25, 2013.[9] I have not received Respondent's response, nor have I received any request to enlarge the time for filing such a response.

Although Respondent has not directly responded to the factual and legal premises raised by the Government, its initial pleading does set forth facts and arguments in support of its application for a Certificate of Registration. Drawing what I can from the premises appearing in Respondent's request for a hearing, I find as follows.

Issue

The substantial issue raised by the Government rests on an undisputed fact. The Government asserts that Respondent's application must be summarily denied because Respondent does not have a pharmacy license issued by the state in which it intends to operate. Under DEA precedent, an application for a retail-pharmacy DEA Certificate of Registration must be summarily denied if the applicant is not authorized to handle controlled substances in the state in which it seeks DEA registration.[10] Unless from the pleadings now before me there is a material issue regarding Respondent's authority to handle controlled substances in California, the application must be denied summarily, without a hearing.

Respondent's Contentions

Respondent sought a hearing on its application to explain why it currently does not have a pharmacy license in California.[11] This explanation is clear and cogent, and was succinctly presented by Mr. Janfaza in Respondent's request for Hearing dated September 3, 2013. In this letter, Mr. Janfaza asked for a hearing, and asked that it be held close to his home, due to his age and medical condition.[12] He explained that he is 76 years old, and currently is receiving disability benefits after undergoing emergency heart surgery in August 2012.[13] His medical condition has left him unable to work, and his condition is described in detail through supporting documentation accompanying Respondent's request for a Hearing.[14] Mr. Janfaza noted as well the medical condition of his wife, whose diagnosis of breast cancer and related surgery in 2012 contributed to the poor financial condition of his family.[15]

Mr. Janfaza also explained the connection between his family's financial condition and the circumstances that currently prevent him from obtaining a license to operate a pharmacy in California.[16] He stated

hearing.'' *Id.* However, in a footnote, the ALJ cited Respondent's request for a hearing and noted that it was dated September 3, 2013 and received by DEA two days later. *See id.* at n.5. Having reviewed the record, I find that the actual date on which Respondent filed its hearing request was September 5, 2013. *See* Letter of Jahangir S. Janfaza to Hearing Clerk, Office of Administrative Law Judges (Sept. 3, 2013).

[1] Order to Show Cause dated August 6, 2013 at 3.

[2] *Id.*

[3] *Id.* at 1.

[4] *Id.*

[5] Respondent's Request for Hearing dated September 3, 2013, received by DEA September 5, 2013, at 1–2.

[6] *Id.*

[7] *Id.* at 2.

[8] Government's Motion for Summary Disposition at 1.

[9] Order for Briefing on Allegations Concerning Respondent's Lack of State Authority at 2.

[10] *See* 21 U.S.C. 801(21), 823(f), 824(a)(3); *see also Deanwood Pharmacy,* 68 FR 41662–01 (DEA July 14, 2003); *Wayne D. Longmore, M.D.,* 77 FR 67669–02 (DEA November 13, 2012); *Alan H. Olefsky, M.D.,* 72 FR 42127–01 (DEA August 1, 2007); *Layfe Robert Anthony, M.D.,* 67 FR 15811 (DEA May 20, 2002); *George Thomas, PA–C,* 64 FR 15811–02 (DEA April 1, 1999); *Shahid Musud Siddiqui, M.D.,* 61 FR 14818–02 (DEA April 4, 1996); *Michael D. Lawton, M.D.,* 59 FR 17792–01 (DEA April 14, 1994); *Abraham A. Chaplan, M.D.,* 57 FR 55280–03 (DEA November 24, 1992). *See also Bio Diagnosis Int'l,* 78 FR 39327–03, 39331 (DEA July 1, 2013) (distinguishing distributor applicants from other ''practitioners'' in the context of summary disposition analysis).

[11] Respondent's Request for hearing at 1–2.

[12] *Id.*

[13] *Id.* at 2.

13 *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

that he currently owes the California State Board of Pharmacy $28,950 personally, and that House of Medicine owes $28,950 as well, resulting in a debt of $57,900. He explained that he offered to make payments of $500 per month (or $6,000 per year) toward retiring this obligation, but that ''it appears that they are not willing to accept my hardship as noted herein.'' [17] Mr. Janfaza concluded by observing that ''I have suffered greatly and lost most if not all of my business over the last few years. Any assistance from your office will be greatly appreciated.'' [18]

Scope of Authority

The case before me is presented under a grant of authority to recommend that the Administrator either grant or deny Respondent's application for a DEA retail-pharmacy license. Pursuant to 21 U.S.C. 823(f), the DEA may grant such an application only to a pharmacy ''practitioner.'' Under 21 U.S.C. 802(21), a ''practitioner'' must be ''licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute [or] dispense . . . controlled substance[s.]'' Given this statutory language, the DEA Administrator does not have the authority under the Controlled Substances Act to grant a registration to a practitioner if that practitioner is not authorized by to dispense controlled substances.[19]

Facts

Given this body of law, the material fact here, indeed the sole fact of consequence, is whether Respondent is authorized by the State of California to dispense controlled substances. Where, as here, no material fact is in dispute, there is no need for an evidentiary hearing and summary disposition is appropriate.[20] The sole question of fact before me can be addressed, and has been addressed, by the pleadings submitted to me by the parties. Our record includes a declaration by Mr. Janfaza that his authority and that of Respondent to dispense controlled substances in California expired in 2012 and has not been renewed.[21] The reasons for nonrenewal are not material, given the statutory language set forth above.

Analysis, Findings of Fact and Conclusions of Law

In determining whether to grant the Government's motion for summary disposition, I am required to apply the principle of law that holds such a motion may be granted in an administrative proceeding if no material question of fact exists:

> It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory—even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks (citations omitted).[22]

In this context, I am further guided by prior decisions before the DEA involving certificate holders who lacked licenses to distribute or dispense controlled substances. On the issue of whether an evidentiary hearing is required, ''it is well settled that when there is no question of material fact involved, there is no need for a plenary, administrative hearing.'' [23] Under this guidance, the Government's motion must be sustained unless a material fact question has been presented.

The Government argues that the sole determinative fact now before me is that Respondent lacks a California pharmacy license. I agree. In order for a pharmacy to receive a DEA registration authorizing it to dispense controlled substances under 21 U.S.C. 823(f), it must meet the definition of ''practitioner'' as found in the Controlled Substances Act.[24] Such an entity must be ''licensed, registered, or otherwise permitted by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice.'' [25] Delegating to the Attorney General the authority to determine who may or may not be registered to perform these duties, Congress permitted such registration only to ''practitioners'' as defined by the Controlled Substances Act.[26]

As cited by the Government in its Motion for Summary Disposition, there is substantial authority both through agency precedent and through decisions of courts in review of that precedent, holding that an application for a retail pharmacy DEA registration is dependent upon the applicant having a state license to dispense controlled substances.[27] Under the doctrine before me, the Government meets its burden of establishing grounds to deny an application for registration upon sufficient proof establishing the applicant's state pharmacy license has expired and has not been renewed. That proof is in the record before me, and it warrants the summary denial of Respondent's application for a DEA Certificate of Registration.

I am mindful of the arguments raised by Respondent in its Request for a Hearing, including the fact that Respondent's lack of a pharmacy license is based on financial obligations Respondent and Mr. Janfaza have incurred with the California Board of Pharmacy, and with the difficulties Mr. Janfaza faces in meeting those obligations. These difficulties do not, however, change the fact that without a state pharmacy license, Respondent is not a ''practitioner'' and cannot be granted a Certificate of Registration.

Some care should be taken to assure the parties that the actions taken in this administrative proceeding conform to constitutional requirements. I have examined the parties' contentions with an eye towards ensuring all tenets of due process have been adhered to. There is, however, no authority for me to evaluate the facts that underlie Respondent's contentions. While the details of these circumstances may explain why Mr. Janfaza has been unable to renew his pharmacy's California license, the facts or allegations in his request for a hearing are not material in the administrative proceedings now before the DEA. In the proceedings now before me, the only material question was answered by Respondent in its Request for Hearing. Further, while the Order to Show Cause sets forth a non-exhaustive summary of facts and law relevant to a determination that granting this application would be inconsistent with the public interest under 21 U.S.C. 823(f), the conclusion, order and recommendation that follow are based solely on a finding that Respondent is not a ''practitioner'' as that term is defined by 21 U.S.C. 802(21), and I make no finding regarding whether granting this application would or would not be inconsistent with the public interest.

[17] *Id.*

[18] *Id.*

[19] *See Abraham A. Chaplan, M.D.,* 57 FR 55280–03, 55280 (DEA 1992), and cases cited therein.

[20] *See Michael G. Dolin, M.D.,* 65 FR 5661 (DEA February 4, 2000); *see also Philip E. Kirk, M.D.,* 48 FR 32887 (DEA July 19, 1983), *aff'd sub nom. Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984).

[21] Respondent's Request for Hearing at 1.

[22] *NLRB v. International Assoc. of Bridge,* 549 F.2d 634, 638 (9th Cir. 1977) (quoting *United States* v. *Consolidated Mines & Smelting Co., Ltd.,* 455 F.2d 432, 453 (9th Cir. 1971)).

[23] *See Michael G. Dolin, M.D.,* 65 Fed. Reg. 5661 (DEA February 4, 2000); *Jesus R. Juarez, M.D.,* 62 FR. 14945 (DEA March 28, 1997); *see also Philip E. Kirk, M.D.,* 48 FR 32887 (DEA July 19, 1983), *aff'd sub nom. Kirk v. Mullen,* 749 F.2d 297 (6th Cir. 1984).

[24] 21 U.S.C. 802(21).

[25] *Id.*

[26] 21 U.S.C. 823(f).

[27] Government's Motion for Summary Disposition at 4 and cases cited therein.

Order Granting the Government's Motion for Summary Disposition and Recommendation

I find there is no genuine dispute regarding whether Respondent is a ''practitioner'' as that term is defined by 21 U.S.C. 802(21), and that based on the record the Government has established that Respondent is not a practitioner and is not authorized to dispense controlled substances in the state in which it seeks to operate under a DEA Certificate of Registration. I find no other material facts at issue, for the reasons set forth in the Government's Motion for Summary Disposition. Accordingly, I GRANT the Government's Motion for Summary Disposition.

Upon this finding, I ORDER that this case be forwarded to the Administrator for final disposition and I RECOMMEND the Administrator DENY Respondent's application for a DEA Certificate of Registration.

Dated: October 2, 2013.

Christopher B. McNeil,

Administrative Law Judge.

[FR Doc. 2014–01794 Filed 1–29–14; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 13–21]

Ralph J. Chambers, M.D.; Decision and Order

On February 11, 2013, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Ralph J. Chambers, M.D. (Applicant), of Sanford, Florida. GX 3. The Show Cause Order proposed the revocation of Applicant's DEA Certificate of Registration BC2172485, on the ground that his continued ''registration would be inconsistent with the public interest.'' *Id.* at 1 (citing 21 U.S.C. 823(f)). The Order also sought the denial of Applicant's June 2, 2010 pending application for a DEA registration at an address in Orange City, Florida.[1] *Id.*

The Show Cause Order alleged that, from June 2006 through January 2009, Applicant ''inappropriately prescribed excessive quantities and combinations of controlled substances'' to eight confidential informants. *Id.* The Show Cause Order also alleged that a ''medical expert'' reviewed patient files seized from Applicant's practice and determined that ''for more than eighty patients, [he] inappropriately prescribed excessive quantities and combinations of controlled substances and failed to maintain proper medical documentation containing a legitimate medical purpose for [his] course of actions for those patients.'' *Id.* at 2.

On March 11, 2013, Applicant filed a request for a hearing, and the matter was assigned to an Administrative Law Judge (ALJ). GX 4. However, on June 13, 2013, Applicant submitted a letter to the ALJ, wherein Applicant ''decided to waive [his] rights [sic] to a hearing regarding the revocation of my DEA Certificate.'' *Id.* at 2. The next day, the ALJ found that Applicant waived his request for a hearing and terminated the proceeding. *Id.* Subsequently, the Government forwarded the Investigative Record along with a Request for Final Agency Action to this Office, seeking the revocation of Applicant's DEA registration as well as the denial of any pending applications. Based on Applicant's letter of June 13, 2013, I find that he has waived his right to a hearing. 21 CFR 1301.43(d). I therefore issue this Decision and Final Order based on the record submitted by the Government and make the following findings of fact.

Applicant's Registration and Licensure Status

On August 25, 2010, Applicant was issued DEA Certificate of Registration BC2172485, pursuant to which he was authorized to dispense controlled substances as a practitioner in schedules II through V; this registration's expiration date was August 25, 2013. GX 1. On August 1, 2013, Applicant submitted a renewal application for this registration.[2]

Under an Agency regulation applicable to those applicants who are subject to an Order to Show Cause:

> [i]n the event that an applicant for reregistration (who is doing business under a registration previously granted and not revoked or suspended) has applied for reregistration at least 45 days before the date on which the existing registration is due to expire, and the Administrator has issued no order on the application on the date on which the existing registration is due to expire, the existing registration of the applicant shall automatically be extended and continue in effect until the date on which the Administrator so issues his/her order. The Administrator may extend any other existing registration under the circumstances contemplated in this section even though the Applicant failed to apply for reregistration at least 45 days before expiration of the existing registration, with or without request by the Applicant, if the Administrator finds that such extension is not inconsistent with the public health and safety.

21 CFR 1301.36(i). Because Applicant had previously been served with an Order to Show Cause, and he did not apply to renew his registration until twenty-four days before it was due to expire, pursuant to the above regulation, I conclude that his registration expired on August 25, 2013. Having reviewed the record, I further conclude—for reasons explained below—that the extension of Applicant's registration during the pendency of this proceeding would be ''inconsistent with the public health and safety.'' *Id.* I therefore hold that Applicant's registration expired on August 25, 2013. *See Paul H. Volkman,* 73 FR 30630, 30641 (2008). However, I further hold that Applicant's renewal application remains pending before the agency. *See id.*

Applicant is also the holder of a Florida state medical license, ME58544. However, he has been subjected to discipline by the Florida Board of Medicine on two occasions.

Applicant's first brush with the Board occurred in 2001. GX 2, at 1. That year, the Board filed an administrative complaint against Applicant, alleging, *inter alia,* that with respect to a patient, who had suffered a stroke, he ''fail[ed] to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances,'' as well as that he ''failed to keep written medical records justifying the course of treatment'' for that patient. *Id.* at 9–10 (citing Fla. Stat. § 458.331(1)(m)). Applicant did not dispute the facts, and following a hearing, he agreed to: (1) Pay a $5,000 fine, (2) pay $1,728, this sum being the Board's costs in the case, (3) complete twenty hours of continuing medical education, (4) complete a medical records course, and (5) submit to a Quality Assurance Review. *Id.* at 2.

In 2010, the Board filed a new complaint, and in 2011, the Board filed two more complaints; these complaints culminated in a single final settlement order in 2012. *Id.* at 13. The 2010 complaint[3] alleged that, between December 16, 2009 and May 27, 2010, Applicant ''dispensed medicinal drugs

[1] Notwithstanding this allegation, no evidence was put forward establishing that any such application is pending before the Agency.

[2] I have taken official notice of the Agency's registration records which show that Applicant filed a renewal application on August 1, 2013. *See* 5 U.S.C. 556(e); 21 CFR 1316.59(e); *Attorney General's Manual on the Administrative Procedure Act* § 7(d) (1947).

[3] State of Florida Department of Health Case number 2010–03851.

for human consumption for a fee or remuneration'' when he ''was not registered with the Board of Medicine to dispense medicinal drugs for human consumption,'' in violation of Fla. Stat. § 465.0276(2). *Id.* at 76. The complaint also alleged that, by dispensing medication without a proper registration, Applicant violated Florida law by ''practice[ing] beyond the scope permitted by law . . . .'' *Id.* at 78 (citing Fla. Stat. § 458.331(1)(v) (2013)).

The first 2011[4] complaint made numerous factual allegations regarding Applicant's treatment of Patient J.D.[5] Id. at 28–54. Count I of the complaint then alleged, *inter alia,* that over various periods, Applicant committed malpractice by prescribing controlled substances including Xanax, Lortab (hydrocodone), oxycodone, and Dilaudid (hydromorphone), ''in doses which were not medically justified.'' *Id.* at 55–56 (citing Fla. Stat. § 458.331(1)(t)). Count II of the complaint alleged that the aforesaid prescribing constituted ''inappropriate[] or excessive[] prescrib[ing] [of] medications.'' *Id.* at 57 (citing Fla. Stat. § 458.331(1)(q)). Finally, Count III alleged that during the various periods, Applicant ''fail[ed] to document a justification for the prescription[s]'' of the four drugs, and that he also ''fail[ed] to document a specific examination of Patient J.D. from December 23, 2006, to August 16, 2010.'' *Id.* at 59–60 (citing Fla. Stat. § 458.331(1)(m)).

The second 2011 complaint[6] made numerous factual allegations regarding Applicant's treatment of patient L.S. *Id.* at 63–68. Count I of the complaint then alleged that on three occasions, Applicant committed malpractice by: (1) Prescribing Xanax ''in doses which were not medically justified,'' or 2) ''[b]y authorizing . . . refills of the prescription of Xanax and Lortab,'' or 3) ''[b]y failing to refer . . . L.S. for a psychiatric consultation.'' *Id.* at 69–70 (citing Fla. Stat. § 458.331(1)(t)). Count II alleged that the aforesaid prescribing of Xanax and Lortab constituted ''inappropriate[] and/or excessive[] prescribing [of] medications.'' *Id.* at 71 (citing Fla. Stat. § 458.331(1)(q)). Finally, Count III alleged that Applicant ''fail[ed] to document a justification for the prescription of the amount of Xanax'' on three occasions, and that he ''fail[ed] to document a physical examination or assessment of . . . L.S. on February 10, 2007.'' *Id.* at 72 (citing Fla. Stat. § 458.331(1)(m)).

On August 17, 2012, Applicant entered into a Settlement Agreement with the Board. Therein, ''Applicant neither admit[ted] nor denie[d] the allegations of fact contained in the Administrative Complaint [sic] for purposes of these proceedings only.'' *Id.* at 18. However, he did ''admit[] that the facts alleged in the Administrative Complaint [sic], if proven, would constitute violations of Chapter 458, Florida Statutes, as alleged in the Administrative Complaint [sic].'' *Id.* Moreover, he further agreed that when the Agreement was presented to the Board, he would ''offer no evidence, testimony or argument that disputes any stipulated fact or conclusion of law.'' *Id.* at 24.

Pursuant to the Agreement, Applicant was reprimanded and his medical license was suspended until he submitted to an evaluation by either a state program or Board-approved evaluation and appear before the Board's Probation Committee. *Id.* at 19. The Board also assessed an administrative fine of $60,000 against his license and required that he pay $15,910.65 to the Department of Health for its costs in investigating and prosecuting the matter. *Id.* at 19–20. Applicant also agreed to cease practicing if, within 105 days of the filing of the Board's final order, he did not receive written confirmation from the Board that it had received the full amount of both the fine and costs. *Id.* Finally, he agreed to take three courses: (1) A course in the ''Legal and Ethical Implications in Medicine,'' (2) a course in prescribing controlled drugs, and (3) a course in quality medical recordkeeping. *Id.* at 21.

On October 12, 2012, the Settlement Agreement was submitted to the Florida Board, and on October 24, 2012, the Board issued a final order approving the Agreement. *Id.* at 13–14. Applicant's license is currently classified as ''Obligations Active'' by the Florida Department of Health, which means that ''the licensed practitioner may practice his/her profession in the State of Florida under the conditions specified by the licensing board or department.''[7]

The Investigations of Applicant

The 2005–2006 Investigation

In 2005, the Florida Department of Law Enforcement (FDLE) notified a Sergeant with the Daytona Beach Police Department, who was then assigned to a Drug and Money Laundering Task Force, that a female who had been arrested for trafficking in hydrocodone and alprazolam might have information related to Applicant. GX 17, at 1. Subsequently, the Sergeant oversaw four undercover buys from Applicant, which were done by two confidential sources (CS1 and CS2); CS1 did the June 24, 2005 visit, and CS2 did the May 30, 2006, June 27, 2006, and July 26, 2006 visits. *Id.*

During the operations, the police observed the CSs enter and exit Applicant's office; they also placed a recording device on the CSs. *Id.* However, during the last operation, the recording device did not work. *Id.* During each operation, the CSs obtained prescriptions for controlled substances, which they subsequently provided to the police. *Id.* Copies of these prescriptions were submitted in the record provided by the Government, as were the recordings and transcriptions for the three visits when the recording device functioned properly. *See* GX 9–12.

Following the buys on June 24, 2005, June 27, 2006 and July 26, 2006, the confidential sources told the Sergeant that Applicant failed to perform any physical examination. *Id.* at 2. For the May 30, 2006 undercover buy (which was CS2's first visit), the CS told the Sergeant that Applicant had briefly touched his back. *Id.*

The recordings of the June 24, 2005 operation establish that the CS did not complain of any pain and that Applicant neither asked her any questions about her medical condition (indeed, nearly all of the interaction involved a discussion of the CS's family issues), nor performed a physical examination. GX 9. Applicant nonetheless gave CS1 prescriptions for 60 tablets of OxyContin 20mg (oxycodone, sch. II), 90 tablets of Lorcet 10/650 (hydrocodone/acetaminophen, sch. III), 90 Xanax 1mg (sch. IV), and 90 Soma (carisoprodol, then unscheduled under federal law). *Id.* CS1 paid $65.00 in cash and then left. GX 9.

As for the May 30, 2006 operation, the transcript of the operation corroborates the CS's hearsay statement that the Applicant physically touched him. GX 10, at Tr. 1, at 11–12. Yet there is no

[4] State of Florida Department of Health Case number 2009–05877.

[5] These included that Applicant failed to document a patient's vital signs, failed to record the quantities of the controlled substances prescribed, and continued to increase the dosage amounts for Lortab and alprazolam for one patient despite continuously noting ''no change'' in that patient's medical record. *See id.* at 28–52. In another instance, Applicant prescribed oxycodone, Lortab, and alprazolam to a patient who ''reported to Applicant that he had been getting Lortab off the street while waiting for his appointment.'' *Id.* at 36.

[6] State of Florida Department of Health Case number 2009–20428.

[7] I have taken official notice of the status of Applicant's medical license by accessing the online database of all licensed providers maintained by Florida Department of Health. *See http://ww2.doh.state.fl.us/IRM00PRAES/PRASLIST.ASP.*

other evidence establishing that Applicant's physical examination of the CS was inadequate.[8] *See David Ruben,* 78 FR 38363, 38384 (2013). Moreover, the CS complained of pain, stating that he had strained his back lifting a fire extinguisher (weighing 40–60 pounds) and that he had pain ''all over,'' that his back was ''tender,'' and that when he woke up, his back ''cramps'' on him. *Id.* at 10. Applicant gave the CS a prescription for 60 Naprosen (a non-controlled drug) and 60 Lortab 10, a schedule III controlled substance containing hydrocodone.

As for the June 27, 2006 operation, the prescriptions establish that the same CS, who made the previous visit, made this visit. The recording and transcript show that Applicant did not perform a physical examination. However, there is no evidence that the Government's Expert reviewed this encounter or the CS's patient file, and there is no evidence that under the standards of accepted medical practice, the performance of a physical exam was required at this visit.

The recording and transcript do reflect that after Applicant and the CS greeted each other, a lengthy discussion ensued of such matters as Applicant's prior experience treating gunshot wounds as a trauma surgeon and critical care physician, his decision to move to Florida, and the skill required to perform cardiac and orthopedic surgery, the latter being ''just carpentry,'' which requires knowledge of ''some anatomy'' and ''patience.'' GX 11, Tr. Part 4, at 1–8. Applicant then asked the CS: ''What's going on with you?'' *Id.* at 8

To this, the CS replied: ''Well . . . that . . . what you gave me last time. Made me feel really good. Ah . . . coming to see if I can get something a little stronger this time.'' *Id.* Applicant than asked the CS if he wanted something ''[s]tronger or just more'' of what he had previously gotten; the CS answered: ''[m]aybe more stronger.'' *Id.* Applicant then stated: ''Okay, no problem,'' and asked the CS if he was getting ''any therapy?'' *Id.* The CS replied that he was not. *Id.* Applicant then asked the CS, ''not into it?'' *Id.* The CS answered ''[y]eah,'' and Applicant said ''fair enough.'' *Id.* Applicant then left the exam room and subsequently provided the CS with prescriptions for 60 Ultram (tramadol, a non-controlled drug) and 120 oxycodone 15mg, a schedule II controlled substance.

CS2 returned to Applicant on July 27, 2006. GX 12, at 5. However, as explained above, the recording device malfunctioned. In his affidavit, the Sergeant stated that the CS told him that Applicant did not perform a physical exam. GX 17, at 2. The CS also told the Sergeant that Applicant did not recognize him and did not remember what he was being treated for. *Id.* Most significantly, the CS told Applicant that he had ''previously pulled a muscle in his back, but was no longer in pain'' and that ''he just liked how the pain medication made him feel and wanted something stronger than the oxycodone 15mg tablets'' he obtained at the ''previous visit.'' *Id.* The CS also told the Sergeant that he received a prescription for 90 tablets of oxycodone 30mg. *Id.* Of note, the Sergeant's statement is corroborated by a copy of the prescription. GX 10, at 5.

The 2008–2009 Investigation

Several years later, a DEA Diversion Investigator (DI), in conjunction with the Volusia County Florida Bureau of Investigation (VBI) and the Department of Health and Human Services Medicaid Fraud Control Unit (DHHS), conducted four undercover visits of Applicant. GX 18, at 1. The visits were done on September 18, 2008, October 16, 2008, November 24, 2008, and January 15, 2009, and were performed by two different confidential sources (CS3 and CS4), who were equipped with a recording device,[9] and after each visit the CSs were debriefed. *Id.*

According to the DI, after each of the visits, the confidential sources told her that Applicant did not perform a physical examination yet prescribed controlled substances to the CSs. *Id.* at 2. Subsequently, a search warrant was obtained from the Florida courts authorizing the search of Applicant's clinic, and was executed on October 1, 2009. *Id.* Pursuant to the warrant, Applicant's medical records were seized. *Id.* These records were turned over to Dr. Theodore Parran, an expert working for the Government, for review.[10] *Id.*

On September 18, 2008, CS3 visited Applicant at his place of business. GX 13. After stating that ''I just can't move'' and ''I'm just so uncomfortable,'' Applicant asked ''[s]o what do we need to do?'' *Id.* at Tr. 1, at 7. CS3 then asked if she could ''get something for the discomfort that I have.'' *Id.* Applicant said ''okay'' and asked if she was no longer getting therapy. *Id.* at 8. CS3 said that she had not ''been able to fin[d] anybody that does this deep tissue,'' but that she was getting massages. *Id.* After CS3 made a further vague comment about her condition, Applicant stated that ''at one point I g[a]ve you some Percocets, at one point, I gave you some Lortab. I mean, do you want, did anything work for you?'' *Id.* CS3 replied: ''Well, first, the, um . . . I guess the last one was the Percocet. That didn't work, but that helped with anti-inflammatory, too. I think you gave me something.'' *Id.*

Applicant replied, ''[w]ell, now you saw me one time. You saw that other guy, the other guy gets it cheaper than this place.'' *Id.* CS3 then denied that she had ''see[n] anybody in that office,'' an apparent reference to Applicant's former practice location, and Applicant noted that it has been ''like two (2) years ago.'' *Id.* CS3 again stated that she had not gone back to that office because it did not have a therapist and she ''didn't really care for his . . . chiropractic procedure.'' *Id.* at 9. Applicant said ''okay'' and asked the CS if she was ''tak[ing] something for pain, an anti-inflammatory?'' *Id.* The CS said ''yeah,'' after which CS and Applicant discussed various other matters, none of which related to the CS's medical condition. *Id.*

Consistent with the DI's statement that the CSs had informed her that Applicant did not perform a physical exam, there is no evidence that Applicant performed a physical exam of CS3. Applicant nonetheless wrote CS3 a prescription for 180 tablets of Percocet 10/325mg. GX 13. CS3 paid $90.00 for the visit. *Id.* at 8.

On October 16, 2008, CS3 returned to Applicant and paid $90.00 in cash. GX 14. After greeting each other and discussing how she could lose weight, CS3 asked Applicant if he could ''give [her] a little extra this time?'' *Id.* Tr. 1, at 10. Applicant answered, ''uh-hum,'' but never asked CS3 why she wanted or needed more medication. *Id.*

CS3 then told Applicant that she had a friend who wanted to come in asked if he was seeing new patients. *Id.* at 11. Applicant said he was but he had rules and the CS's friend would have to bring documentation and that he would let the patient ''know beforehand what the rules are gonna be as far as what you get . . . cause somebody walks in here and wants strong pain medication and they've never had anything before, I say, 'Let's start out with anti-inflammatories and muscle relaxers, first, and therapy, and let's see how things go.' So . . . I don't know.'' *Id.*

CS3 then stated that she had ''shared a little bit [of her medications]'' with her

[8] As explained below, there is a lengthy report of an Expert regarding his review of numerous patient files. However, the Expert did not discuss these visits.

[9] DI Stocum's declaration states the date as November 25, 2008. GX 18. The date on the issued prescriptions for that CS, however, is November 24, 2008. *See* GX 15.

friend and did not ''know if that was the right thing to do.'' *Id.* Applicant replied that ''it's neither right or wrong, as far as I'm concerned, but you must understand, and, although, I don't think you can get in trouble for it, you both broke the law by doing that.'' *Id.* After CS3 replied ''I did?'' Applicant explained that ''[y]ou were dealing drugs and he was taking illegal medication; these are controlled substances.'' *Id.* at 12. After CS3 asked if it would ''be better now if I just get him an appointment,'' Applicant stated that ''he can call,'' but that he would have to meet with his colleague and ''bring in his documentation.'' *Id.*

Applicant asked if the CS's friend ''had surgery before,'' but the CS did not know. *Id.* Applicant then explained that if ''he's had surgery before, then I just need to see some documentation . . . about the surgery.'' *Id.* After CS3 stated that she did not ''think it was that'' and that he may be ''going to a chiropractor,'' Applicant added that ''if he can show me that he's had therapy and things like that, that makes a difference.'' *Id.* at 12–13. Applicant then explained that ''in other words, there are a lot of people who just want to walk in and say, 'Give me pain medicine.' And I say, 'You don't just get pain medicine without some documentation.''' *Id.* at 13. Applicant advised that if the CS's friend ''gets his medical records together and gets it to us . . . we'll get back to him.'' *Id.* Applicant then authorized the dispensing of 210 tablets of Percocet (oxycodone/apap) 10/325mg, for which the CS paid $200.[11] *Id.*

On November 24, 2008, CS3 returned to Applicant's clinic and obtained 240 more tablets of Percocet 10/325mg. GX 15, at 2. However, as found above, the recording device malfunctioned. GX 18, at 2. In her affidavit, the DI stated that during the post-visit debriefing, the CS said that Applicant did not perform a physical exam and only took her weight and blood pressure. *Id.* While the DI's affidavit states that Applicant also required that CS3 sign a form in which she agreed not to share her medications and that she did not ask for an increase in her prescription, the affidavit offers no further information regarding the interaction between the CS and Applicant. *Id.*

According to the DI, on January 15, 2009, CS4 visited Applicant.[12] GX 16. After exchanging greetings and discussing the holidays, CS4 stated that he was ''feeling better though.'' *Id.,* Tr. 1, at 5. After discussing whether CS4 needed his prescriptions ''split up the same way again,'' Applicant asked the CS, ''[h]ow's work?'' *Id.* The CS replied, ''[p]retty good, not too bad. Doing pretty good these days. My pain is getting better . . . that that makes it real good.'' *Id.* Applicant then asked the CS if he did ''anything for New Year's Eve''; the CS replied that he had gone to his uncle's party. *Id.* at 6–7. Shortly after that, the CS's encounter with Applicant ended. *Id.*

CS4 filled his prescription at Applicant's clinic. As the evidence shows, Applicant dispensed 240 tablets of Oxycodone 15mg. *Id.*

The Government Expert's Analysis of the Seized Medical Records

As found above, after the execution of the search warrant, the DI provided over 115 medical records to Dr. Theodore Parran for his review. GX 18, at 2. Dr. Parran, who has practiced medicine for thirty years, is a board-certified specialist in addiction medicine and internal medicine. GX 6. Dr. Parran is a member of the faculty at the Case Western Reserve University School of Medicine and developed the school's Addiction Fellowship Programs. *Id.* at 1, 13; GX 7. He is also the Medical Director for the Detoxification Unit at Huron Hospital in East Cleveland, Ohio, and the Medical Director for the Cleveland Treatment Center Methadone Maintenance Clinic. GX 6, at 14. He has also served as a reviewer for several professional journals on issues related to substance abuse, presented numerous lectures on substance abuse and controlled substance prescribing, and authored (or co-authored) a large number of articles for professional journals and book chapters for treatises. *Id.* at 6–13.

Following his review, Dr. Parran offered the following findings. Most significantly, Dr. Parran opined ''that there are many cases where the prescribing of controlled drugs appears to have been for other than [a] legitimate medical purpose and appears not to have taken place within the usual course of medical practice.'' GX 7, at 1.

Dr. Parran then identified several ''general characteristics'' of Applicant's ''prescribing behaviors that are concerning and even alarming.'' *Id.* Specifically, he found that: (1) ''There [was] virtually always a very scant initial history and typically no documented evidence of a sufficient physical exam done on patients'' in the records; (2) there was a remarkable similarity in how Applicant treated each patient, suggesting a lack of individualized treatment; (3) there was typically no note in the patient chart to explain why Applicant started, increased, or changed a drug regimen; (4) there were very few, if any, referrals to alternative treatments (*i.e.,* physical therapy) and specialists (*i.e.,* psychiatry, rheumatology, neurology, orthopedics and neurosurgery); and (5) Applicant routinely ''provide[d] on-going supplies of multiple controlled drugs in an escalating pattern, typically culminating in quite high doses, in potentially dangerous combinations.'' *Id.* at 1–2. Dr. Parran thus opined that Applicant's ''pattern of relentlessly prescribing controlled drugs, with insufficient history and physical . . . and no clinical reasoning evident in progress notes what-so-ever, without initiating a clinical work-up or demonstrating evidence of an effort to obtain prior records, and in the face of non-compliance and often out of control behavior on the part of patients, is not consistent with the usual course of medical practice and constitutes prescribing of controlled drugs for other than [a] legitimate medical purpose.'' *Id.* at 2. A more detailed discussion of Dr. Parran's findings with respect to several of the patients follows.

K.B.

At K.B.'s initial visit, she reported that she suffered from head and face trauma and seizures, and was taking undocumented dosages of Xanax, Dilantin and Naproxen. *Id.* at 4. The file included prior medical records from a neurology pain office several years earlier indicating that she had taken ''Oxy 40 BID [twice a day] and Roxi 5 and Xanax 2 TID,'' three times a day. *Id.* Dr. Parran found that there was ''no evidence of a [physical exam] and little evidence of any history taking.'' *Id.*

The next progress note in K.B.'s file is dated 6/6/06, sixteen months after K.B.'s initial visit, and states ''Duragesic does not seem to be effective for pain . . . refills.'' *Id.* Apparently, no explanation was provided as to when Applicant prescribed Duragesic (fentanyl), a schedule II controlled substance to her. *Id.*

The next visit documented in K.B.'s record is dated 7/19/06; the progress notes states ''former WS pt. with chronic back pain/Lmyalgias/HA/seizures and anxiety.'' *Id.* Dr. Parran again noted that there is ''no evidence of a PE [physical exam] at all, or health history, or documentation of current RX or labs (to check Dilantin level, etc.) or studies, prior records, etc.'' *Id.* Yet Applicant prescribed 120 OC 30 mg (oxycodone), 120 Oxy (also oxycodone)

[11] The evidence shows that the drugs were dispensed by Applicant's clinic. GX 14.

[12] However, the transcript lists the date of the visit as January 5, 2009

40mg, 150 Xanax 2mg, Dilantin 300 mg/d, Naprosyn, and 90 Soma.

On 8/16/06, Applicant added 120 Fiorinol to K.B.'s existing medications, without noting why in her record. *Id.* Dr. Parran opined that ''[a]dding a potent barbiturate or an existing barbiturate (soma) and a high dose very potent benzodiazepine and two CII opioids . . . is dangerous to health or even life of a patient and is clinically reckless.'' *Id.*

K.B. received the same prescriptions the following month, but the visit note documents only the prescriptions. *Id.* Thereafter, there were no progress notes until February 2007, when the note stated that K.B. was going to a neurosurgeon and needed a new MRI, and the same prescriptions were provided. *Id.* Yet K.B. did not provide an MRI at either her April or May office visits, and in August 2007, the progress note stated that K.B. had complained that the ''pharmacist shorted me . . . so [she was] in bed almost all of last month.'' *Id.*

Dr. Parran then noted that there was no evidence of a physical examination at any time in the past year except for a note regarding ''spasm/tenderness in L/SP,'' and yet Applicant added a prescription for 60 MS XR (morphine sulfate extended release)—''a third CII opioid with no mention in the record at all!'' *Id.* Dr. Parran noted that K.B. received prescriptions that month for Soma 150, 150 OC 30 mg, 150 Xanax 2mg, Dilantin, 120 Oxy 40mg, and had refills that were still active for Naproxen and Fioricet. *Id.* However, her chart included a note stating that: ''Medicaid refused Soma due to too high a dose and Oxy due to excessive quantity.'' *Id.*

Next, Dr. Parran found that the progress note for 11/7/07 listed K.B.'s pain as 8/10, and that she reported she ''only got ½ of meds from pharmacy this month.'' *Id.* Dr. Parran noted there were ''no studies, referrals, evidence of a PE, evidence of a neurological exam ever'' and yet Applicant wrote prescriptions were for 120 Fiorinal; 150 Xanax 2mg; 120 MS XR 60mg QID (four times a day, notwithstanding that the drug is to be taken twice a day); 150 Soma; 150 OC 30mg; 60 Oxy 80mg. *Id.*

Dr. Parran further found that the February 2008 progress note stated that K.B. ''self-increases medication in cold weather.'' *Id.* Moreover, while the note of 3/27/08 states that K.B. ''will sched f/u with surgery;'' and the note dated 4/08 states, ''surgery next month''; the note of 5/22/08 states that she ''ran out early,'' with ''no mention of WD [withdrawal management],'' abstinence symptoms, nor mention of surgery. *Id.*

Next, Dr. Parran observed that the 7/17/08 note stated: ''Hold RX until mother comes in with cash payment.'' *Id.* Applicant noted that he was providing an additional prescription of ''OC 15mg #300'' to K.B.'s medications, but did not document a justification for doing so. *Id.*

The 8/14/08 progress note reported K.B.'s ''Pain 7/10.'' *Id.* Moreover, the note stated that K.B. received the following prescriptions: 150 OC 30mg; 300 Oxydose 15 mg; 120 Fiorinal; 150 Xanax 2mg; 56 Oxycontin 80 mg. BID; 112 MS XR 60 mg QID; and 150 Soma. *Id.* Dr. Parran then explained that this provided K.B. with ''four CII opioids all at quite high dose and three sedative hypnotics!'' and was ''[s]imply unbelievable.'' *Id.*

As for K.B.'s 9/11/08 visit, the note listed her pain as ''7/10'' and stated that ''OC 15 mg's have helped smooth out pain well.'' *Id.* Dr. Parran then explained that this was ''inconsistent data in the medical record.'' *Id.*

On 10/09/08 Applicant increased the prescription dosages to 180 OC 30 mg; 120 MS; 60 Oxycontin; 180 Soma; 180 Xanax. *Id.* Yet notwithstanding the increases, the progress notes for her next month's visit stated that her pain was a ''7/10'' but that the ''meds [were] effective.'' *Id.*

On February 5, 2009, Applicant again increased K.B.'s prescriptions. *Id.* These prescriptions provided K.B. with 300 OC 30 mg, 180 OC 15 mg, 60 OxyContin 80 mg, Fiorinol 120 X3, 200 Xanax 2mg, and 200 Soma, as well as two prescriptions for MS XR 60 mg, one for 94 tablets and one for 56. *Id*

In April 2009 the progress notes include ''pharmacy call re: Concern[s] about amounts of OC and too early refills.'' *Id.* In June 2009, Applicant prescribed 30 OxyContin 80mg in addition to the existing 60 OxyContin 80mg; Dr. Parran found, however, that there was ''no indication in PN [progress notes] as to why.'' *Id.* Dr. Parran then opined that:

> The prescribing of four and a half years of markedly escalating opioids and other controlled drugs to this patient with no evaluation, an insufficient H&P, non-existent work-up, lack of studies/consults/evaluation, up to exceedingly high doses of opioids, is inconsistent with the usual course of medical practice and was for other than a legitimate medical purpose.

Id.

D.B.

Regarding D.B., Dr. Parran found that ''prior records recommend avoiding long-term narcotic medications.'' *Id.* at 5. D.B. reported ''spinal and back pain'' and yet ''mark[ed] off in the patient self report[,] pain in each and every part of the body listed.'' *Id.* She also reported being on methadone 40mg, oxycodone 30 mg, Xanax 2mg, and Soma, but another note ''explicitly state[d] that the patient was not on any medications currently.'' *Id.* Applicant nonetheless prescribed 120 OC 30mg and 60 Valium10mg at the initial office visit. *Id.* Dr. Parran concluded that ''this is clinically reckless and if taken as directed would result in patient harm and even an accidental potentially fatal OD.'' *Id.*

At her next appointment (four weeks later), Applicant changed the prescriptions to 120 Percocet 10mg; 120 methadone 40 mg; 90 Xanax 2mg. *Id.* According to Dr. Parran, this was a ''massive increase,'' which was ''even more clinically reckless, and in a patient who was not on any current medications just 4 weeks earlier, could and should have caused harm or even death if taken as directed.'' *Id.*

Next, Dr. Parran found that the progress notes showed that the following month, asthma medications were added. *Id.* Dr. Parran reported that there was ''no discussion of asthma (a medical concern in the face of this huge amount of opioid and benzo prescribing), no evidence of a lung exam or evaluation of the severity of pulmonary function.'' *Id.*

Over the next three months, D.B.'s patient file documents multiple increases in her prescriptions, such that by December, she was receiving 240 methadone 40mg, 120 Xanax 2mg, 120 Oxycodone 30mg, and 90 Soma, ''with no indication in the medical record.'' *Id.* Dr. Parran explained that ''[t]his bears no resemblance to the usual course of medical practice.'' *Id.* Additional increases in Applicant's prescribing of oxycodone, as well as other drugs followed, notwithstanding that Applicant documented in D.B.'s file that the ''meds are working good.'' *Id.* Regarding the prescriptions, Dr. Parran explained that ''[t]he prescribing of three years of markedly escalating opioids and other controlled drugs to this patient with no evaluation, an insufficient [history and physical], non-existent work-up, lack of studies/consults/evaluation, up to exceedingly high doses of opioids, is inconsistent with the usual course of medical practice and was for other than a legitimate medical purpose.'' *Id.*

J.H.

Dr. Parran found that J.H.'s patient file indicated that during an initial office visit in January 2007, she complained of back pain from a motor vehicle accident in 1994, as well as anxiety from deaths

in the family. *Id.* at 16. J.H. also reported that she had not seen a doctor since 1994 and was not on any medications. *Id.* In the patient file, Applicant wrote that ''we would treat her for anxiety and not to expect any pain meds.'' *Id.* However, an additional note stated that J.H. was getting ''Percocets from her dad'' for back pain. *Id.*

Dr. Parran found that there were ''no prior records/studies/referrals/work-up'' or significant history and physical documented in her patient file. *Id.* Yet, at the initial visit, Applicant prescribed to J.H. 180 Percocet 5 mg. and 30 Xanax 2mg. *Id.* Dr. Parran explained that ''[t]his is completely unsupported by the medical record, [and] is inconsistent with the usual course of medical practice and lack [sic] legitimate medical purpose.'' *Id.*

Dr. Parran found that at J.H.'s next visit (one month later), Applicant nearly tripled the oxycodone to 120 Oxy 15 mg, but made no mention of this in the progress note. *Id.* Dr. Parran then explained that if J.H. ''had not been on prior opioids . . . and she took it as prescribed . . . it could have resulted in [an] accidental OD [overdose] and even fatal accidental OD.'' *Id.*

Dr. Parran observed that at J.H.'s next visit, Applicant added 180 Percocet 5mg to her prescriptions for 120 Oxy 15mg and 30 Xanax 2mg and merely noted that these were refills. *Id.* Three months later, Applicant documented that the medications ''were working fine,'' even though he noted that she was ''doubling up on [her] meds'' and had been ''out of medications for one week.'' *Id.* Yet he did not document any withdrawal symptoms in J.H.'s record and did not change her prescriptions. *Id.*

Two months later, he again increased her Oxycodone 15mg prescription and doubled her Xanax to 60 tablets. *Id.* The following month, he noted that J.H. had ''been doubling on Oxy 15s . . . would like increase''; Applicant increased the prescription to 120 Oxycodone 30mg. *Id.* Within no more than a few days, J.H. claimed that she had been ''robbed at knife-point in [a] local store'' and that her prescriptions were stolen and she ''want[ed] more.'' *Id.* at 16–17. Applicant documented that he told her ''no,'' and that J.H. later ''called back and reported maybe only half the RX was stolen and [that] she could probably make it to the next'' visit. *Id.* at 17. Yet at the next visit, J.H. reported being ''better'' and that ''all is well.'' *Id.* Applicant provided new prescriptions and did not document any discussion about J.H.'s claim that half of her medicine had been stolen or whether she actually ''only need[ed] half the medication.'' *Id.*

By June 2008, Applicant had increased J.H.'s oxycodone prescription to 200 oxycodone 30mg. *Id.* That month, she also asked Applicant to increase the Xanax, and Applicant increased the prescription to 90 tablets. *Id.* In November, he again increased her oxycodone prescription by 30 more tablets to 240,[13] even though he noted that she was ''fine'' and there were ''no new issues or complaints.'' *Id.*

Dr. Parran also noted that between February and May 2009, J.H.'s chart contained no indication of a visit or prescriptions. *Id.* Yet on May 15, 2009, Applicant ''restart[ed] all meds at [the] prior dosages.'' *Id.* Dr. Parran explained that ''[t]his is clinically reckless and demonstrated disregard for the health and safety of a patient.'' *Id.* He then opined that ''the prescribing of controlled drugs to this patient was done in a manner that is inconsistent with the usual course of medical practice, and appears to have been done for other than legitimate medical purpose.'' *Id.*

A.C.

Reviewing the file for Patient A.C., who complained of back pain, Dr. Parran noted that the history forms were ''basically blank'' except for a notation of ''back pain'' and ''Xanax/Lortab/Oxy.'' *Id.* at 10. He further found that there was ''no evidence of a significant PE or neuro exam,'' that there was ''no imaging,'' and that there was ''no verification of prior RX.'' *Id.* Yet Applicant prescribed to A.C. 120 oxycodone 30mg, 180 Lortab 10mg, and 30 Xanax 2mg. *Id.* Dr. Parran explained that ''[t]his is simply unbelievable and demonstrates reckless disregard for the health and safety of a patient.'' *Id.*

Dr. Parran further found that while A.C.'s file indicated that he had suffered a back injury at work and had seen an orthopedist, Applicant never had A.C. sign a release for the records maintained by the orthopedist. *Id.* Moreover, A.C. missed several visits, showing up several days later, and that during one such late visit, A.C. said that he had been out of medications ''for two days.'' *Id.* Yet there was ''no evidence'' that A.C. went through withdrawal, although this ''should have been severe.'' *Id.* Dr. Parran also noted that Applicant did not perform a urine drug screen on A.C. *Id.* Finally, A.C.'s medical record showed that he had been simultaneously seeing another physician for six months. *Id.* Here again, Dr. Parran opined that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose in prescribing controlled substances to A.C.

S.H.

Dr. Parran found that S.H. complained ''of coccyx/tail bone pain'' which Applicant documented as being ''sporadic.'' *Id.* at 17. Dr. Parran then found that there was ''virtually no HX [history] and no PE [physical exam]'' done at S.H.'s initial office visit and that ''all patient health history and registration paperwork is blank.'' *Id.* Dr. Parran further observed that while S.H. had been a patient at Applicant's previous clinic and there were patient notes for the period of June through September (which immediately preceded) S.H.'s first visit to Applicant's new clinic, there was ''basically no clinical information on them what so ever,'' again with ''virtually no'' history and ''nearly no PE performed.'' *Id.*

Dr. Parran found that at the first visit (Oct. 2007), Applicant prescribed 200 oxycodone 30mg to S.H., who was driving from Tampa to Sanford, a distance of more than 100 miles. *Id.* at 18. Dr. Parran further found that over the following two years, the progress notes included notations that S.H. had run out of medications. *Id.*

For example, two months after the first visit, Applicant noted that S.H. ''overtook medications—not strong enough—ran out,'' yet there was no indication that S.H. had withdrawal symptoms. *Id.* Moreover, even though this was ''contrary to [S.H.'s] Pain Agreement,'' Applicant increased S.H.'s oxycodone prescription to 240 tablets. *Id.*

In April 2008, S.H. reported having undergone knee surgery and asked for more pain medication because the surgeon would not prescribe more to him. *Id.* Applicant did not obtain the records, nor was there a release in the file. *Id.* While it is unclear whether Applicant increased the medications at this visit, in May, he prescribed 300 oxycodone 30mg. *Id.*

In July 2008, S.H. claimed that he ''ran out of medications'' because he ''lost 50 in the water while fishing.'' *Id.* Here again, there was no discussion of whether S.H. had undergone withdrawal symptoms. *Id.* Yet Applicant issued another prescription. *Id.*

In October 2008, S.H. reported that he had run ''out of medication 10 days ago,'' but then changed his story ''to 5 days ago.'' *Id.* S.H. then claimed that he did ''not [have] enough medication'' and that he was ''stretch[ing] meds from prior visits.'' *Id.* Applicant than

[13] He had previously increased the prescription to 210 tablets in late July.

increased the prescription to 360 oxycodone 30mg. *Id.*

In December 2008, S.H. reported that he had been out of medication for two days. *Id.* According to Dr. Parran, S.H. should have had ''horrendous'' withdrawal symptoms but there was no notation that he had undergone withdrawal. *Id.* Applicant then increased S.H.'s prescription to 390 oxycodone 30mg. *Id.* While at S.H.'s January 2009 visit, he told Applicant that ''everything is okay'' and that he had ''left over meds,'' Applicant nonetheless increased the prescription to 400 oxycodone 30mg. *Id.*

Dr. Parran also found that S.H. was seven days late for his March visit (at which he was prescribed a different drug—Morphine Sulfate Immediate Release) and nineteen days late for his April visit (at which Applicant returned to prescribing 400 oxycodone 30mg), and yet there was no mention of why S.H. had been late at either visit. *Id.* Dr. Parran opined that ''[t]his is dangerous and demonstrates clinically reckless disregard for the health and safety of the patient.'' *Id.*

Finally, Dr. Parran noted that at S.H.'s last visit, there was ''no mention of anxiety/depression/sleep/muscle spasm issues and no mention of [benzodiazepines] at all, yet'' Applicant added a prescription for 90 Xanax 2mg. to the prescription for 400 oxycodone 30mg. *Id.* Dr. Parran opined that this was also ''dangerous, and demonstrates clinically reckless disregard for the health and safety of the patient.'' *Id.* Dr. Parran then concluded that ''the prescribing of controlled drugs to this patient was done in a manner that is inconsistent with the usual course of medical practice, and appears to have been done for other than [a] legitimate medical purpose.'' *Id.*

D.F.

Applicant treated D.F. from May 2008 through September 2009. *Id.* at 14–15. During those sixteen months Applicant prescribed increasing amounts of oxycodone, Dilaudid, methadone and Soma.

The records of the initial office visit showed that D.F. complained of ''fibromyalgia and chronic pain endorsing 31 symptoms in the patient self-report sheet and 12 of 15 pain descriptors—and pain everywhere in his body except hips.'' *Id.* at 14. The progress note then stated: ''spoke with PT . . . he wants to get off methadone and use the Duragesic and other less expensive medications.'' *Id.* Regarding this, Dr. Parran opined that ''methadone is the least expensive'' of these drugs and that ''this is inconsistent!'' *Id.*

The file also contained a letter indicating that D.F. had been on a methadone maintenance program at 70 mg/d since 12/07. *Id.* at 15. Dr. Parran noted that the file included prior records from a pain management specialist dated April 2007, a normal MRI, and that D.F. had been ''on Lyrica and Lidoderm (but no other controlled drugs).'' *Id.*

Dr. Parran found that there was ''[b]asically no H&P [History and Physical]'' and yet Applicant started issuing prescriptions for 180 Oxycodone 30mg, Duragesic 75mics, and 50 methadone 10mg. *Id.* Dr. Parran then found that at D.F.'s last visit (9/28/09) before the search of his clinic, Applicant had increased D.F.'s prescriptions to: 240 Oxycodone 30mg; 150 Dilaudid 8mg; 240 Oxycodone 15mg; 300 Methadone 10mg; and 60 Soma. *Id.*

Dr. Parran found that throughout D.F.'s file, there were multiple notations that that she was running out early and yet Applicant increased the prescriptions. *Id.* More specifically, the note for D.F.'s second visit (June 2008) states ''doing good and ran out early''; Applicant then increased the prescriptions to 200 Oxy 30 mg. and 90 methadone 10mg. *Id.* Moreover, when, in July 2008, D.F. ''asked about Soma,'' Applicant added a prescription for 28 Soma. *Id.*

Next, Dr. Parran found that the 8/8/08 progress note again stated that D.F. ''ran out early,'' and that Applicant increased her prescriptions to 220 Oxy and 120 methadone. *Id.* Two months later (on 10/8/08), Applicant noted that ''Pt. ran out one week ago (no W/D),'' and increased the ''Soma up to 60 and Oxy to 270.'' *Id.*

Dr. Parran found that at D.F.'s November 2008 visit, Applicant noted that he was increasing the methadone prescription to 200 tablets and the Oxy 30mg to 300 tablets; he also noted that he was ceasing the Duragesic patches because they were ''not working well.'' *Id.* Dr. Parran then observed that ''this is totally contrary to the first OV notes and completely internally inconsistent.'' *Id.*

Next, according to the February 2009 note, D.F. ''request[ed] more methadone'' and Applicant increased the prescription to 270 tablets; he also prescribed 300 tablets of Oxy 30mg. *Id.* At the April 2009 visit, Applicant added 120 Dilaudid 4mg to D.F.'s medications, which also included 240 Oxycodone 15mg, 180 Oxycodone 30mg, and 60 Soma. *Id.*

The following month, Applicant changed D.F. from Dilaudid back to methadone, issuing prescriptions for 240 Methadone 10 mg, 240 Oxycodone 15 mg, 180 Oxycodone 30 mg, and 60 Soma. *Id.* And in June, Applicant resumed prescribing 120 tablets of Dilaudid 4mg and again increased the methadone to 270 tablets, which he further increased to 300 tablets the next month. *Id.* Dr. Parran found Applicant's methadone prescribing remarkable given that this was for ''a patient who was supposedly being taken off a methadone program and [being given] other medications and patches!'' *Id.*

Next, Dr. Parran found that the August 2009 progress note stated that D.F. had ''request[ed] 8 mg of Dilaudid'' and that Applicant ''increase[d] [the] Dilaudid to 8mg #120.'' *Id.* Moreover, Dr. Parran found that the following month, Applicant increased the Dilaudid to 150 tablets (again of 8mg), and also prescribed 240 Oxycodone 30mg. *Id.* Finally, Dr. Parran found that at D.F.'s last visit before the 2009 search, Applicant issued prescriptions for 240 Oxycodone 30mg, 240 Oxycodone 15mg, 150 Dilaudid 8mg, 300 methadone 10mg, and 60 Soma. *Id.* According to Dr. Parran, ''[t]his is just plain dangerous.'' *Id.* Dr. Parran thus concluded that Applicant's ''prescribing of controlled drugs to this patient was done in a manner that is inconsistent with the usual course of medical practice, and appears to have been done for other than legitimate medical purpose.'' *Id.*

T.T.

Reviewing T.T.'s file, Dr. Parran found that at the initial visit (2/8/06), she complained of chronic lower back pain, but reported taking ''no medications.'' *Id.* at 36. Dr. Parran observed that T.T. reported no prior doctor and that her file contained no studies, labs, or records and that there was ''virtually no'' history and physical documented ''with no neuro[logical] exam.'' *Id.* Applicant nonetheless diagnosed T.T. as having ''thoracic and Lumbar Myalgias'' and issued her a prescription for 90 tablets of Lortab (hydrocodone/apap) 5mg. *Id.*

Dr. Parran than observed that at T.T.'s next visit (3/06), Applicant increased her prescription to 120 Lorcet 10mg, and thus nearly tripled the daily dose. *Id.* Next, Dr. Parran found that in late April, T.T. was provided an ''early [prescription] by 10 days.'' *Id.* Moreover, in late May, Applicant increased her Lortab prescription to 150 tablets and yet seven days later (June 7), he gave her a prescription for another 120 tablets. *Id.* Later the same month, Applicant gave T.T. prescriptions for additional drugs including 60 Valium 10mg, 30 Darvocet, and 60 Soma, and in October, he increased the Lorcet to 180

tablets. *Id.* Moreover, in November, Applicant added 90 oxycodone 30mg to her medications, and also prescribed 60 Valium 10mg, 180 Lortab 10mg, and 60 Soma. *Id.* Dr. Parran then observed that there was no discussion in T.T.'s progress notes regarding the prescriptions. *Id.* Moreover, in January, Applicant further increased T.T.'s oxycodone prescription to 120 tablets. *Id.*

On February 7, 2007, T.T., who did not have an appointment, obtained new prescriptions for all of the drugs, claiming that her brother was addicted to methamphetamine and had beaten her and taken all of her drugs. *Id.* Applicant again increased T.T.'s oxycodone prescriptions to 180 tablets. *Id.*

Next, Dr. Parran found that while the May 2007 note stated that T.T. got tired a lot and did not take either the Valium or Soma, Applicant again prescribed both drugs. *Id.* Dr. Parran then noted an early refill for Valium (10/20/07), which was followed in November by a change to 60 Xanax 2mg (which doubled the dose), as well an increase to 200 oxycodone 30mg which was further increased to 240 tablets in December, which was followed by an increase to 90 Xanax 2mg in January. *Id.*

While in February, T.T. reported having doubled up on her medications and sought an early refill, Applicant did not grant her request. *Id.* However, in March, T.T. reported she was ''out of Xanax [and] asked for more,'' and Applicant obliged, increasing her prescription to 120 tablets. *Id.*

Over the next several months, Applicant changed T.T.'s Lortab prescription to 90 oxycodone 15mg, and increased her Xanax prescription to 150 tablets (and also prescribed to her, both oxycodone 30mg and 15mg, as well as Soma). *Id.* In October 2008, Applicant further increased her oxycodone 30mg prescription to 270 tablets, her oxycodone 15mg prescription to 120 tablets, her Xanax 2mg prescription to 180 tablets, and also prescribed 60 Soma. *Id.* Dr. Parran described this as ''incredibly bizarre!'' *Id.* Yet at T.T.'s next visit, which occurred later that month on October 30th, Applicant further increased her prescriptions for oxycodone 15mg and Xanax to 150 and 200 tablets respectively, prompting Dr. Parran to opine that ''[t]here is no legitimate medical purpose for this prescribing.'' *Id.*

Only two days later, T.T. reported that medications were stolen and Applicant gave her a prescription for 30 Xanax, which was followed only four days later with a prescription for 180 Xanax. *Id.* Later that month, T.T.'s sister called and asserted that T.T. was stealing her medications; the same day, T.T. called and claimed her medications had been stolen. *Id.* Moreover, in the middle of December, Applicant received a phone call from an apparent relative of T.T. stating that T.T. was getting addicted. *Id.* Yet at T.T.'s next visit, he again gave her a prescription for 180 Xanax, as well as increased her Soma prescription to 90 tablets. *Id.*

Dr. Parran found that in February 2009, Applicant received a report that T.T. was ''seeing other doctors and selling her pills in the pharmacy parking lot.'' *Id.* He also found T.T.'s file included a March 2009 fax from an addiction treatment program with a release for her records. *Id.*

Dr. Parran further found that notwithstanding that T.T. had been undergoing treatment for addiction and had not seen Applicant for approximately three months, in June 2009, Applicant again saw her and prescribed both oxycodone 30mg and Xanax to her, prompting Dr. Parran to opine that ''[t]his is simply unbelievable.'' *Id.* Subsequently, in August, T.T. requested an early refill of her Xanax prescription, claiming that she had spilled the pills in the toilet. *Id.* While Applicant did not give her a refill, at her next office visit, he ''wrote all'' of the prescriptions for her. *Id.* Dr. Parran thus concluded that ''the prescribing of controlled drugs to this patient was done in a manner that is inconsistent with the usual course of medical practice, and appears to have been done for other than legitimate medical purpose.'' *Id.*

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied ''if the Attorney General determines that the issuance of such registration . . . would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

''These factors are . . . considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors and may give each factor the weight . . . [I] deem[] appropriate in determining whether . . . an application for registration [should be] denied.'' *Id.; see also Kevin Dennis,* 78 FR 52787, 52794 (2013); *MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011).

The Government has the burden of proving, by substantial evidence, that the requirements for a denial of an application, pursuant to 21 U.S.C. § 823(f), are met. 21 CFR 1301.44(e). This is so even in a non-contested case. *Gabriel Sanchez,* 78 FR 59060, 59063 (2013). Having considered all of the factors, I conclude that the Government's evidence with respect to factors two and four establishes, *prima facie,* that the issuance of a DEA certificate of registration to Applicant ''would be inconsistent with the public interest.'' *See* 21 U.S.C. 823(f).[14]

Factor One: Recommendation of the Appropriate State Licensing Board

At the outset, it should be noted that the Board has not made a formal recommendation as to what action the Agency should take in this matter. However, ''DEA precedents have typically taken a broader view as to the scope of this factor.'' *Tony T. Bui, M.D.,* 75 FR 49979, 49986 (2010).

The Government argues that the Florida Board of Medicine has found that Applicant ''prescribed controlled substances excessively and/or inappropriately'' to two patients (J.D. and L.S.) and that his ''license was suspended.'' Request for Final Agency Action, at 6. The Government further argues that the Board's findings ''cannot be collaterally attacked in a DEA proceeding'' and that while his license has since been reinstated, this is not dispositive of the public interest inquiry.'' *Id.* at 7.

It is well settled that while the possession of state authority to dispense controlled substance is a prerequisite for obtaining (and maintaining a registration), the possession of such authority is not dispositive of the public interest inquiry. *See Jayam Krishna-Iyer,* 74 FR 459, 461 (2009) (quoting *Mortimer B. Levin,* 55 FR 8209, 8210 (1990)). Thus, while Applicant currently holds an active medical license with the State, the Controlled Substances Act requires that the Agency make an independent determination from that made by the Florida Medical Board as to whether

[14] The Attorney General has delegated this authority to the Administrator. *See* 28 CFR 0.100(b).

granting controlled substance privileges to him would be in the public interest. *See id.*

That being said, I do not rely on the findings of the Florida Medical Board regarding Applicant's prescribing of controlled substances to the two patients. While the state proceedings resulted in the assessment of substantial fines and costs, a suspension until he appeared before the Board's probation committee, and other conditions including that he take three courses, Applicant ''neither admit[ted] nor denie[d] the allegations of fact contained in the Administrative Complaint[s].'' GX 2, at 18. Moreover, there was no hearing in the matter, and while DEA has held that the findings of fact and legal conclusions that are made pursuant to a consent agreement or a stipulated settlement may be entitled to preclusive effect in an Agency proceeding, *see David A. Ruben,* 78 FR 38363, 38365 (2013),[15] the settlement agreement between Applicant and the Board says nothing about whether Applicant would be estopped from challenging the findings in a subsequent proceeding brought by the Board (or other another state agency) against him. *See id.* at 38366–67 (giving preclusive effect to findings of state consent agreement which provided that physician could not ''contest the validity of the Findings of Fact . . . contained in the [o]rder in any present or future administrative proceedings before the Board,'' in a proceeding before ''any other state agency'' of the same State, and physician agreed not to challenge any portion of the order in state or federal court).[16] Here, while Applicant agreed that he could not seek judicial review of the Agreement, the Government does not cite to any authority of the Florida courts holding that settlement agreements that contain similar wording as that in Applicant's, are entitled to preclusive effect. *See also id.* (noting that state courts gave preclusive effect to findings made in consent agreements).

Accordingly, I do not rely on the Board's findings of fact and legal conclusions. Nor is there any need to do so given the extensive evidence which supports the conclusion that Applicant has repeatedly violated the CSA's prescription requirement.[17]

Factors Two and Four: Applicant's Experience in Dispensing Controlled Substances and Record of Compliance With Laws Relating to Controlled Substances

To effectuate the dual goals of conquering drug abuse and controlling both the legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Consistent with the maintenance of the closed regulatory system, a controlled substance may only be dispensed upon a lawful prescription issued by a practitioner. *Carlos Gonzalez, M.D.,* 76 FR 63118, 63141 (2011).

Fundamental to the CSA's scheme is the Agency's longstanding regulation, which states that ''[a] prescription for a controlled substance [is not] effective [unless it is] issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. 829] and . . . the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' *Id.*

As the Supreme Court has explained, ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)); *United States* v. *Alerre,* 430 F.3d 681, 691 (4th Cir. 2005), *cert. denied,* 574 U.S. 1113 (2006) (stating that the prescription requirement likewise stands as a proscription against doctors acting not ''as a healer[,] but as a seller of wares.'').

Under the CSA, it is fundamental that a practitioner must establish and maintain a legitimate doctor-patient relationship in order to act ''in the usual course of . . . professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Paul H. Volkman,* 73 FR 30629, 30642 (2008), *pet. for rev. denied,* 567 F.3d 215, 223–24 (6th Cir. 2009); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that the physician exceeded the bounds of professional practice, when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against . . . misuse and diversion''). The CSA, however, generally looks to state law to determine whether a doctor and patient have established a legitimate doctor-patient relationship. *Volkman,* 73 FR 30642.

In Florida, a physician is barred from ''prescribing, dispensing, administering, mixing, or otherwise preparing . . . any controlled substance, other than in the course of the physician's professional practice.'' Fla. Stat. § 458.331(q). The statute further explains that ''prescribing, dispensing . . . or otherwise preparing . . . controlled substances [] inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice.'' *Id.; see also* Fla. Stat. § 893.05(1) (''A practitioner, in good faith and in the course of his or her professional practice only, may prescribe . . . a controlled substance[.]''). As such, when a physician acts outside the course of professional practice, he is shirking his ''responsibility to dispense . . . controlled substances only in the course of [his] professional practice.'' *Florida* v. *Toth,* Case No. 80–2309, 1981 WL 180354, at *8 (Fla. Div. of Admin. Hearings Mar. 31, 1981).

Moreover, prior to the conduct at issue here, the Florida Board of Medicine promulgated Standards for the Use of Controlled Substances for the Treatment of Pain, which were codified in the Florida Administrative Code. *See* Fla. Admin. Code R.64B8–9.013 (2003).[18] Therein, the Board explained

[15] *See University of Tenn.* v. *Elliot,* 478 U.S. 788, 797–98 (1986) (''When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata[.]'') (internal quotations and citations omitted); *Robert L. Dougherty, M.D.,* 76 FR 16823, 16830 (2011).

[16] Of these clauses, only the latter is contained in Applicant's settlement agreement.

[17] I also place no weight on the findings of fact and legal conclusions of the 2001 Board Order. Those findings do not establish that Applicant committed any violations of controlled substance laws and regulations but only that he committed malpractice. As the Administrator has explained, ''the CSA and its case law 'amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally,' an authority which remains vested in the States.'' *Bui,* 75 FR 49988 (quoting *Gonzales* v. *Oregon,* 546 U.S. 243, 270 (2006)).

[18] The standards were first adopted on December 21, 1999, and subsequently amended on November 10, 2002 and October 19, 2003. New standards were promulgated on October 17, 2010; these standards substituted the word ''shall'' and thus made mandatory various provisions which had formerly

that the ''standards are not intended to define complete or best practice, but rather to communicate what the Board considers to be within the boundaries of professional practice.'' *Id.* R.64B8–9.013(1)(g).

Of particular significance here are the Board's standards pertaining to the ''Evaluation of the Patient'' and ''Medical Records.'' With respect to the former, the Board's standard provided that:

> A complete medical history and physical examination must be conducted and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record also should document the presence of one or more recognized medical indications for the use of a controlled substances.

Id. R.64B8–9.013(3)(a). And with respect to Medical Records, the Board's standard provided that:

> The physician is required to keep accurate and complete records to include, but not be limited to:
> 1. The medical history and physical examination, including history of drug abuse or dependence, as appropriate;
> 2. Diagnostic, therapeutic, and laboratory results;
> 3. Evaluations and consultations;
> 4. Treatment objectives;
> 5. [D]iscussion of risks and benefits;
> 6. Treatments;
> 7. Medications (including date, type, dosage, and quantity prescribed);
> 8. Instructions and agreements; and
> 9. Periodic reviews. Records must remain current and be maintained in an accessible manner and readily available for review.

Id. R.64B8–9.013(3)(f).

Here, there is substantial evidence to support the conclusion that on multiple occasions, Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed controlled substances. 21 CFR 1306.04(a). The evidence shows that notwithstanding that the Florida Board's standards clearly required that he perform a patient history and physical examination before prescribing to CS1, he did not ask the CS any questions about her medical condition nor performed a physical examination. Yet, he issued her prescriptions for 60 tablets of OxyContin (sch. II), 90 tablets of Lorcet 10/650 (sch. III) and 90 tablets of Xanax (alprazolam, sch. IV), as well as carisoprodol.[19] I thus conclude that Applicant violated 21 CFR 1306.04(a) in prescribing OxyContin, Lorcet and Xanax to CS1.

With respect to CS2, it is acknowledged that the evidence showed that he complained of pain and that Applicant performed a brief physical exam at his first visit. Moreover, there is no evidence establishing that under the standards of professional practice, the examination was inadequate. Nor is there any evidence that under the standards of professional practice, Applicant was required to perform a physical exam at CS2's subsequent visits.

That being said, at CS2's second visit, Applicant made no inquiry into CS2's purported pain condition and CS2 made no mention of being in pain. To the contrary, CS2 made clear that he was seeking the controlled substances to abuse them as he told Applicant that the drug that was prescribed at the previous visit ''[m]ade [him] feel really good'' and that he had ''com[e] to see if [he] could get something a little stronger this time.'' After Applicant asked the CS if he wanted something ''stronger or just more'' of what he had gotten at the previous visit, the CS stated that he wanted something ''more stronger''; Applicant stated: ''Okay, no problem,'' after which the CS told Applicant that he was not doing ''any therapy'' and admitted that he was ''not into it.'' Applicant then gave the CS a prescription for 120 oxycodone 15mg. As this conversation demonstrates, this was not a legitimate medical encounter between a doctor and his patient, but rather the negotiation of a drug deal, and thus, I hold that Applicant violated 21 CFR 1306.04(a) when he issued the prescription.

As for CS2's final visit during which the recording device malfunctioned, according to the Sergeant, the CS related in the post-operation debriefing that he told Applicant that he ''was no longer in pain,'' that ''he just liked how the pain medication made him feel,'' and that he wanted something stronger than oxycodone 15mg, which was what he had received at the previous visit. The CS also told the Sergeant that he received a prescription for oxycodone 30mg, which is corroborated by a copy of the prescription.

Notwithstanding that the CS's statements are hearsay and unsworn, I find that they are reliable and entitled to weight given that several other of the CS's hearsay statements were corroborated by other evidence. More specifically, the CS's statement to the Sergeant regarding the scope of the physical exam which was performed by Applicant at the May 30, 2006 visit and the absence of any such exam at the June 27, 2006 visit were corroborated by the recordings. So too, the CS's statement that he received a prescription for oxycodone 30mg was corroborated by the prescription itself. In addition, the recordings of the other visits portray a physician who showed no real interest in determining whether his patients actually had medical conditions which warranted treatment. I therefore find that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed 90 tablets of oxycodone 30mg to the CS. *See* 21 CFR 1306.04(a).

As for the September 18, 2008 visit, the recording establishes that Applicant had previously seen CS3 at least two years earlier and that he did not perform a physical exam of her. That being said, CS3 did complain of pain (''I just can't move'' and ''I'm just so uncomfortable'') and, while Florida's regulation requires a physical exam as part of the initial evaluation of a patient, the Government adduced no expert testimony as to whether it was within the usual course of professional practice to prescribe a controlled substance without performing a new physical exam.[20] I therefore find that the Government has not proved that Applicant violated the prescription requirement when he prescribed 180 tablets of Percocet 10/325mg to CS3 at this visit.

As for CS3's visit of October 16, 2008, the evidence shows that she asked Applicant if he could ''give [her] a little extra this time.'' Applicant, however, never asked CS3 why she wanted or needed more medication. Moreover, later in the encounter, CS3 told Applicant that she had a friend who wanted to see him and that she had ''shared a little bit [of] her medications'' with him, and that she did not ''know if this was the right thing to do.'' While Applicant told CS3 that she had broken the law and she was ''dealing drugs and he [her friend] was taking illegal medication'' because these ''are controlled substances,'' Applicant nonetheless gave her a new prescription, and increased the quantity

used the word ''should'' in setting forth the scope of a physician's obligations.

[19] At the time, carisoprodol was not a controlled substance under federal law. However, in 2011, carisoprodol was placed in schedule IV, based, in part, on its abuse as part of cocktail of other controlled substances which included narcotics such as oxycodone or hydrocodone, and benzodiazepines, such as Valium (diazepam) and Xanax (alprazolam). *See Schedules of Controlled Substances, Placement of Carisoprodol Into Schedule IV,* 76 FR 77330 (2011).

[20] Nor do we know if Applicant performed at physical exam at the previous visit. That being said, it was the Government's burden to produce evidence that Applicant had not performed a physical exam at that visit.

to 210 tablets of Percocet 10/325. Notably, at no time during this visit did Applicant ask CS3 any questions about her pain condition, how it affected her ability to function, and whether the medication was effective. Accordingly, I conclude that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he issued this prescription to CS3. 21 CFR 1306.04(a).

As for CS3's final visit, while there is evidence that Applicant further increased her prescription to 240 tablets, the recording device failed. While in her affidavit, the DI stated that during the debriefing, the CS said that Applicant did not perform a physical exam and only took her weight and blood pressure, here again, there is no evidence as to whether, under the standards of medical practice, Applicant was require to perform a physical exam and the scope of an appropriate exam. Nor is there any other evidence as to whether Applicant asked the CS whether she had pain, how the pain affected her ability to function, and how the medication was working. Notwithstanding my conclusion that the prescription issued at CS3's previous visit violated federal law, because the Government has the burden of proof, I conclude that it has not produced substantial evidence to support a finding that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he issued this prescription.

As for CS4's January 2009 visit, the recording of the visit suggests that the CS had previously seen Applicant. The Government, however, produced no evidence as to when this previous visit occurred (or that there had been no such visit) and whether Applicant had performed a physical exam at this visit.

To be sure, the recording establishes that Applicant did not perform a physical exam at the CS's January 2009 visit. However, here again, there is no evidence as to whether, under the standards of medical practice, a physical exam was required at this visit. Nor is there substantial evidence that, under the standards of medical practice, Applicant's evaluation was inadequate. Finally, the CS's statement that ''[m]y pain is getting better . . . and that [i.e., the oxycodone] makes it real good'' does not conclusively establish that the CS was seeking controlled substances for the purpose of abusing them or diverting them to others. Accordingly, I conclude that the Government has failed to prove that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed oxycodone to CS4.

By contrast, the Government did produce substantial evidence—in the form of the Expert's report—that Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed controlled substances to numerous patients. As found above, the Government's Expert reviewed the medical records of over one hundred and fifteen of Applicant's patients and found numerous instances in which Applicant acted outside of the usual course of professional practice and lacked a legitimate medical purpose in prescribing controlled substances. GX 6, at 1.

As support for his conclusion, Dr. Parran identified several ''general'' and ''alarming'' characteristics of Applicant's ''prescribing behaviors.'' More specifically, he found that: (1) ''there [was] virtually always a very scant initial history and typically no documented evidence of a sufficient physical exam done on patients'' in the records; (2) there was a remarkable similarity in how Applicant treated each patient, suggesting a lack of individualized treatment; (3) there was typically no note in the patient chart to explain why Applicant started, increased, or changed a drug regimen; (4) there were very few, if any, referrals to alternative treatments (*i.e.,* physical therapy) and specialists (*i.e.,* psychiatry, rheumatology, neurology, orthopedics and neurosurgery); and (5) Applicant routinely ''provide[d] on-going supplies of multiple controlled substances in an escalating pattern, typically culminating in quite high doses, in potentially dangerous combinations.'' GX 7, at 1–2. Dr. Parran thus opined that:

> [Applicant's] pattern of relentlessly prescribing controlled drugs, with insufficient history and physical . . . and no clinical reasoning evident in progress notes . . . what-so-ever, without initiating a clinical work-up or demonstrating evidence of an effort to obtain prior records, and in the face of noncompliance and often out of control behavior on the part of patients, is not consistent with the usual course of medical practice and constitutes prescribing of controlled drugs for other than [a] legitimate medical purpose.

Id. at 2.

Dr. Parran's conclusions are fully supported by the more detailed discussion he provided of Applicant's prescribing to various patients including K.B., D.B., J.H., A.C., S.H., D.F., and T.T., as well as others. As these findings show, Applicant repeatedly prescribed highly abused (and multiple) controlled substances including schedule II and III narcotics, as well as benzodiazepines to the patients, without doing a physical exam or doing an inadequate exam and having obtained little to no history; failed to obtain prior records; failed to refer patients to specialists; repeatedly increased both the quantity and strengths of medications or prescribed additional medications without any justification and frequently did so while noting that previous prescriptions were ''working good'' or the patient was doing ''better'' or ''fine''; prescribed large doses of controlled substances to patients even when presented with evidence that the patients were not currently on medications or had recently been in detoxification programs; prescribed controlled substances even in the face of evidence that the patients were doctor shopping, selling pills, or engaged in various scams (such as claiming that their medications were stolen or had been dropped into the toilet); and ignored evidence that patients did not go through withdrawal even when they reported having been out of drugs for several days.

As these findings (as well as the recordings of several of the undercover visits) demonstrate, Applicant was not engaged in the legitimate practice of medicine with respect to many of his patients, but was engaged in outright drug dealing. *See Jack A, Danton,* 76 FR 60900, 60917 (2011). I therefore find that the Government's evidence with respect to factors two and four establishes that the issuance of a new registration to Applicant ''would be inconsistent with the public interest.'' [21] 21 U.S.C. 823(f). *See also Eugene H.*

[21] In its request for Final Agency Action, the Government alleges that Applicant lacked candor during the 2009 interview and that this conduct should be considered under factor five. While the Government cites to three pages of the interview transcript as support for its contention, it does not identify the specific questions posed by the Investigators to which it contends Applicant provided answers that lacked candor. Req. for Final Agency Action, at 9 (citing GX 5, at 38–39, 50). Indeed, many of the remarks of the various law enforcement personnel on these pages are not even properly characterized as questions. Thus, while ''[c]andor during DEA investigations properly is considered by the DEA to be an important factor when assessing whether a . . . registration is consistent with the public interest,'' *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005), because the Government does not identify the specific questions and false answers, I decline to make any findings on the issue.

That being said, such findings are not necessary to support the sanction I have decided to impose, given the unrefuted evidence that Applicant diverted controlled substances and the lack of any evidence that he acknowledges his misconduct. There being no evidence in the record that Applicant has accepted responsibility for his actions, Applicant has failed to rebut the Government's *prima facie* showing that his registration would be ''inconsistent with the public interest.'' *Medicine Shoppe,* 73 FR 387 (citing 21 U.S.C. 823(f)).

Tapia, M.D., 52 FR 30458, 30459 (1987) (considering evidence that a physician did not perform physical exams and issued medically unnecessary prescriptions under factor two); *Thomas Parker Elliott, D.O.,* 52 FR 36312, 36313 (1987) (adopting ALJ's conclusion that physician's ''experience in the handling [of] controlled substances clearly warrants finding that his continued registration is inconsistent with the public interest,'' based on the physician's having ''prescribed enormous quantities of highly addictive drugs to [ten] individuals'' without adequate medical justification).

Under agency precedent, ''where a registrant [or applicant] has committed acts inconsistent with the public interest, [he] must accept responsibility for his . . . actions and demonstrate that he . . . will not engage in future misconduct.'' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009); *see also Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008). Here, because Applicant waived his right to a hearing (as well as his right to submit a written statement in lieu of a hearing), GX 4, at 2, the only evidence in the record to refute the conclusion that his continued registration is ''inconsistent with the public interest'' is that he apparently completed the courses required by the Florida Board of Medicine as evidenced by the fact that his medical license remains current and active.

There is, however, no evidence that Applicant acknowledges his misconduct, which is egregious, and accepts responsibility for it. Indeed, the Expert's report identifies dozens of patients (beyond the seven specifically discussed above) to whom Applicant diverted controlled substances. Accordingly, Applicant's application will be denied.[22] *See Krishna-Iyer,* 74 FR 464 (''[E]ven where the Agency's proof establishes that a practitioner has committed only a few acts of diversion, this Agency will not grant [an application for] registration unless he accepts responsibility for his misconduct.''); *see also MacKay* v. *DEA,* 664 F.3d 808, 822 (10th Cir. 2011) (sustaining agency order revoking practitioner's registration based on proof physician knowingly diverted drugs to two patients).

[22] As found above, because Applicant did not submit his renewal application at least 45 days before the expiration of his registration, and had been served previously with the Order to Show Cause, pursuant to 21 CFR 1301.36(i), his registration expired on August 25, 2013. Had his registration not expired per the Agency's rule, I would have revoked it.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I order that the pending application of Ralph J. Chambers, M.D., for a DEA Certificate of Registration be, and it hereby is, denied. This Order is effective immediately.

Dated: January 17, 2014.

Thomas M. Harrigan,

Deputy Administrator.

[FR Doc. 2014–01797 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; United States Pharmacopeial Convention

By Notice dated September 27, 2013, and published in the **Federal Register** on October 25, 2013, 78 FR 64014, United States Pharmacopeial Convention, 12601 Twinbrook Parkway, Rockville, Maryland 20852, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Noroxymorphone (9668), a basic class of controlled substance listed in schedule II.

The company plans to import reference standards for sale to researchers and analytical labs.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of United States Pharmacopeial Convention to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated United States Pharmacopeial Convention to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: January 15, 2014.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2014–01784 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Cambrex Charles City, Inc.

By Notice dated September 27, 2013, and published in the **Federal Register** on October 25, 2013, 78 FR 64013, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616–3466, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
4-Anilino-N-phenethyl-4-piperidine (8333).	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Opium, raw (9600)	II
Poppy Straw Concentrate (9670)	II

The company plans to import the listed controlled substances for internal use, and to manufacture bulk intermediates for sale to its customers.

Comments and requests for hearings on application to import narcotic raw material are not appropriate. 72 FR 3417 (2007).

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Cambrex Charles City, Inc., to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Cambrex Charles City, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of

the basic classes of controlled substances listed.

Dated: January 16, 2014.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2014–01707 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Clinical Supplies Management, Inc.

By Notice dated August 29, 2013, and published in the **Federal Register** on September 6, 2013, 78 FR 54913, Clinical Supplies Management, Inc., 342 42nd Street South, Fargo, North Dakota 58103, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Sufentanil (9740), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance with the sole purpose of packaging, labeling, and distributing to customers which are qualified clinical sites, conducting FDA-approved clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Clinical Supplies Management, Inc., to import the basic class of controlled substance is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Clinical Supplies Management, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: January 14, 2014.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2014–01788 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Halo Pharmaceutical, Inc.

By Notice dated August 14, 2013, and published in the **Federal Register** on August 20, 2013, 78 FR 51210, Halo Pharmaceutical, Inc., 30 North Jefferson Road, Whippany, New Jersey 07981, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Dihydromorphine (9145)	I
Hydromorphone (9150)	II

Dihydromorphine is an intermediate in the manufacture of Hydromorphone and is not for commercial distribution.

The company plans to manufacture Hydromorphone for sale to other manufacturers and to manufacture other controlled substances for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of Halo Pharmaceutical, Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Halo Pharmaceutical, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: January 15, 2014.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2014–01785 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Chattem Chemicals, Inc.

By Notice dated August 14, 2013, and published in the **Federal Register** on August 20, 2013, 78 FR 51210, Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Gamma Hydroxybutyric Acid (2010).	I
4-Methoxyamphetamine (7411)	I
Dihydromorphine (9145)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Lisdexamfetamine (1205)	II
Methylphenidate (1724)	II
Pentobarbital (2270)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Meperidine (9230)	II
Methadone (9250)	II
Methadone intermediate (9254)	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Opium tincture (9630)	II
Opium, powdered (9639)	II
Opium, granulated (9640)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Alfentanil (9737)	II
Remifentanil (9739)	II
Sufentanil (9740)	II
Tapentadol (9780)	II
Fentanyl (9801)	II

The company plans to manufacture the listed controlled substances in bulk for distribution and sale to its customers. Regarding (9640), the company plans to manufacture another controlled substance for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of Chattem Chemicals, Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Chattem Chemicals, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical

security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: January 15, 2014.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2014–01782 Filed 1–29–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs sponsored information collection request (ICR) revision titled, ''Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before March 3, 2014.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201309-1240-002* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–6881 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks OMB approval under the PRA to revise the Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor, Form CM–972, to include information about how a respondent with a disability may contact the OWCP in order to receive assistance in completing the form. There is no change to the information collected from the public.

Individuals filing with the OWCP, Division of Coal Mine Workers' Compensation for benefits under the Black Lung Benefits Act may elect to be represented or assisted by an attorney or other representative. For those cases that are approved, 30 U.S.C. 901 of the Black Lung Benefits Act and 20 CFR 725.365–6 of the Black Lung Regulations have established standards for the information and documentation that must be submitted to the program for review so that the representative may be paid for services rendered to the claimant. Upon receipt of that evidence, the adjudicating official is required by regulation to evaluate the application and, based on the supporting information in the claim file, approve a fee for services rendered. Form CM–972 provides a standardized format that assists representatives participating in the Black Lung Benefits Program to submit the required information.

Form CM–972 is sent to and completed by the authorized representative of a black lung claimant whose claim has been approved for benefits. The completed form is then returned to and evaluated by the district director, administrative law judge, or appropriate appellate tribunal before whom the claimed services were performed, and a fee amount is determined.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0011. The current approval is scheduled to expire on January 31, 2014; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 11, 2013 (77 FR 55761).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0011. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Application for Approval of a Representative's Fee in

Black Lung Claim Proceedings Conducted by the U.S. Department of Labor.

OMB Control Number: 1240–0011.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 338.

Total Estimated Number of Responses: 338.

Total Estimated Annual Burden Hours: 237.

Total Estimated Annual Other Costs Burden: $0.

Dated: January 24, 2014.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2014–01756 Filed 1–29–14; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Operator Controversion, Operator Response, Operator Response to Schedule for Submission of Additional Evidence, and Operator Response to Notice of Claim

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Operator Controversion, Operator Response, Operator Response to Schedule for Submission of Additional Evidence, and Operator Response to Notice of Claim,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before March 3, 2014.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201309-1240-004* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–6881 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks OMB approval under the PRA to revise the Operator Controversion, Operator Response, Operator Response to Schedule for Submission of Additional Evidence (Form CM–2970), and Operator Response to Notice of Claim (Form CM–2970a) information collection to include information about how a respondent with a disability may contact the OWCP in order to receive assistance in completing the form. There is no change to the information collected from the public.

The OWCP, Division of Coal Mine Workers' Compensation (DCMWC) administers the Black Lung Benefits Act (30 U.S.C. 901 et seq.), which provides benefits to coal miners totally disabled due to pneumoconiosis, and their surviving dependents. When the DCMWC makes a preliminary analysis of a claimant's eligibility for benefits, and if a coal mine operator has been identified as potentially liable for payment of those benefits, the responsible operator is notified of the preliminary analysis. Regulations require that a coal mine operator be identified and notified of potential liability as early in the adjudication process as possible. Forms CM–2790 and CM–2970 are used for claims filed after January 19, 2001, and indicate that the coal mine operator will submit additional evidence or respond to the notice of claim.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0033. The current approval is scheduled to expire on January 31, 2014; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 11, 2013 (78 FR 55760).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0033. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Operator Controversion, Operator Response, Operator Response to Schedule for Submission of Additional Evidence, and Operator Response to Notice of Claim.

OMB Control Number: 1240–0033.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 9,600.

Total Estimated Number of Responses: 9,600.

Total Estimated Annual Burden Hours: 2,000.

Total Estimated Annual Other Costs Burden: $0.

Dated: January 24, 2014.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2014–01843 Filed 1–29–14; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employer's First Report of Injury or Occupational Disease and Employer's Supplementary Report of Accident or Occupational Illness

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Employer's First Report of Injury or Occupational Disease and Employer's Supplementary Report of Accident or Occupational Illness,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before March 3, 2014.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201309-1240-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–6881 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The OWCP administers the Longshore and Harbor Workers' Compensation Act. The Act provides benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employee in loading, unloading, repairing or building a vessel. In addition, several acts extend coverage to certain other employees.

Longshore Act section 30(a) requires an employer having knowledge of a disease or injury related to an employee's employment to file a report of the disease or injury with the Secretary of Labor within 10 days after the date of injury or death. *See also* 20 CFR 702.201. Form LS–202 requests information the employer must report regarding the injury. Longshore Act section 30(b) requires the employer to furnish additional necessary reports regarding an employee's injury. Form LS–210 is used as a supplementary report after the employer's first report to report additional periods of lost-time from work. Proper filing of Forms LS–202 and LS–210 meet the statutory requirements. This ICR has been classified as a revision, because the OWCP has augmented accessibility features on the forms, in order make it easier for persons with disabilities to provide needed information.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0003. The current approval is scheduled to expire on January 31, 2014; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 19, 2013 (77 FR 57662).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0003. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Employer's First Report of Injury or Occupational Disease and Employer's Supplementary Report of Accident or Occupational Illness.

OMB Control Number: 1240–0003.

Affected Public: Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 21,083.

Total Estimated Number of Responses: 21,083.

Total Estimated Annual Burden Hours: 5,271.

Total Estimated Annual Other Costs Burden: $9,909.

Dated: January 23, 2014.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2014–01745 Filed 1–29–14; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2005–0022]

TÜV SÜD Product Services GmbH: Grant of Renewal of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces its final decision granting renewal of recognition of TÜV SÜD Product Services GmbH's (TUVPSG) as a Nationally Recognized Testing Laboratory (NRTL) under 29 CFR 1910.7.

DATES: The renewal of recognition becomes effective on January 30, 2014.

FOR FURTHER INFORMATION CONTACT: David W. Johnson, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210, phone (202) 693–2110, or email at *johnson.david.w@dol.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

OSHA recognition of an NRTL signifies that the organization meets the requirements in § 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification. OSHA maintains an informational Web site for each NRTL that details its scope of recognition available at *http://www.osha.gov/dts/otpca/nrtl/index.html*.

OSHA processes applications by an NRTL for renewal of recognition following requirements in Appendix A to 29 CFR 1910.7. OSHA conducts renewals in accordance with the procedures in 29 CFR 1910.7, App. II.C. In accordance with these procedures, NRTLs submit a renewal request to OSHA not less than nine months or no more than one year before the expiration date of its current recognition. A renewal request includes a request for renewal and any additional information the NRTL wishes to submit to demonstrate its continued compliance with the terms of its recognition and 29 CFR 1910.7. If OSHA has not conducted an on-site assessment of the NRTL key sites within the past 18 to 24 months, it will schedule the necessary on-site assessments prior to the expiration date of the NRTL's recognition. Upon review of the submitted material and, as necessary, the successful completion of the on-site assessment, OSHA announces its preliminary decision to grant or deny renewal in the **Federal Register** and solicits comments from the public. OSHA then publishes a final **Federal Register** notice responding to any comments and renewing the NRTL's recognition for a period of five years, or denying the renewal of recognition.

TUVPSG initially received OSHA recognition as an NRTL on July 20, 2001 (66 FR 38032), for a five-year period ending on July 20, 2006. TUVPSG submitted a timely request for renewal, dated October 10, 2005 (see Exhibit OSHA–2005–0022–0003), and retained its recognition pending OSHA's final decision in this renewal process. The current address of the TUVPSG facility recognized by OSHA and included as part of the renewal request is TÜV SÜD Product Services GmbH, Ridlerstrasse 65, D–80339, Munich, Germany.

OSHA evaluated TUVPSG's application for renewal and made a preliminary determination that TUVPSG can continue to meet the requirements prescribed by 29 CFR 1910.7 for recognition. OSHA conducted an audit of TUVPSG's facilities on April 26, 2013, and found TUVPSG to be in conformance with all applicable NRTL requirements. Accordingly, OSHA determined that it did not need to conduct an on-site review of TUVPSG's facilities based on its evaluation of TUVPSG's application and all other available information.

OSHA published the preliminary notice announcing TUVPSG's renewal request in the **Federal Register** on November 25, 2013. The Agency requested comments by December 10, 2013, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant TUVPSG's request for renewal of recognition.

To obtain or review copies of all public documents pertaining to the TUVPSG's application, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Docket No. OSHA–2005–0022 contains all materials in the record concerning TUVPSG's recognition.

II. Final Decision and Order

Pursuant to the authority granted under 29 CFR 1910.7, OSHA hereby gives notice of the renewal of recognition of TUVPSG as an NRTL. OSHA NRTL Program staff reviewed the renewal request for TUVPSG and other pertinent information provided by TUVPSG. Based on this review, OSHA finds that TUVPSG meets the requirements of 29 CFR 1910.7 for renewal of its recognition, subject to the limitation and conditions listed below. OSHA limits the renewal of TUVPSG's recognition to include the terms and conditions of TUVPSG's individual scope of recognition. The scope of recognition for TUVPSG is available in the **Federal Register** notice dated July 20, 2001 (66 FR 38032) or at OSHA's informational Web page for TUVPSG's recognition as an NRTL on OSHA's Web site at *http://www.osha.gov/dts/otpca/nrtl/tuvpsg.html*.

Conditions

In addition to those conditions already required by 29 CFR 1910.7, TUVPSG also must abide by the following conditions of the recognition:

1. TUVPSG must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as an NRTL, and provide details of the change(s);

2. TUVPSG must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVPSG must continue to meet the requirements for recognition, including all previously published conditions on TUVPSG's scope of recognition, in all areas for which it has recognition.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to Section 8(g)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657(g)(2)), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on January 27, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2014–01858 Filed 1–29–14; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0043]

TÜV SÜD America, Inc.: Grant of Renewal of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: This notice announces the Occupational Safety and Health Administration's final decision granting renewal of recognition of TÜV SÜD America, Inc., as a Nationally Recognized Testing Laboratory (NRTL) under 29 CFR 1910.7.

DATES: The renewal of recognition becomes effective on January 30, 2014.

FOR FURTHER INFORMATION CONTACT: David W. Johnson, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210, phone (202) 693–2110, or email at *johnson.david.w@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

OSHA recognition of an NRTL signifies that the organization meets the requirements in Section 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification. OSHA maintains an informational Web site for each NRTL that details its scope of recognition available at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

OSHA processes applications by an NRTL for renewal of recognition following requirements in Appendix A to 29 CFR 1910.7. OSHA conducts renewals in accordance with the procedures in 29 CFR 1910.7, App. II.C. In accordance with these procedures, NRTLs submit a renewal request to OSHA not less than nine months or no more than one year before the expiration date of its current recognition. A renewal request includes a request for renewal and any additional information the NRTL wishes to submit to demonstrate its continued compliance with the terms of its recognition and 29 CFR 1910.7. If OSHA has not conducted an on-site assessment of the NRTL headquarters and any key sites within the past 18 to 24 months, it will schedule the necessary on-site assessments prior to the expiration date of the NRTL's recognition. Upon review of the submitted material and, as necessary, the successful completion of the on-site assessment, OSHA announces its preliminary decision to grant or deny renewal in the **Federal Register** and solicits comments from the public. OSHA then publishes a final **Federal Register** notice responding to any comments and renewing the NRTL's recognition for a period of five years, or denying the renewal of recognition.

TÜV SÜD America, Inc. (TUVAM) initially received OSHA recognition as an NRTL on January 25, 2002 (67 FR 3737), for a five-year period ending on January 25, 2007. TUVAM submitted a timely request for renewal, dated March 7, 2006 (see Exhibit OSHA–2007–0043–0005), and retained its recognition pending OSHA's final decision in this renewal process. The current addresses of TUVAM facilities recognized by OSHA and included as part of the renewal request are:

1. TÜV SÜD America, Inc., 10 Technology Drive, Peabody, Massachusetts 01960;
2. TÜV SÜD America, Inc., 10040 Mesa Rim Road, San Diego, California 92121; and
3. TÜV SÜD America, Inc., 1775 Old Highway 8 NW., Suite 104, New Brighton, Minnesota 55112.

OSHA evaluated TUVAM's application for renewal and made a preliminary determination that TUVAM can continue to meet the requirements prescribed by 29 CFR 1910.7 for recognition. OSHA conducted an audit of TUVAM's facilities on August 17, 2012 (Peabody, MA), and April 27, 2012 (San Diego, CA), and found TUVAM to be in conformance with all applicable NRTL requirements. Accordingly, OSHA determined that it did not need to conduct an on-site review of TUVAM's facilities based on its evaluation of TUVAM's application and all other available information.

OSHA published the preliminary notice announcing TUVAM's renewal request in the **Federal Register** on November 4, 2013. The Agency requested comments by November 19, 2013, but received no comments in response to this notice. OSHA now is proceeding with this final notice to grant TUVAM's request for renewal of recognition.

To obtain or review copies of all public documents pertaining to the TUVAM's application, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Docket No. OSHA–2007–0043 contains all materials in the record concerning TUVAM's recognition.

II. Final Decision and Order

Pursuant to the authority granted under 29 CFR 1910.7, OSHA hereby gives notice of the renewal of recognition of TUVAM as an NRTL. OSHA NRTL Program staff reviewed the renewal request for TUVAM and other pertinent information provided by TUVAM. Based on this review of the renewal request for TUVAM and other pertinent information provided by TUVAM, OSHA finds that TUVAM meets the requirements of 29 CFR 1910.7 for renewal of its recognition, subject to the limitation and conditions listed below. OSHA limits the renewal of TUVAM's recognition to include the terms and conditions of TUVAM's individual scope of recognition. The scope of recognition for TUVAM is available in the **Federal Register** notice dated January 25, 2002 (67 FR 3737) or at OSHA's informational Web page for TUVAM's recognition as an NRTL on OSHA's Web site at *http://www.osha.gov/dts/otpca/nrtl/TUVAM.html.*

Conditions

In addition to those conditions already required by 29 CFR 1910.7, TUVAM also must abide by the following conditions of the recognition:

1. TUVAM must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as an NRTL, and provide details of the change(s);

2. TUVAM must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVAM must continue to meet the requirements for recognition, including all previously published conditions on TUVAM's scope of recognition, in all areas for which it has recognition.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to Section 8(g)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657(g)(2)), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on January 27, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2014–01860 Filed 1–29–14; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF MANAGEMENT AND BUDGET

2013 Statutory Pay-as-You-Go Act Annual Report

Authority: 2 U.S.C. 934

AGENCY: Office of Management and Budget (OMB).

ACTION: Notice.

SUMMARY: This report is being published as required by the Statutory Pay-As-You-Go (PAYGO) Act of 2010, 2 U.S.C. 931 et seq. The Act requires that OMB issue (1) an annual report as specified in 2 U.S.C. 934(a) and (2) a sequestration order, if necessary.

FOR FURTHER INFORMATION CONTACT: Patrick Locke. 202–395–3672.

SUPPLEMENTARY INFORMATION: This report and additional information about the PAYGO Act can be found at *http://www.whitehouse.gov/omb/paygo_default.*

Courtney Timberlake,

Assistant Director for Budget.

This Report is being published pursuant to section 5 of the Statutory Pay-As-You-Go (PAYGO) Act of 2010, Public Law 111–139, 124 Stat. 8, 2 U.S.C. 934, which requires that OMB issue an annual PAYGO report, including a sequestration order if necessary, no later than 14 working days after the end of a congressional session.

This Report describes the budgetary effects of all legislation enacted during the first session of the 113th Congress and presents the 5-year and 10-year PAYGO scorecards maintained by OMB. Because neither the 5-year nor 10-year scorecard shows a debit for the budget year, which for purposes of this Report is fiscal year 2014,[1] a sequestration order under subsection 5(b) of the PAYGO Act, 2 U.S.C § 934(b), is not necessary.

No legislation was enacted with an emergency designation under section 4(g) of the PAYGO Act, 2 U.S.C. 933(g), during the first session of the 113th Congress. In addition, the scorecards include no current policy adjustments made under section 4(c) of the PAYGO Act, 2 U.S.C. 933(c), for legislation enacted during the first session of the 113th Congress. The authority for current policy adjustments expired as of December 31, 2011. For these reasons, the Report does not contain any information about emergency legislation or a description of any current policy adjustments.

I. PAYGO Legislation With Budgetary Effects

PAYGO legislation is authorizing legislation that affects direct spending or revenues; and appropriations legislation that affects direct spending in the years beyond the budget year or affects revenues in any year.[2] For a more complete description of the Statutory PAYGO Act, see the OMB Web site, http://www.whitehouse.gov/omb/paygo_description, and Chapter 11, ''Budget Concepts,'' of the *Analytical Perspectives* volume of the 2014 Budget, *http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/concepts.pdf.*

The 5-year PAYGO scorecard shows that PAYGO legislation enacted in the first session of the 113th Congress was estimated to have PAYGO budgetary effects that increased the deficit by an average of $25 million each year from 2014 through 2018.[3] Balances carried over from prior sessions of the Congress more than offset the deficit increases being shown on the 5-year scorecard in years 2014, 2015, and 2017, but would add to the deficit increase in 2016. The 10-year PAYGO scorecard shows that PAYGO legislation for the first session of the 113th Congress increased the deficit by an average of $7 million each year from 2014 through 2023. Balances from prior sessions more than offset the deficit increases in years 2014 through 2022.

In the first session of the 113th Congress, 21 laws were enacted that were determined to constitute PAYGO legislation. Of the 21 enacted PAYGO laws, 9 laws were estimated to have PAYGO budgetary effects (costs or savings) in excess of $500,000 over one or both of the 5-year or 10-year PAYGO windows. These were:

- Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113–6;
- Bonneville Unit Clean Hydropower Facilitation Act, Public Law 113–20;
- Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act, Public Law 113–24;
- Department of Veterans Affairs Expiring Authorities Act of 2013, Public Law 113–37;
- Helium Stewardship Act of 2013, Public Law 113–40;
- An Act to extend the period during which Iraqis who were employed by the United States Government in Iraq may be granted special immigrant status and to temporarily increase the fee or surcharge for processing machine-readable nonimmigrant visas, Public Law 113–42;
- Congressional Award Program Reauthorization Act of 2013;
- Continuing Appropriations Act, 2014, Public Law 113–46; and
- National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66.

Finally, in addition to the laws identified above, 12 laws enacted in this session were estimated to have negligible budgetary effects—costs or savings of less than $500,000 over both the 5-year and 10-year PAYGO windows.

II. Budgetary Effects Excluded From the Scorecard Balances

Two laws enacted in the first session of the 113th Congress had estimated budgetary effects on direct spending and revenues that are not included in the calculations for the PAYGO scorecards due to exclusions required by law. Public Law 113–28, the Bipartisan Student Loan Certainty Act of 2013, and Public Law 113–67, the Bipartisan

[1] References to years on the PAYGO scorecards are to fiscal years.

[2] Provisions in appropriations acts that affect direct spending in the years beyond the budget year (also known as ''outyears'') or affect revenues in any year are scorable for the purposes of the PAYGO scorecards except if the provisions produce outlay changes that net to zero over the current year, budget year, and the four subsequent years. As specified in section 3 of the Statutory PAYGO Act, off-budget effects are not counted as budgetary effects. Off-budget effects refer to effects on the Social Security trust funds (Old-Age and Survivors Insurance and Disability Insurance) and the Postal Service.

[3] As provided in section 4(d) of the PAYGO Act, 2 U.S.C. 933(d), budgetary effects on the PAYGO scorecards are based on congressional estimates for bills including a reference to a congressional estimate in the Congressional Record, and for which such a reference is indeed present in the Record. Absent such a congressional cost estimate, OMB is required to use its own estimate for the scorecard. None of the bills enacted during the first session of the 113th Congress had such a congressional estimate and therefore OMB was required to provide an estimate for all PAYGO laws enacted during the session.

Budget Act of 2013 and Pathway for SGR Reform Act of 2013,[4] contain provisions that state, ''[t]he budgetary effects of this Act shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.'' For this reason, the budgetary effects of these laws are not included in the PAYGO scorecards.

III. PAYGO Scorecards

STATUTORY PAY-AS-YOU-GO SCORECARDS

[In millions of dollars, negative amounts portray decreases in deficits]

	2014	2015	2016	2017	2018
First Session of the 113th Congress	25	25	25	25	25
Balances from Previous Sessions	*−9,994*	*−9,994*	*1,041*	*−839*	*0*
Five-year PAYGO Scorecard	−9,969	−9,969	1,066	−814	25

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
First Session of the 113th Congress	7	7	7	7	7	7	7	7	7	7
Balances from Previous Sessions	*−8,215*	*−8,215*	*−8,215*	*−8,215*	*−8,215*	*−8,215*	*−8,215*	*−1,844*	*−1,134*	*0*
Ten-year PAYGO Scorecard	−8,209	−8,209	−8,209	−8,209	−8,209	−8,209	−8,209	−1,838	−1,128	7

The total net budgetary effects of all PAYGO legislation enacted during the first session of the 113th Congress on the five-year scorecard increase the deficit by $125 million. This total is averaged over the years 2014 to 2018 on the 5-year PAYGO scorecard, resulting in $25 million in each year. Balances carried over from prior sessions of the Congress create savings in 2014 and 2015, resulting in total savings of $9,969 million in each of those years. However, the balance carried over for 2016 increases the deficit by $1,041 million, which results in a net cost on the 5-year PAYGO scorecard in 2016 of $1,066 million. Balances in 2017 carried over from the prior session added savings to the scorecard which resulted in net savings in that year of $814 million. The five-year PAYGO window extended only through 2017 in the second session of the 112th Congress, so there were no five-year scorecard balances in 2018 to carry over.

The total 10-year net impact of legislation enacted during the first session of the 113th Congress had costs of $65 million. The 10-year PAYGO scorecard shows the total net impact averaged over the 10-year period, resulting in $7 million in costs every year. Balances from prior sessions added savings to the scorecard which resulted in net savings of $8,209 million in 2014 through 2020, $1,838 million in 2021, and $1,128 million in 2022. The 10-year PAYGO window extended only through 2022 in the second session of the 112th Congress, so there were no 10-year scorecard balances in 2023 to carry over.

IV. Sequestration Order

As shown on the scorecards, the budgetary effects of PAYGO legislation enacted in the first session of the 113th Congress, combined with the balances left on the scorecard from previous sessions of the Congress, resulted in net savings on both the 5-year and the 10-year scorecard in the budget year, which is 2014 for the purposes of this Report. Because the costs for the budget year, as shown on the scorecards, do not exceed savings for the budget year, there is no ''debit'' on either scorecard under section 3 of the PAYGO Act, 2 U.S.C. 932, and there is no need for a sequestration order.

The savings shown on the scorecards for 2014 will be removed from the scorecards that are used to record the budgetary effects of PAYGO legislation enacted in the second session of the 113th Congress. The totals shown in 2015 through 2023 will remain on the scorecards and will be used in determining whether a sequestration order will be necessary at the end of future sessions of the Congress.

[FR Doc. 2014–01805 Filed 1–29–14; 8:45 am]

BILLING CODE P

[4] The official title of Public Law 113–67, ''Making continuing appropriations for fiscal year 2014, and for other purposes,'' refers to the bill's original provisions before it was amended to substitute the provisions of the Bipartisan Budget Act and the Pathway for SGR Reform Act.

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for Reinstatement, With Change, of a Previously Approved Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA intends to submit the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public. Contact information is collected from corporate credit unions to allow for supervision and communication.

DATES: Comments will be accepted until March 31, 2014.

ADDRESSES: Interested parties are invited to submit written comments to the NCUA Contact and the OMB Reviewer listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, Fax No. 703–837–2861, Email: *OCIOPRA@ncua.gov*.

OMB Reviewer: Office of Management and Budget, ATTN: Desk Officer for the National Credit Union Administration, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information, a copy of the information collection request, or a copy of submitted comments should be directed to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

SUPPLEMENTARY INFORMATION:

I. Abstract and Request for Comments

NCUA is amending/reinstating the collection for 3133–0053. The Federal Credit Union Act, 12 U.S.C. 1762, specifically requires a federal credit union to report the identity of credit union officials. Section 748.1(a) of the NCUA Rules and Regulations requires federally insured credit unions to submit a Report of Officials annually to NCUA containing the annual certification of compliance with security requirements. The branch information is requested under the authority of Section 741.6 of the NCUA Rules and Regulations. This particular collection of information is for the Report of Officials of corporate credit unions. The information is used for the supervision of and communication with corporate credit unions.

The NCUA requests that you send your comments on this collection to the location listed in the addresses section. Your comments should address: (a) The necessity of the information collection for the proper performance of NCUA, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility, and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents such as through the use of automated collection techniques or other forms of information technology. It is NCUA's policy to make all comments available to the public for review.

II. Data

Title: Corporate Report of Officials.

OMB Number: 3133–0053.

Form Number:

Type of Review: Reinstatement, with change, of a previously approved collection.

Description: NCUA utilizes the information to collect contact information for corporate credit unions.

Respondents: Corporate credit unions, or ''banker's banks'' for natural person credit unions.

Estimated No. of Respondents/Record keepers: 15.

Estimated Burden Hours Per Response: 1 hour.

Frequency of Response: Annual.

Estimated Total Annual Burden Hours: 15 hours.

Estimated Total Annual Cost: $750.

By the National Credit Union Administration Board on January 17, 2014.

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2014–01904 Filed 1–29–14; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities; Meeting of the Arts and Artifacts Indemnity Panel Advisory Committee

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts Domestic Indemnity Panel. The purpose of the meeting is for panel review, discussion, evaluation, and recommendation on applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities, for exhibitions beginning on or after April 1, 2014.

DATES: The meeting will be held on Wednesday, February 12, 2014, from 9:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Old Post Office Building, 1100 Pennsylvania Ave. NW., Washington, DC 20506, in Room 730.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Committee Management Officer, 1100 Pennsylvania Avenue NW., Washington, DC 20506, or call (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the National Endowment for the Humanities' TDD terminal at (202) 606–8282.

SUPPLEMENTARY INFORMATION: Because the meeting will consider proprietary financial and commercial data provided in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified, and the methods of transportation and security measures confidential, the meeting will be closed to the public pursuant section 552b(c)(4) of Title 5 U.S.C. I have made this determination under the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated July 19, 1993.

Dated: January 14, 2014.

Lisette Voyatzis,

Committee Management Officer.

[FR Doc. 2014–00879 Filed 1–29–14; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting; National Science Board

The National Science Board's Executive Committee, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business, as follows:

TIME AND DATE: Friday, January 31, 2014, from 1 p.m. to 2 p.m. EDT.

PLACE: This meeting will be held by teleconference at the National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. A public listening line will be available. Members of the public must contact the Board Office [call 703–292–7000 or send an email message to *nationalsciencebrd@nsf.gov*] at least 24 hours prior to the teleconference for the public listening number.

STATUS: Open.

MATTERS TO BE CONSIDERED: (1) Chairman's opening remarks; and (2) Discussion of agenda for February 2014 meeting.

CONTACT PERSON FOR MORE INFORMATION: Please refer to the National Science Board Web site *www.nsf.gov/nsb* for additional information. Meeting information and updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/*. Point of contact for this meeting is: Peter Arzberger, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–8000.

Ann Bushmiller,

Senior Counsel to the National Science Board.

[FR Doc. 2014–01994 Filed 1–28–14; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–321, 50–366; NRC–2008–0585]

Southern Nuclear Operating Company, Inc.; Edwin I. Hatch Nuclear Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from its regulations for Renewed Facility Operating License Nos. NPF–5 and DPR–57, issued to Southern Nuclear Operating Company (SNC), for operation of the Edwin I. Hatch Nuclear Plant, Units 1 and 2 (HNP), located in Appling County, Georgia. Based on the results of the environmental assessment, the NRC is issuing a finding of no significant impact.

ADDRESSES: Please refer to Docket ID NRC–2008–0585 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0585. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Proposed Exemption to 10 CFR 50.46 and 10 CFR Part 50, Appendix K to Allow GNF-Ziron Fuel Cladding, dated April 23, 2013, is available in ADAMS under Accession No. ML13115A480.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Robert E. Martin, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1493; email: *Robert.Martin@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering issuance of an exemption from 10 CFR 50.46 of Title 10 of the *Code of Federal Regulations* (10 CFR) for Renewed Facility Operating License Nos. NPF–5 and DPR–57, issued to Southern Nuclear Operating Company (SNC), for operation of the Edwin I. Hatch Nuclear Plant, Units 1 and 2 (HNP), located in Appling County, Georgia. Therefore, as required by 10 CFR 51.21, the NRC performed an environmental assessment. Based on the results of the environmental assessment, the NRC is issuing a finding of no significant impact.

II. Environmental Assessment

Identification of the Proposed Action

The proposed action would allow the use of Ziron fuel cladding in two GE14 lead test fuel assemblies (LTAs) in either HNP, Unit 1 or Unit 2, for one or more additional fuel cycles, up to the standard GE14 peak pellet exposure limit. The proposed action is described in the licensee's application dated April 23, 2013. The proposed action is similar to an action previously approved by the NRC staff (staff) wherein, on November 7, 2008 (ADAMS Accession No. ML082950149), the NRC staff issued an exemption enabling the use of two GE14 LTAs in Unit 2 of the HNP for fuel cycles 21, 22 and 23. The Environmental Assessment and Finding of No Significant Impact for that action was published in the **Federal Register** on November 3, 2008 (73 FR 65415). Subsequently, SNC decided not to use those LTAs in Hatch Unit 2 cycle 23. SNC now wishes to continue with irradiation of the two LTAs up to the standard GE14 peak pellet exposure limit, and since the exemption of November 7, 2008, specifically addressed only HNP Unit 2 in fuel cycles 21, 22 and 23, SNC must apply for a further exemption to enable further irradiation of the two LTAs in either of the HNP reactors for one or more additional cycles, up to GNF's approved peak pellet exposure.

The Need for the Proposed Action

The proposed action would allow the use of two LTAs that will include some fuel rods manufactured with a cladding material, called GNF-Ziron, which is similar in composition to Zircaloy-2, but contains a slightly higher iron content than specified in ASTM B350. Irradiation of LTAs with GNF-Ziron fuel rods will enable SNC to acquire in-reactor operating experience with this material. Pursuant to 10 CFR 50.12, ''Specific exemptions,'' the licensee has requested an exemption from 10 CFR 50.46, ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' that requires, among other items, that ''[e]ach boiling or pressurized light-water nuclear power reactor fueled with uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding must be provided with an emergency core cooling system (ECCS) that must be designed so that its calculated cooling performance following postulated loss-of-coolant accidents conforms to the criteria set forth in paragraph (b) of this section.'' Appendix K to 10 CFR Part 50, ''ECCS Evaluation Models,'' requires, among other items, that the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation. The regulations at 10 CFR 50.46 and 10 CFR Part 50, Appendix K, make no provisions for use of fuel rods clad in a material other than zircaloy or ZIRLO. The proposed action would allow the licensee to irradiate a small number of LTAs using fuel rods clad with Ziron alloy either in HNP Unit 1 or Unit 2 up to the standard GE14 peak pellet exposure. Since the material specifications of the Ziron alloy differ from the specification for zircaloy or ZIRLO, a plant-specific exemption is required to support the use of the LTAs.

Environmental Impacts of the Proposed Action

The NRC has completed its safety evaluation of the proposed action and concludes that the application of 10 CFR 50.46 and Appendix K to 10 CFR Part 50, is not necessary to achieve the underlying purpose of the rule.

The details of the NRC staff safety evaluation will be provided in the exemption issued as part of the letter to the licensee approving the exemption to the regulations.

The staff has concluded that such a change would not adversely affect plant safety, and would have no adverse effect on the probability of any accident. For accidents that involve damage or melting of the fuel in the reactor core,

the fuel rod integrity of GNF-Ziron cladded fuel has been shown to be similar to zircaloy cladded fuel; therefore, the consequences of an accident will not be affected. For accidents in which the core remains intact, the use of GNF-Ziron cladding will not have a significant effect on the mix of fission products that could be released in the event of a serious accident; thus, the previously analyzed accident dose consequences remain bounding. Regulatory limits on radiological effluent releases are independent of the type of fuel cladding used. The requirements of 10 CFR 50.36a, Appendix I to 10 CFR Part 50, and 40 CFR Part 190, as well as the plant's Technical Specifications ensure that the release of radioactive gaseous, liquid, and solid waste to unrestricted areas are kept to ''as low as is reasonably achievable'' (ALARA) levels. The licensee's radioactive waste processing system will collect, control, process to reduce the amount of radioactivity, and discharge the waste in accordance with regulatory limits. Therefore, the NRC staff concluded that during routine operations, there will be no significant increase of radiological effluents released into the environment as a result of the proposed exemption request. No significant increase in the allowable individual occupational radiation exposure will occur. The impact to workers is not expected to change because radiation exposure will be controlled in accordance with the licensee's radiation protection program, the ALARA program, in-plant shielding, the use of temporary shielding, and engineering controls. The use of GNF-Ziron fuel rods will not change the potential environmental impacts of incident-free transportation of spent nuclear fuel provided the shipping casks are maintained and transported within the Department of Transportation and NRC's regulations. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action would not change the types or amounts of non-radiological plant effluents. Therefore the proposed action would not result in any foreseeable impacts to land, air, or water resources, including impacts to biota because there would be no change in effluents or emissions into the environment. In addition, there are no known socioeconomic or environmental justice impacts associated with such proposed action because there would be no increase or change in effluents or emissions into the environment that would disproportionately or adversely affect the minority or low income populations. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in NUREG–1437, Supplement 4, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, regarding the Edwin I. Hatch Nuclear Plant, Units 1 and 2, dated May 31, 2001.

Agencies and Persons Consulted

On August 13, 2013, the NRC staff notified the State official of Georgia, Mr. Chuck Mueller, of the Department of Natural Resources, regarding the environmental impact of the proposed action. The State official had no comments.

III. Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated April 23, 2013.

Dated at Rockville, Maryland, this 23rd day of January, 2014.

For the Nuclear Regulatory Commission.

Robert Pascarelli,

Chief, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2014–01880 Filed 1–29–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Planning and Procedures

Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on February 4, 2014, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Tuesday, February 4, 2014–12:00 p.m. Until 1:00 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on November 8, 2013 (78 CFR 67205–67206).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the identified DFO. Moreover, in view of the

possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: January 23, 2014.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2014–01878 Filed 1–29–14; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, February 12, 2014, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.* A period for public comment will be offered following consideration of the last numbered item in the open portion.

MATTERS TO BE CONSIDERED: The agenda for the Commission's February 12, 2014 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report from the Chairman on the publication of the Annual Report and the status of the Annual Compliance Determination.
2. Report from the Office of Public Affairs and Government Relations on legislative activities and the handling of rate and service inquiries from the public.
3. Report from the Office of General Counsel on the status of Commission dockets.
4. Report from the Office of Accountability and Compliance.
5. Report from the Office of the Secretary and Administration.

PORTION CLOSED TO THE PUBLIC:

6. Discussion of pending litigation.

CONTACT PERSON FOR MORE INFORMATION: Brian Corcoran, Acting General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, changes in date or time of the meeting, access for handicapped or disabled persons, the audiocast, or similar matters). The Commission's Web site may also provide information on changes in the date or time of the meeting.

By direction of the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2014–02085 Filed 1–28–14; 4:15 pm]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 206(4)–6; OMB Control No. 3235–0571, SEC File No. 270–513.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

The title for the collection of information is ''Rule 206(4)–6'' under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) (''Advisers Act'') and the collection has been approved under OMB Control No. 3235–0571. The Commission adopted rule 206(4)–6 (17 CFR 275.206(4)–6), the proxy voting rule, to address an investment adviser's fiduciary obligation to clients who have given the adviser authority to vote their securities. Under the rule, an investment adviser that exercises voting authority over client securities is required to: (i) Adopt and implement policies and procedures that are reasonably designed to ensure that the adviser votes securities in the best interest of clients, including procedures to address any material conflict that may arise between the interest of the adviser and the client; (ii) disclose to clients how they may obtain information on how the adviser has voted with respect to their securities; and (iii) describe to clients the adviser's proxy voting policies and procedures and, on request, furnish a copy of the policies and procedures to the requesting client. The rule is designed to assure that advisers that vote proxies for their clients vote those proxies in their clients' best interest and provide clients with information about how their proxies were voted.

Rule 206(4)–6 contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The collection is mandatory and responses to the disclosure requirement are not kept confidential.

The respondents are investment advisers registered with the Commission that vote proxies with respect to clients' securities. Advisory clients of these investment advisers use the information required by the rule to assess investment advisers' proxy voting policies and procedures and to monitor the advisers' performance of their proxy voting activities. The information required by Rule 206(4)–6 also is used by the Commission staff in its examination and oversight program. Without the information collected under the rule, advisory clients would not have information they need to assess the adviser's services and monitor the adviser's handling of their accounts, and the Commission would be less efficient and effective in its programs.

The estimated number of investment advisers subject to the collection of information requirements under the rule is 9,650. It is estimated that each of these advisers is required to spend on average 10 hours annually documenting its proxy voting procedures under the requirements of the rule, for a total burden of 96,500 hours. We further estimate that on average, approximately 139 clients of each adviser would request copies of the underlying policies and procedures. We estimate that it would take these advisers 0.1 hours per client to deliver copies of the policies and procedures, for a total burden of 134,135 hours. Accordingly, we estimate that rule 206(4)–6 results in an annual aggregate burden of collection for SEC-registered investment advisers of a total of 230,635 hours.

Records related to an adviser's proxy voting policies and procedures and proxy voting history are separately required under the Advisers Act recordkeeping rule 204–2 (17 CFR 275.204–2). The standard retention period required for books and records

under rule 204–2 is five years, in an easily accessible place, the first two years in an appropriate office of the investment adviser. OMB has previously approved the collection with this retention period.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01816 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 18f–1 and Form N–18f–1; OMB Control No. 3235–0211, SEC File No. 270–187.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 18f–1 (17 CFR 270.18f–1) enables a registered open-end management investment company (''fund'') that may redeem its securities in-kind, by making a one-time election, to commit to make cash redemptions pursuant to certain requirements without violating section 18(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–18(f)). A fund relying on the rule must file Form N–18F–1 (17 CFR 274.51) to notify the Commission of this election. The Commission staff estimates that 26 funds file Form N–18F–1 annually, and that each response takes one hour. Based on these estimates, the total annual burden hours associated with the rule is estimated to be 26 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. The collection of information required by rule 18f–1 is necessary to obtain the benefits of the rule. Responses to the collection of information will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01815 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 17a–2, SEC File No. 270–189 OMB Control No. 3235–0201.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 17a–2 (17 CFR 240.17a–2), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17a–2 requires underwriters to maintain information regarding stabilizing activities conducted in accordance with Rule 104 of Regulation M. The collections of information under Regulation M and Rule 17a–2 are necessary for covered persons to obtain certain benefits or to comply with certain requirements. The collections of information are necessary to provide the Commission with information regarding syndicate covering transactions and penalty bids. The Commission may review this information during periodic examinations or with respect to investigations. Except for the information required to be kept under Rule 104(i) (17 CFR 242.104(i)) and Rule 17a–2(c), none of the information required to be collected or disclosed for PRA purposes will be kept confidential. The recordkeeping requirement of Rule 17a–2 requires the information be maintained in a separate file, or in a separately retrievable format, for a period of three years, the first two years in an easily accessible place, consistent with the requirements of Exchange Act Rule 17a–4(f) (17 CFR 240.17a–4(f)).

There are approximately 795 respondents per year that require an aggregate total of 3,975 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 5 hours to complete. Thus, the total compliance burden per year is 3,975 burden hours. The total internal compliance cost for the respondents is approximately $250,425.00, resulting in a cost of compliance for each respondent per response of approximately $315.00 (i.e., $250,425.00/795 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site: *http://www.reginfo.gov.* Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission,

c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or by sending an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01814 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 12d3–1; OMB Control No. 3235–0561, SEC File No. 270–504 .

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Section 12(d)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a) generally prohibits registered investment companies (''funds''), and companies controlled by funds, from purchasing securities issued by a registered investment adviser, broker, dealer, or underwriter (''securities-related businesses''). Rule 12d3–1 (''Exemption of acquisitions of securities issued by persons engaged in securities related businesses'' (17 CFR 270.12d3–1)) permits a fund to invest up to five percent of its assets in securities of an issuer deriving more than fifteen percent of its gross revenues from securities-related businesses, but a fund may not rely on rule 12d3–1 to acquire securities of its own investment adviser or any affiliated person of its own investment adviser.

A fund may, however, rely on an exemption in rule 12d3–1 to acquire securities issued by its subadvisers in circumstances in which the subadviser would have little ability to take advantage of the fund, because it is not in a position to direct the fund's securities purchases. The exemption in rule 12d3–1 is available if (i) the subadviser is not, and is not an affiliated person of, an investment adviser that provides advice with respect to the portion of the fund that is acquiring the securities, and (ii) the advisory contracts of the subadviser, and any subadviser that is advising the purchasing portion of the fund, prohibit them from consulting with each other concerning securities transactions of the fund, and limit their responsibility in providing advice to providing advice with respect to discrete portions of the fund's portfolio.

Based on an analysis of fund filings, the staff estimates that approximately 775 fund portfolios enter into subadvisory agreements each year.[1] Based on discussions with industry representatives, the staff estimates that it will require approximately 3 attorney hours to draft and execute additional clauses in new subadvisory contracts in order for funds and subadvisers to be able to rely on the exemptions in rule 12d3–1. Because these additional clauses are identical to the clauses that a fund would need to insert in their subadvisory contracts to rely on rules 10f–3, 17a–10, and 17e–1 and because we believe that funds that use one such rule generally use all of these rules, we apportion this 3 hour time burden equally to all four rules. Therefore, we estimate that the burden allocated to rule 12d3–1 for this contract change would be 0.75 hours.[2] Assuming that all 775 funds that enter into new subadvisory contracts each year make the modification to their contract required by the rule, we estimate that the rule's contract modification requirement will result in 581 burden hours annually.[3]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is necessary to obtain the benefit of relying on rule 12d3–1. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following Web site, www.reginfo.gov. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01813 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

[1] Based on information in Commission filings, we estimate that 44.4 percent of funds are advised by subadvisers.

[2] This estimate is based on the following calculation (3 hours ÷ 4 rules = .75 hours).

[3] This estimate is based on the following calculation: (0.75 hours × 775 portfolios = 581 burden hours).

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Form N–17D–1; OMB Control No. 3235–0229, SEC File No. 270–231.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l–3520), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Section 17(d) (15 U.S.C. 80a–17(d)) of the Investment Company Act of 1940 (''Act'') authorizes the Commission to adopt rules that protect funds and their security holders from overreaching by affiliated persons when the fund and the affiliated person participate in any joint enterprise or other joint arrangement or profit-sharing plan. Rule 17d–1 under the Act (17 CFR 270.17d–1) prohibits funds and their affiliated persons from participating in a joint enterprise, unless an application regarding the transaction has been filed with and approved by the Commission. Paragraph (d)(3) of the rule provides an exemption from this requirement for any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing (''investments'') made by a small business investment company (''SBIC'') and an affiliated bank, provided that reports about the

investments are made on forms the Commission may prescribe. Rule 17d–2 (17 CFR 270.17d–2) designates Form N–17D–1 (17 CFR 274.200) (''form'') as the form for reports required by rule 17d–1.

SBICs and their affiliated banks use form N–17D–1 to report any contemporaneous investments in a small business concern. The form provides shareholders and persons seeking to make an informed decision about investing in an SBIC an opportunity to learn about transactions of the SBIC that have the potential for self dealing and other forms of overreaching by affiliated persons at the expense of shareholders.

Form N–17D–1 requires SBICs and their affiliated banks to report identifying information about the small business concern and the affiliated bank. The report must include, among other things, the SBIC's and affiliated bank's outstanding investments in the small business concern, the use of the proceeds of the investments made during the reporting period, any changes in the nature and amount of the affiliated bank's investment, the name of any affiliated person of the SBIC or the affiliated bank (or any affiliated person of the affiliated person of the SBIC or the affiliated bank) who has any interest in the transactions, the basis of the affiliation, the nature of the interest, and the consideration the affiliated person has received or will receive.

Up to three SBICs may file the form in any year.[1] The Commission estimates the burden of filling out the form is approximately one hour per response and would likely be completed by an accountant or other professional. Based on past filings, the Commission estimates that no more than one SBIC is likely to use the form each year. Most of the information requested on the form should be readily available to the SBIC or the affiliated bank in records kept in the ordinary course of business, or with respect to the SBIC, pursuant to the recordkeeping requirements under the Act. Commission staff estimates that it should take approximately one hour for an accountant or other professional to complete the form.[2] The estimated total annual burden of filling out the form is 1 hour, at an estimated total annual cost of $193.[3] The Commission will not keep responses on Form N–17D–1 confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2014.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01817 Filed 1–29–14; 8:45 am]

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[1] As of September 23, 2013, three SBICs were registered with the Commission.

[2] This estimate of hours is based on past conversations with representatives of SBICs and accountants that have filed the form.

[3] Commission staff estimates that the annual burden would be incurred by a senior accountant with an average hourly wage rate of $193 per hour. *See* Securities Industry and Financial Markets Association, Report on Management and Professional Earnings in the Securities Industry 2012, modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71396; File No. SR–OCC–2013–18]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Concerning the Governance Committee Charter

January 24, 2014.

I. Introduction

On November 26, 2013, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2013–18 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on December 16, 2013.[3] The Commission received no comment letters on the proposed rule change. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

This proposed rule change concerns OCC's Board of Directors (''Board'') formation of a Governance Committee (''GC'') and the GC Charter. The stated purpose of the GC is to review the overall corporate governance of OCC and recommend improvements to OCC's Board. The GC Charter describes the role the GC plays in assisting the Board in fulfilling its responsibilities, as described in OCC's By-Laws and Rules, as well as specifying the policies and procedures governing the membership and organization, scope of authority, and specific functions and responsibilities of the GC. In addition, the guidelines for the composition of the GC as well as the policies regarding its meeting schedule, quorum rules, minute-keeping and reporting requirements are set forth in the GC Charter and conform to applicable requirements specified in OCC's By-Laws and Rules.

The GC is composed of not fewer than five Directors with at least one Public Director, one Exchange Director, and one Member Director. Management Directors will not be members of the GC. The Board will designate a GC Chair and if the Chair is not present at a meeting, the members who are present will designate a member to serve as the Acting Chair. The GC will meet at least four times a year and a majority of the GC members constitutes a quorum. The GC is permitted to call executive sessions from which guests of the GC may be excluded, and GC members are permitted to participate in all meetings by conference telephone call or other means of communication that permit all meeting participants to hear each other. The GC Chair, or the Chair's designee, will report regularly to the Board on the GC's activities.

The GC Charter sets forth certain functions and responsibilities for the GC including, but not limited to, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4. OCC also filed the proposed change as an advance notice under Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act titled the Payment, Clearing, and Settlement Supervision Act of 2010. 12 U.S.C. 5465(e)(1). The Commission published notice of the advance notice on December 16, 2013. *See* Release No. 34–71803 (Dec. 16, 2013), 78 FR 77181 (Dec. 20, 2013) (SR–OCC–2013–807).

[3] *See* Securities Exchange Act Release No. 71030 (Dec. 11, 2013), 78 FR 76182 (Dec. 16, 2013) (SR–OCC–2013–18).

following: review the composition of the Board as a whole, including the Board's balance of participant and non-participant directors, business specialization, technical skills, diversity and other desired qualifications; review the Board's Charter for consistency with regulatory requirements, transparency of the governance process and other sound governance practice and recommend changes to the Board, where appropriate; review the committee structure of the Board, including the GC, and recommend changes to the Board, where appropriate; review OCC's policies and procedures for identifying and reviewing Board nominee candidates, including the criteria for Board nominees; develop and recommend to the Board a periodic process of self-evaluation of the role and performance of the Board, its committees and management in the governance of OCC; review OCC's policies on conflicts of interest of directors, including the OCC Directors Code of Conduct and recommend changes, where appropriate; and review OCC's new director orientation program as well as OCC's training and education programs for Board members and recommend changes, where appropriate. In addition to the foregoing, the GC may undertake other activities, as appropriate, or as may be delegated to it by the Board. In discharging its role, the GC shall confer with management and other employees of OCC to the extent the GC deems it necessary to fulfill its duties.[4]

III. Discussion

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act.[5] Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to protect investors and the public interest.[6] Rule 17Ad–22(d)(8) requires clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act.[7]

The Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act and Rule 17Ad–22(d)(8) thereunder. By reviewing and recommending improvements to OCC's governance structure, the GC and the GC Charter may help ensure that OCC's governance structure is designed to protect investors and the public interest. In addition, by way of clarifying the duties and operations of the GC the GC Charter may help OCC establish, implement, maintain, and enforce policies and procedures reasonably designed to have governance arrangements that are clear and transparent.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[8] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–OCC–2013–18) be and hereby is *approved.*[10]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01812 Filed 1–29–14; 8:45 am]

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[4] The GC, subject to the approval of the Board, is permitted to hire specialists or rely on outside advisors or specialists to assist it in carrying out the GC's activities. The GC has the authority to approve the fees and retention terms of such advisors and specialists.

[5] 15 U.S.C. 78s(b)(2)(C).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 17 CFR 240.17Ad–22(d)(8).

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78s(b)(2).

[10] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71394; File No. SR–NYSEArca–2014–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to a Corporate Action in Which Its Indirect Parent, NYSE Euronext Holdings LLC, Will Become a Wholly Owned Subsidiary of IntercontinentalExchange, Inc.

January 24, 2014.

Pursuant to Section 19(b)(1)[1] of the U.S. Securities Exchange Act of 1934, as amended (the ''Exchange Act''), and Rule 19b–4 thereunder,[2] notice is hereby given that on January 22, 2014, NYSE Arca, Inc. (''NYSE Arca'') filed with the U.S. Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared substantially by NYSE Arca. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

A. Overview of the Proposed Merger

NYSE Arca, a Delaware corporation, registered national securities exchange and self-regulatory organization, is submitting this rule filing (the ''*Proposed Rule Change*'') to the U.S. Securities and Exchange Commission (the ''Commission'') in connection with the contribution by IntercontinentalExchange Group, Inc., a Delaware corporation (''*ICE Group*''), of its 100% membership interest in NYSE Euronext Holdings LLC, a Delaware limited liability company (''*NYX Holdings*''), which is an indirect owner of a 100% interest in NYSE Arca, to another wholly owned subsidiary of ICE Group, IntercontinentalExchange, Inc., a Delaware corporation (''*ICE Inc.*'').

NYX Holdings owns 100% of the equity interest of NYSE Group, Inc., a Delaware corporation (''*NYSE Group*''), which in turn directly or indirectly owns (1) 100% of the equity interest of three registered national securities exchanges and self-regulatory organizations (together, the ''*NYSE Exchanges*'')—the New York Stock Exchange, LLC (the ''Exchange''), NYSE Arca, and NYSE MKT LLC (''*NYSE MKT*'')—and (2) 100% of the equity interest of NYSE Market (DE), Inc. (''*NYSE Market*''), NYSE Regulation, Inc. (''*NYSE Regulation*''), NYSE Arca L.L.C., NYSE Arca Equities, Inc. (''*NYSE Arca Equities*'') and NYSE Amex Options LLC (''*NYSE Amex Options*'') (the NYSE Exchanges, together with (x) NYSE Market, NYSE Regulation, NYSE Arca L.L.C., NYSE Arca Equities and NYSE Amex Options and (y) any similar U.S. regulated entity acquired, owned or created after the date hereof, the ''*U.S. Regulated Subsidiaries*'' and each, a ''*U.S. Regulated Subsidiary*''). Each of the Exchange and NYSE MKT will be separately filing a proposed rule change in connection with the matters addressed herein that will be substantially the same as the Proposed Rule Change.

Upon completion of ICE Group's contribution to ICE Inc. of 100% of NYX Holdings (the ''*Transfer*''), each U.S. Regulated Subsidiary will become an

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

indirect wholly owned subsidiary of ICE Inc. ICE Inc. will remain a direct wholly owned subsidiary of ICE Group, a public company that is listed on the Exchange. The Transfer is strictly an internal reorganization that does not affect the interests of ICE Group's stockholders. The Transfer will not affect the operation of the U.S. Regulated Subsidiaries.

The Transfer is part of the process pursuant to which ICE Group will prepare for the previously announced sale of the continental European cash equity platforms and the derivatives trading on them (the ''*Euronext Sale*'') currently owned by Euronext N.V., a Dutch company with limited liability (''*Euronext*'') and a wholly owned subsidiary of ICE Group. The Transfer also will facilitate the transitioning of the derivatives businesses of another current subsidiary of Euronext, Liffe Administration and Management (''*LAM*''), to ICE Futures Europe, a subsidiary of ICE Inc., and will enable ICE Inc. to continue in compliance with certain debt covenants after the Euronext Sale. (The transitioning of the derivatives business of LAM is subject to regulatory approval in the United Kingdom.)

B. Summary of Proposed Rule Change

NYSE Arca is proposing that, in connection with the Transfer, the Commission approve the organizational documents of ICE Inc. and amendments to the Amended and Restated Limited Liability Company Agreement of NYX Holdings (''*NYX Holdings Operating Agreement*'') and the Amended and Restated Bylaws of ICE Group (''*ICE Group Bylaws*''). The Proposed Rule Change is summarized as follows:

Certificate of Incorporation and Bylaws of ICE Inc. ICE Inc. would take appropriate steps to incorporate voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries. Specifically, the Fifth Amended and Restated Certificate of Incorporation of ICE Inc. (the ''*ICE Inc. Certificate*'') [3] and the Second Amended and Restated Bylaws of ICE Inc. (the ''*ICE Inc. Bylaws*'') [4] would contain provisions to incorporate these concepts with respect to itself, as well as its directors, officers, employees and agents (as applicable):

• *Voting and Ownership Restrictions in the ICE Inc. Certificate.* The ICE Inc. Certificate would contain voting and ownership restrictions that will take effect only in the event ICE Group does not hold all of the issued and outstanding shares of stock of ICE Inc. The ICE Inc. Certificate would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cast more than 10% of the then outstanding votes entitled to be cast on a matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes entitled to be cast on a matter. The ICE Inc. Certificate would provide that ICE Inc. will be required to disregard any votes purported to be cast in excess of the voting restriction. In the event that any person(s) exceeds the ownership restrictions, it will be obligated to sell promptly, and ICE Inc. will be obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding. The ICE Inc. board of directors may waive the voting and ownership restrictions if it makes certain determinations and expressly resolves to permit the voting and ownership that is subject to such restrictions, and such resolutions have been filed with, and approved by, the Commission under Section 19(b) of the U.S. Securities Exchange Act of 1934, as amended (together, with the rules promulgated thereunder, the ''Exchange Act'') and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority. The ICE Inc. Certificate further provides that the board of directors may not approve either voting or ownership rights in excess of a 20% threshold with respect to any person that is a Member of the Exchange, (an ''*NYSE Member*''), a Member of NYSE MKT (including any person who is a related person of such member, a ''*NYSE MKT Member*''), an ETP Holder of NYSE Arca Equities (an ''*ETP Holder*''), or an OTP Holder or OTP Firm of NYSE Arca, (an ''*OTP Holder*'' and ''*OTP Firm,*'' respectively), as each of these terms is defined in the ICE Inc. Certificate.

• *Jurisdiction.* The ICE Inc. Bylaws will provide that ICE Inc. and its directors, and, to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, its officers, and those of its employees whose principal place of business and residence is outside the United States will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceedings pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act. The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its officers, directors and employees to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.

• *Books and Records.* The ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act, and that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and by any U.S. Regulated Subsidiary to the extent they are related to the activities of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight. In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.

• *Restrictions on Amendments to ICE Inc. Certificate and Bylaws.* The ICE Inc. Certificate would provide that before

[3] The text of the proposed ICE Inc. Certificate is attached to the Proposed Rule Change as Exhibit 5A.

[4] The text of the proposed ICE Inc. Bylaws is attached to the Proposed Rule Change as Exhibit 5B.

any amendment to the ICE Inc. Certificate may be effectuated, such amendment would need to be submitted to the board of directors of each U.S. Regulated Subsidiary and, if so determined by any such board, would need to be filed with, or filed with and approved by, the Commission before such amendment may become effective. The ICE Inc. Bylaws would include the same requirement.

• *Additional Matters.* The ICE Inc. Bylaws would include provisions regarding cooperation with the Commission and the U.S. Regulated Subsidiaries, compliance with U.S. federal securities laws, confidentiality of information regarding the U.S. Regulated Subsidiaries' self-regulatory function, preservation of the independence of the U.S. Regulated Subsidiaries' self-regulatory function, and directors' consideration of the effect of ICE Inc.'s actions on the U.S. Regulated Subsidiaries' ability to carry out their respective responsibilities under the Exchange Act.

• *Proposed Amendments to NYX Holdings Operating Agreement.*[5] The NYX Holdings Operating Agreement currently provides that all membership interests in NYX Holdings must be held by ICE Group. In order that ICE Group may contribute all of the membership interests in NYX Holdings to ICE Inc., the NYX Holdings Operating Agreement would be amended to reflect that ICE Inc. is the ''Member'' and previously was the ''Initial Member'', as those terms are used throughout the NYX Holdings Operating Agreement, and to make nonsubstantive conforming changes to the recitals and definitions.

• *Proposed Approval of Transfer of NYX Holdings Membership Interests.* NYX Holdings Operating Agreement currently provides that ICE Group, as the sole member, may not transfer or assign any membership interests of NYX Holdings to any person or entity without the Commission's approval. ICE Group has adopted the resolutions in order to permit ICE Group to transfer its membership interest in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership (the ''ICE Group 2013 Resolutions'').[6] NYX Holdings has adopted resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. (the ''NYX Holdings Resolutions'').[7]

The proposed Fifth Amended and Restated Certificate of Incorporation of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Bylaws of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Limited Liability Company Agreement of NYSE Euronext Holdings LLC, effective as of the consummation of the Transfer; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc., adopted by the Board of Directors of IntercontinentalExchange Group, Inc. on December 13, 2013; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc. that will be adopted by the Board of Directors of IntercontinentalExchange Group, Inc. as of the consummation of the Transfer; the resolutions of the Board of Managers of NYSE Euronext Holdings LLC, that will be adopted by the Board of Directors of NYSE Euronext Holdings LLC; and the proposed Second Amended and Restated Bylaws of IntercontinentalExchange Group, Inc., effective as of the consummation of the Transfer are attached to the Proposed Rule Change as Exhibits 5A, 5B, 5C, 5D–1, 5D–2, 5E and 5F, respectively.

The text of the Proposed Rule Change is available at NYSE Arca, the Commission's Public Reference Room, and on the Web site of NYSE Arca (*www.nyse.com*). The text of Exhibits 5A through 5F to the Proposed Rule Change is also available on NYSE Arca's Web site and on the Commission's Web site (*www.sec.gov/rules/sro.shtml*).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE Arca has 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. NYSE Arca 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to adopt the rules necessary to permit ICE Group to effect the Transfer.

1. Overview of the Transfer

NYSE Arca is submitting the Proposed Rule Change to the Commission in connection with the transfer by ICE Group of all membership interests in NYX Holdings to ICE Inc. Other than as described herein and in the separate proposed rule changes filed by each NYSE Exchange, ICE Group, ICE Inc. and the NYSE Exchanges do not plan to make any changes to the regulated activities of the U.S. Regulated Subsidiaries in connection with the Transfer. If ICE Group or ICE Inc. determines to make any such changes to the regulated activities of any U.S. Regulated Subsidiary, it will seek the approval of the Commission. The Proposed Rule Change, if approved by the Commission, will not be effective until the consummation of the Transfer.

ICE Inc. is a wholly owned subsidiary of ICE Group and a sister subsidiary of NYX Holdings. ICE Group will contribute the equity interests in NYX Holdings to ICE Inc., at which point NYX Holdings will become a direct wholly owned subsidiary of ICE Inc., and the U.S. Regulated Subsidiaries owned by NYX Holdings will become indirect wholly owned subsidiaries of ICE Inc. ICE Group will continue as the ultimate parent entity of NYX Holdings through ICE Inc.

2. Overview of ICE Inc. Following the Transaction

Following the Transfer, ICE Group will continue to hold all of the equity interests in ICE Inc., and ICE Inc. will hold all the membership interests in NYX Holdings. NYX Holdings will continue to hold (1) 100% of the equity interests of NYSE Group (which, in turn, directly or indirectly holds 100% of the equity interests of the U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext (which, in turn, directly or indirectly holds 100% of the equity interests in certain regulated trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). The Transfer is part of the process pursuant to which ICE Group will prepare for the Euronext Sale.

The ICE Inc. Certificate and Bylaws will include ownership and voting limitations and certain other provisions

[5] The text of the proposed Second Amended and Restated Limited Liability Company Operating Agreement of NYX Holdings is attached to the Proposed Rule Change as Exhibit 5C.

[6] A copy of the ICE Group 2013 Resolutions is attached to the Proposed Rule Change as Exhibit 5D–1.

[7] A copy of the NYX Holdings Resolutions is attached to the Proposed Rule Change as Exhibit 5E.

to satisfy U.S. and European regulatory requirements as described in detail in the Proposed Rule Change. These provisions are modeled on provisions currently in the ICE Group Certificate of Incorporation and Bylaws, as well as those in the NYX Holdings Operating Agreement.

Other than certain modifications described herein, the current corporate structure, governance and self-regulatory independence and separation of each U.S. Regulated Subsidiary will be preserved.

ICE Group and ICE Inc. acknowledge that to the extent either becomes aware of possible violations of the rules of the Exchange, NYSE Arca or NYSE MKT, it will be responsible for referring such possible violations to each such exchange, respectively.

3. Proposed Approval of Transfer of NYX Holdings Membership Interests

Article VII of the current NYX Holdings Operating Agreement provides that the sole Member, ICE Group, may not transfer or assign any membership interests of NYX Holdings to any person or entity unless such transfer shall (1) be filed with and approved by the Commission under Section 19 of the Exchange Act and (2) filed with and approved by the relevant European Regulators under the Applicable European Exchange Regulations. ICE Group, as sole Member, has adopted the ICE Group 2013 Resolutions in order to permit ICE Group to transfer its membership interests in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership. NYX Holdings has adopted the NYX Holdings Resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. NYSE Arca is requesting approval by the Commission of the ICE Group 2013 Resolutions and the NYX Holdings Resolutions to allow the Transfer to take place.

4. Proposed Amendments to Ownership and Voting Restrictions After the Transfer

Overview

NYSE Arca is proposing that, effective as of the completion of the Transfer, the ICE Inc. Certificate would contain voting and ownership restrictions that are substantially identical to those currently in the ICE Group Certificate and the NYX Holdings Operating Agreement and would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cause more than 10% of the votes entitled to be cast on any matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes that may be cast on any matter. These limitations would apply only in the event that ICE Group does not own all of the issued and outstanding stock in ICE Inc. and only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary.

Voting and Ownership Restrictions in the ICE Inc. Certificate

Under the Proposed Rule Change, the ICE Inc. Certificate would provide that, in the event ICE Group does not own all of the issued and outstanding shares of stock of ICE Inc., (1) no person, either alone or together with its related persons (as defined in the ICE Inc. Certificate), may be entitled to vote or cause the voting of shares of stock of ICE Inc. beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter, and (2) no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons to refrain from voting shares of stock of ICE Inc. (the ''*ICE Inc. Voting Restriction*'').[8] The ICE Inc. Certificate will require ICE Inc. to disregard any votes purported to be cast in excess of the ICE Inc. Voting Restriction.

In addition, the ownership restrictions in the ICE Inc. Certificate would provide that, if such restrictions apply, no person, either alone or together with its related persons, may at any time own beneficially shares of ICE Inc. representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''*ICE Inc. Ownership Restrictions*'').[9] If any person, either alone or together with its related persons, owns shares of ICE Inc. in excess of the ICE Inc. Ownership Restriction, then such person and its related persons are obligated to sell promptly, and ICE Inc. is obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.[10]

The ICE Inc. Certificate would provide that the ICE Inc. Voting Restriction and the ICE Inc. Ownership Restriction would apply only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary.

The ICE Inc. Voting Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to any vote, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of ICE Inc. stock beneficially owned by such person or its related persons in excess of the ICE Inc. Voting Restriction; (2) the board of directors of ICE Inc. has resolved to expressly permit such voting; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act [11] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[12] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that the exercise of such voting rights (or the entering into of a voting agreement), as applicable:

- will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to

[8] *See* ICE Inc. Certificate, Article V Section A.

[9] *See* ICE Inc. Certificate, Article V Section B.

[10] *See* ICE Inc. Certificate, Article V Section B.4.

[11] 15 U.S.C. 78s(b).

[12] *See* ICE Inc. Certificate, Article V Section A.2.

enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;

• for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm; and

• for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;

• for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and

• neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person (as such terms are defined in the ICE Inc. Certificate).[13]

The ICE Inc. Ownership Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to the acquisition of any shares of ICE Inc. that would cause such person, either alone or together with its related persons, to exceed the ICE Inc. Ownership Restriction, of such person's intention, either alone or together with its related persons, to acquire such ownership; (2) the board of directors of ICE Inc. has resolved to expressly permit such ownership; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act[14] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[15] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that such ownership:

• Will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;

• will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);

• is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;

• for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm;

• for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;

• for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and

• neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person.

In order to allow ICE Inc. to own and vote all of the outstanding common stock of NYX Holdings after the Transfer, ICE Inc. has delivered written notice to the board of NYX Holdings pursuant to the procedures set forth in the NYX Holdings Operating Agreement requesting approval of its voting and ownership of NYX Holdings shares in excess of the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. Among other things, in this notice, ICE Inc. represented to the board of NYX Holdings that neither it, nor any of its related persons, is (1) an NYSE Member; (2) an NYSE MKT Member; (3) an ETP Holder; (4) an OTP Holder or OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person.

On December 13, 2013, the board of directors of ICE Group adopted the ICE Group 2013 Resolutions to authorize and instruct the transfer ownership of NYX Holdings to ICE Inc. On ——, 2014, the board of managers of NYX Holdings, acting by unanimous written consent, adopted the NYX Holdings Resolutions to permit ICE Inc., either alone or with its related persons, to exceed the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. In adopting such resolutions, the board of managers of NYX Holdings made the necessary determinations set forth in the NYX Holdings Operating Agreement (which are similar to those set forth above) and approved the submission of the Proposed Rule Change to the Commission.

5. Additional Matters To Be Addressed in the ICE Inc. Certificate and Bylaws[16]

Jurisdiction Over Individuals

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, and, to the extent that they are involved in the activities of the U.S. Regulated Subsidiaries, ICE Inc.'s officers and those of its employees whose principal place of business and residence is outside the United States, would be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. The ICE Inc. Bylaws would also provide that, with respect to any such suit, action, or proceeding brought by the Commission, ICE Inc. and its directors, officers and employees would (1) be deemed to agree that ICE Inc. may serve as U.S. agent for purposes of service of process in such suit, action, or proceedings relating to ICE Inc. or any of its subsidiaries; and (2) be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceedings is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts of the Commission.[17]

In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees of ICE Inc. will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[18]

The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting a

[13] *See* ICE Inc. Certificate, Article V Sections A.3(c)(i), A.3(d)(i) and B.3(c)(i).

[14] 15 U.S.C. 78s(b).

[15] *See* ICE Inc. Certificate, Article V Section B.2.

[16] The ICE Inc. Certificate and Bylaws will also set forth certain restrictions and requirements relating to ICE Group's [sic] European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to ICE Group's [sic] U.S. Regulated Subsidiaries and U.S. regulatory matters.

[17] *See* ICE Inc. Bylaws, Section 7.1.

[18] *See* ICE Inc. Bylaws, Section 8.4.

position as an officer, director or employee, as applicable, of ICE Inc. to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.[19]

NYSE Arca anticipates that the functions and activities of each U.S. Regulated Subsidiary generally will be carried out by the officers and directors of such U.S. Regulated Subsidiary, over each of whom the Commission has direct authority pursuant to Section 19(h)(4) of the Exchange Act.[20]

Access to Books and Records

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[21] In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.[22] The ICE Inc. Bylaws also would provide that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and any U.S. Regulated Subsidiary to the extent they are related to the activities of the U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight.[23]

Additional Matters

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. will comply with the U.S. federal securities laws and the rules and regulations thereunder, and will cooperate with the Commission and with the U.S. Regulated Subsidiaries pursuant to and to the extent of their respective regulatory authority.[24] In addition, ICE Inc. would be required to take reasonable steps necessary to cause its agents to cooperate with the Commission and, where applicable, the U.S. Regulated Subsidiaries pursuant to their regulatory authority.[25] The ICE Inc. Bylaws would also provide that, in discharging his or her responsibilities as a member of the ICE Inc. board of directors or as an officer or employee of ICE Inc., each such director, officer or employee will (a) comply with the U.S. federal securities laws and the rules and regulations thereunder; (b) cooperate with the Commission; and (c) cooperate with the U.S. Regulated Subsidiaries pursuant to and to the extent of their regulatory authority (but this provision will not create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any such matters or to limit his or her consideration of such matters).[26]

The ICE Inc. Bylaws would also provide that all confidential information that comes into the possession of ICE Inc. pertaining to the self-regulatory function of any U.S. Regulated Subsidiary will (a) not be made available to any persons other than to those officers, directors, employees and agents of ICE Inc. that have a reasonable need to know the contents thereof; (b) be retained in confidence by ICE Inc. and the officers, directors, employees and agents of ICE Inc.; and (c) not be used for any commercial purposes.[27] In addition, the ICE Inc. Bylaws would provide that these obligations regarding such confidential information will not be interpreted so as to limit or impede (i) the rights of the Commission or the relevant U.S. Regulated Subsidiary to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees or agents of ICE Inc. to disclose such confidential information to the Commission or any U.S. Regulated Subsidiary.[28]

In addition, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, officers and employees will give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and to its obligations to investors and the general public, and will not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of any U.S. Regulated Subsidiary relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of such U.S. Regulated Subsidiary to carry out its responsibilities under the Exchange Act.[29]

Finally, the ICE Inc. Bylaws would provide that each director of ICE Inc. would, in discharging his or her responsibilities, to the fullest extent permitted by applicable law, take into consideration the effect that ICE Inc.'s actions would have on the ability of (a) the U.S. Regulated Subsidiaries to carry out their responsibilities under the Exchange Act; and (b) the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to (1) engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to prevent fraudulent and manipulative acts and practices in the securities markets; (2) promote just and equitable principles of trade in the securities markets; (3) foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (4) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (5) in general, protect investors and the public interest.[30]

Amendments to the ICE Inc. Certificate and Bylaws

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that, before any amendment to or repeal of any provision of the ICE Inc. Bylaws shall be effective, such amendment or repeal shall be submitted to the board of directors of each U.S. Regulated Subsidiary (or the boards of directors of their successors) and if any or all of such boards of directors determine that, before such amendment or repeal may be effectuated, the same must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Exchange Act and the rules promulgated thereunder, then the same will not be effectuated until filed with, or filed with and approved by, the Commission, as the case may be.[31] These requirements would also apply to

[19] *See* ICE Inc. Bylaws, Section 9.3.

[20] 15 U.S.C. 78s(h)(4).

[21] *See* ICE Inc. Bylaws, Section 8.4.

[22] *See* ICE Inc. Bylaws, Sections 8.4 and 8.6.

[23] *See* ICE Inc. Bylaws, Section 8.3.

[24] *See* ICE Inc. Bylaws, Section 9.l.

[25] *See id.*

[26] *See* ICE Inc. Bylaws, Section 3.14(b).

[27] *See* ICE Inc. Bylaws, Section 8.1.

[28] *See* ICE Inc. Bylaws, Section 8.2.

[29] *See* ICE Inc. Bylaws, Section 9.4.

[30] *See* ICE Inc. Bylaws, Section 3.14(a). This requirement would not, however, create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any of the foregoing matters or to limit his or her consideration to such matters. *See* ICE Inc. Bylaws, Section 3.14(c).

[31] *See* ICE Inc. Bylaws, Section 11.3.

any action by ICE Inc. that would have the effect of amending or repealing any provisions of the ICE Inc. Certificate.[32]

6. Proposed Amendment to the NYX Holdings Operating Agreement

In addition, NYSE Arca proposes that the NYX Holdings Operating Agreement be amended to reflect that ICE Inc. will be the sole member of the LLC as a result of ICE Group's transfer of the membership interest in NYX Holdings to ICE Inc.[33] The NYX Holdings Operating Agreement also would be amended to reflect that ICE Inc. previously was the ''Initial Member'', to delete references to NYSE Euronext LLC and to make nonsubstantive conforming changes to the recitals and definitions.

7. Proposed Amendment to the ICE Group Bylaws

The provisions in the ICE Group Certificate establishing the standard for each director's approval of ownership or voting rights in excess of the limitations in the ICE Group Certificate do not currently require a director to consider whether such approval would impair the ability of ICE Inc. and NYX Holdings to comply with the Exchange Act and the rules and regulations thereunder.[34] Also, the provisions in the ICE Group Bylaws establishing the standards for the Board's approval of any action by ICE Group does not currently require a director to take into consideration the effect that such action would have on the ability of ICE Inc. and NYX Holdings (a) to engage in conduct that fosters and does not interfere with the ability of each such entity to prevent fraudulent and manipulative acts and practices in the securities markets; (b) to promote just and equitable principles of trade in the securities markets; (c) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (d) to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (e) in general, to protect investors and the public interest.[35] Under the Proposed Rule Change, the ICE Group Bylaws would be amended to add references to ICE Inc. and NYX Holdings in each such provision.[36]

2. Statutory Basis

NYSE Arca believes that this filing is consistent with Section 6(b) of the Exchange Act[37] in general, and furthers the objectives of Section 6(b)(1)[38] in particular, in that it enables NYSE Arca to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of NYSE Arca Equities. With respect to the ability of the Commission to enforce the Exchange Act as it applies to the U.S. Regulated Subsidiaries after the Transfer, the U.S. Regulated Subsidiaries will operate in the same manner following the Transfer as they operate today. Thus, the Commission will continue to have plenary regulatory authority over the U.S. Regulated Subsidiaries, as is the case currently with these entities. The Proposed Rule Change is consistent with and will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to each U.S. Regulated Subsidiary, its direct and indirect parent entities and its directors, officers, employees and agents to the extent they are involved in the activities of such U.S. Regulated Subsidiary.

NYSE Arca also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act[39] because the Proposed Rule Change summarized herein would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE Arca 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 Exchange Act. The Proposed Rule Change relates to an internal reorganization of subsidiaries of ICE Group and is not designed to address any competitive issue in the U.S. securities markets, or have any impact on competition in those markets. The Proposed Rule Change is part of ICE Group's process to implement the Euronext Sale. The Euronext Sale will be subject to review and approval by multiple European regulators.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NYSE Arca has neither solicited nor received written comments on the Proposed Rule Change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days after publication (i) as the Commission may designate 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 or disapprove the 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 email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

[32] *See* ICE Inc. Certificate, Article IX(C).

[33] *See* NYX Holdings Operating Agreement, Preamble.

[34] ICE Group Certificate, Article V, Sections A.3(a)(i) and B.3(a)(i).

[35] ICE Group Bylaws, Section 3.14(a)(3).

[36] Resolutions of the Board of Directors of ICE Group approving these amendments are attached to the Proposed Rule Change as Exhibit 5D–2 (the ''ICE Group 2014 Resolutions''). The proposed amendments to the ICE Group Bylaws are attached as Exhibit 5F to the Proposed Rule Change. *See* Proposed ICE Group Bylaws 3.14(a)(3) and 3.15(g).

[37] 15 U.S.C. 78f(b).

[38] 15 U.S.C. 78f(b)(1).

[39] 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR–NYSEArca–2014–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–08, and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01810 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71393; File No. SR–NYSE–2014–04]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Action in Which Its Indirect Parent, NYSE Euronext Holdings LLC, Will Become a Wholly Owned Subsidiary of IntercontinentalExchange, Inc.

January 24, 2014.

Pursuant to Section 19(b)(1)[1] of the U.S. Securities Exchange Act of 1934, as amended (the ''Exchange Act''), and Rule 19b–4 thereunder,[2] notice is hereby given that on January 17, 2014, the New York Stock Exchange, LLC (the ''Exchange'') filed with the U.S. Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

A. Overview of the Proposed Merger

The New York Stock Exchange, LLC (the ''Exchange''), a New York limited liability company, registered national securities exchange and self-regulatory organization, is submitting this rule filing (the ''*Proposed Rule Change''*) to the U.S. Securities and Exchange Commission (the ''Commission'') in connection with the contribution by IntercontinentalExchange Group, Inc., a Delaware corporation (''*ICE Group''*), of its 100% membership interest in NYSE Euronext Holdings LLC, a Delaware limited liability company (''*NYX Holdings''*), which is an indirect owner of a 100% interest in the Exchange, to another wholly owned subsidiary of ICE Group, IntercontinentalExchange, Inc., a Delaware corporation (''*ICE Inc.''*).

NYX Holdings owns 100% of the equity interest of NYSE Group, Inc., a Delaware corporation (''*NYSE Group''*), which in turn directly or indirectly owns (1) 100% of the equity interest of three registered national securities exchanges and self-regulatory organizations (together, the ''*NYSE Exchanges''*)—the Exchange, NYSE Arca, Inc. (''*NYSE Arca''*) and NYSE MKT LLC (''*NYSE MKT''*)—and (2) 100% of the equity interest of NYSE Market (DE), Inc. (''*NYSE Market''*), NYSE Regulation, Inc. (''*NYSE Regulation''*), NYSE Arca L.L.C., NYSE Arca Equities, Inc. (''*NYSE Arca Equities''*) and NYSE Amex Options LLC (''*NYSE Amex Options''*) (the NYSE Exchanges, together with (x) NYSE Market, NYSE Regulation, NYSE Arca L.L.C., NYSE Arca Equities and NYSE Amex Options and (y) any similar U.S. regulated entity acquired, owned or created after the date hereof, the ''*U.S. Regulated Subsidiaries''* and each, a ''*U.S. Regulated Subsidiary''*). Each of NYSE Arca and NYSE MKT will be separately filing a proposed rule change in connection with the matters addressed herein that will be substantially the same as the Proposed Rule Change.

Upon completion of ICE Group's contribution to ICE Inc. of 100% of NYX Holdings (the ''*Transfer''*), each U.S. Regulated Subsidiary will become an indirect wholly owned subsidiary of ICE Inc. ICE Inc. will remain a direct wholly owned subsidiary of ICE Group, a public company that is listed on the Exchange. The Transfer is strictly an internal reorganization that does not affect the interests of ICE Group's stockholders. The Transfer will not affect the operation of the U.S. Regulated Subsidiaries.

The Transfer is part of the process pursuant to which ICE Group will prepare for the previously announced sale of the continental European cash equity platforms and the derivatives trading on them (the ''*Euronext Sale''*) currently owned by Euronext N.V., a Dutch company with limited liability (''*Euronext''*) and a wholly owned subsidiary of ICE Group. The Transfer also will facilitate the transitioning of the derivatives businesses of another current subsidiary of Euronext, Liffe Administration and Management (''*LAM''*), to ICE Futures Europe, a subsidiary of ICE Inc., and will enable ICE Inc. to continue in compliance with certain debt covenants after the Euronext Sale. (The transitioning of the derivatives business of LAM is subject to regulatory approval in the United Kingdom.)

B. Summary of Proposed Rule Change

The Exchange is proposing that, in connection with the Transfer, the Commission approve the organizational documents of ICE Inc. and amendments to the Amended and Restated Limited Liability Company Agreement of NYX Holdings (''*NYX Holdings Operating Agreement''*) and the Amended and Restated Bylaws of ICE Group (''*ICE Group Bylaws''*). The Proposed Rule Change is summarized as follows:

Certificate of Incorporation and Bylaws of ICE Inc. ICE Inc. would take appropriate steps to incorporate voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries. Specifically, the Fifth Amended and Restated Certificate of Incorporation of ICE Inc. (the ''*ICE Inc.*

Certificate'') [3] and the Second Amended and Restated Bylaws of ICE Inc. (the ''*ICE Inc. Bylaws''*) [4] would contain provisions to incorporate these concepts with respect to itself, as well as its directors, officers, employees and agents (as applicable):

• *Voting and Ownership Restrictions in the ICE Inc. Certificate.* The ICE Inc. Certificate would contain voting and ownership restrictions that will take effect only in the event ICE Group does not hold all of the issued and outstanding shares of stock of ICE Inc. The ICE Inc. Certificate would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cast more than 10% of the then outstanding votes entitled to be cast on a matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes entitled to be cast on a matter. The ICE Inc. Certificate would provide that ICE Inc. will be required to disregard any votes purported to be cast in excess of the voting restriction. In the event that any person(s) exceeds the ownership restrictions, it will be obligated to sell promptly, and ICE Inc. will be obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding. The ICE Inc. board of directors may waive the voting and ownership restrictions if it makes certain determinations and expressly resolves to permit the voting and ownership that is subject to such restrictions, and such resolutions have been filed with, and approved by, the Commission under Section 19(b) of the U.S. Securities Exchange Act of 1934, as amended (together, with the rules promulgated thereunder, the ''Exchange Act'') and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority. The ICE Inc. Certificate further provides that the board of directors may not approve either voting or ownership rights in excess of a 20% threshold with respect to any person that is a Member of the Exchange, (an ''*NYSE Member''*), a Member of NYSE MKT (including any person who is a related person of such member, a ''*NYSE MKT Member''*), an ETP Holder of NYSE Arca Equities (an ''*ETP Holder''*), or an OTP Holder or OTP Firm of NYSE Arca, (an ''*OTP Holder''* and ''*OTP Firm,''* respectively), as each of these terms is defined in the ICE Inc. Certificate.

• *Jurisdiction.* The ICE Inc. Bylaws will provide that ICE Inc. and its directors, and, to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, its officers, and those of its employees whose principal place of business and residence is outside the United States will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceedings pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act. The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its officers, directors and employees to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.

• *Books and Records.* The ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act, and that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and by any U.S. Regulated Subsidiary to the extent they are related to the activities of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight. In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.

• *Restrictions on Amendments to ICE Inc. Certificate and Bylaws.* The ICE Inc. Certificate would provide that before any amendment to the ICE Inc. Certificate may be effectuated, such amendment would need to be submitted to the board of directors of each U.S. Regulated Subsidiary and, if so determined by any such board, would need to be filed with, or filed with and approved by, the Commission before such amendment may become effective. The ICE Inc. Bylaws would include the same requirement.

• *Additional Matters.* The ICE Inc. Bylaws would include provisions regarding cooperation with the Commission and the U.S. Regulated Subsidiaries, compliance with U.S. federal securities laws, confidentiality of information regarding the U.S. Regulated Subsidiaries' self-regulatory function, preservation of the independence of the U.S. Regulated Subsidiaries' self-regulatory function, and directors' consideration of the effect of ICE Inc.'s actions on the U.S. Regulated Subsidiaries' ability to carry out their respective responsibilities under the Exchange Act.

• *Proposed Amendments to NYX Holdings Operating Agreement.*[5] The NYX Holdings Operating Agreement currently provides that all membership interests in NYX Holdings must be held by ICE Group. In order that ICE Group may contribute all of the membership interests in NYX Holdings to ICE Inc., the NYX Holdings Operating Agreement would be amended to reflect that ICE Inc. is the ''Member'' and previously was the ''Initial Member'', as those terms are used throughout the NYX Holdings Operating Agreement, and to make nonsubstantive conforming changes to the recitals and definitions.

• *Proposed Approval of Transfer of NYX Holdings Membership Interests.* NYX Holdings Operating Agreement currently provides that ICE Group, as the sole member, may not transfer or assign any membership interests of NYX Holdings to any person or entity without the Commission's approval. ICE Group has adopted the resolutions in order to permit ICE Group to transfer its membership interest in NYX Holdings to ICE Inc. and to amend the NYX

[3] The text of the proposed ICE Inc. Certificate is attached to the Proposed Rule Change as Exhibit 5A.

[4] The text of the proposed ICE Inc. Bylaws is attached to the Proposed Rule Change as Exhibit 5B.

[5] The text of the proposed Second Amended and Restated Limited Liability Company Operating Agreement of NYX Holdings is attached to the Proposed Rule Change as Exhibit 5C.

Holdings Operating Agreement to reflect the change of ownership (the ''ICE Group 2013 Resolutions'').[6] NYX Holdings has adopted resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. (the ''NYX Holdings Resolutions'').[7]

The proposed Fifth Amended and Restated Certificate of Incorporation of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Bylaws of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Limited Liability Company Agreement of NYSE Euronext Holdings LLC, effective as of the consummation of the Transfer; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc., adopted by the Board of Directors of IntercontinentalExchange Group, Inc. on December 13, 2013; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc. that will be adopted by the Board of Directors of IntercontinentalExchange Group, Inc. as of the consummation of the Transfer; the resolutions of the Board of Managers of NYSE Euronext Holdings LLC, that will be adopted by the Board of Directors of NYSE Euronext Holdings LLC; and the proposed Second Amended and Restated Bylaws of IntercontinentalExchange Group, Inc., effective as of the consummation of the Transfer are attached to the Proposed Rule Change as Exhibits 5A, 5B, 5C, 5D–1, 5D–2, 5E and 5F, respectively.

The text of the Proposed Rule Change is available at the Exchange, the Commission's Public Reference Room, and on the Web site of the Exchange (*www.nyse.com*). The text of Exhibits 5A through 5F to the Proposed Rule Change is also available on the Exchange's Web site and on the Commission's Web site (*www.sec.gov/rules/sro.shtml*).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange has 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. The Exchange has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements..

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to adopt the rules necessary to permit ICE Group to effect the Transfer.

1. Overview of the Transfer

The Exchange is submitting the Proposed Rule Change to the Commission in connection with the transfer by ICE Group of all membership interests in NYX Holdings to ICE Inc. Other than as described herein and in the separate proposed rule changes filed by each NYSE Exchange, ICE Group, ICE Inc. and the NYSE Exchanges do not plan to make any changes to the regulated activities of the U.S. Regulated Subsidiaries in connection with the Transfer. If ICE Group or ICE Inc. determines to make any such changes to the regulated activities of any U.S. Regulated Subsidiary, it will seek the approval of the Commission. The Proposed Rule Change, if approved by the Commission, will not be effective until the consummation of the Transfer.

ICE Inc. is a wholly owned subsidiary of ICE Group and a sister subsidiary of NYX Holdings. ICE Group will contribute the equity interests in NYX Holdings to ICE Inc., at which point NYX Holdings will become a direct wholly owned subsidiary of ICE Inc., and the U.S. Regulated Subsidiaries owned by NYX Holdings will become indirect wholly owned subsidiaries of ICE Inc. ICE Group will continue as the ultimate parent entity of NYX Holdings through ICE Inc.

2. Overview of ICE Inc. Following the Transaction

Following the Transfer, ICE Group will continue to hold all of the equity interests in ICE Inc., and ICE Inc. will hold all the membership interests in NYX Holdings. NYX Holdings will continue to hold (1) 100% of the equity interests of NYSE Group (which, in turn, directly or indirectly holds 100% of the equity interests of the U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext (which, in turn, directly or indirectly holds 100% of the equity interests in certain regulated trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). The Transfer is part of the process pursuant to which ICE Group will prepare for the Euronext Sale.

The ICE Inc. Certificate and Bylaws will include ownership and voting limitations and certain other provisions to satisfy U.S. and European regulatory requirements as described in detail in the Proposed Rule Change. These provisions are modeled on provisions currently in the ICE Group Certificate of Incorporation and Bylaws, as well as those in the NYX Holdings Operating Agreement.

Other than certain modifications described herein, the current corporate structure, governance and self-regulatory independence and separation of each U.S. Regulated Subsidiary will be preserved.

ICE Group and ICE Inc. acknowledge that to the extent either becomes aware of possible violations of the rules of the Exchange, NYSE Arca or NYSE MKT, it will be responsible for referring such possible violations to each such exchange, respectively.

3. Proposed Approval of Transfer of NYX Holdings Membership Interests

Article VII of the current NYX Holdings Operating Agreement provides that the sole Member, ICE Group, may not transfer or assign any membership interests of NYX Holdings to any person or entity unless such transfer shall (1) be filed with and approved by the Commission under Section 19 of the Exchange Act and (2) filed with and approved by the relevant European Regulators under the Applicable European Exchange Regulations. ICE Group, as sole Member, has adopted the ICE Group 2013 Resolutions in order to permit ICE Group to transfer its membership interests in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership. NYX Holdings has adopted the NYX Holdings Resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. The Exchange is requesting approval by the Commission of the ICE Group 2013 Resolutions and the NYX Holdings Resolutions to allow the Transfer to take place.

4. Proposed Amendments to Ownership and Voting Restrictions After the Transfer

Overview

The Exchange is proposing that, effective as of the completion of the Transfer, the ICE Inc. Certificate would contain voting and ownership restrictions that are substantially

[6] A copy of the ICE Group 2013 Resolutions is attached to the Proposed Rule Change as Exhibit 5D–1.

[7] A copy of the NYX Holdings Resolutions is attached to the Proposed Rule Change as Exhibit 5E.

identical to those currently in the ICE Group Certificate and the NYX Holdings Operating Agreement and would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cause more than 10% of the votes entitled to be cast on any matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes that may be cast on any matter. These limitations would apply only in the event that ICE Group does not own all of the issued and outstanding stock in ICE Inc. and only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary.

Voting and Ownership Restrictions in the ICE Inc. Certificate

Under the Proposed Rule Change, the ICE Inc. Certificate would provide that, in the event ICE Group does not own all of the issued and outstanding shares of stock of ICE Inc., (1) no person, either alone or together with its related persons (as defined in the ICE Inc. Certificate), may be entitled to vote or cause the voting of shares of stock of ICE Inc. beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter, and (2) no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons to refrain from voting shares of stock of ICE Inc. (the ''*ICE Inc. Voting Restriction*'').[8] The ICE Inc. Certificate will require ICE Inc. to disregard any votes purported to be cast in excess of the ICE Inc. Voting Restriction.

In addition, the ownership restrictions in the ICE Inc. Certificate would provide that, if such restrictions apply, no person, either alone or together with its related persons, may at any time own beneficially shares of ICE Inc. representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''*ICE Inc. Ownership Restrictions*'').[9] If any person, either alone or together with its related persons, owns shares of ICE Inc. in excess of the ICE Inc. Ownership Restriction, then such person and its related persons are obligated to sell promptly, and ICE Inc. is obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.[10]

The ICE Inc. Certificate would provide that the ICE Inc. Voting Restriction and the ICE Inc. Ownership Restriction would apply only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary.

The ICE Inc. Voting Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to any vote, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of ICE Inc. stock beneficially owned by such person or its related persons in excess of the ICE Inc. Voting Restriction; (2) the board of directors of ICE Inc. has resolved to expressly permit such voting; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act[11] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[12] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that the exercise of such voting rights (or the entering into of a voting agreement), as applicable:

- Will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;
- for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm; and
- for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;
- for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and
- neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person (as such terms are defined in the ICE Inc. Certificate).[13]

The ICE Inc. Ownership Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to the acquisition of any shares of ICE Inc. that would cause such person, either alone or together with its related persons, to exceed the ICE Inc. Ownership Restriction, of such person's intention, either alone or together with its related persons, to acquire such ownership; (2) the board of directors of ICE Inc. has resolved to expressly permit such ownership; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act[14] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[15] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that such ownership:

- Will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;

[8] *See* ICE Inc. Certificate, Article V Section A.

[9] *See* ICE Inc. Certificate, Article V Section B.

[10] *See* ICE Inc. Certificate, Article V Section B.4.

[11] 15 U.S.C. 78s(b).

[12] *See* ICE Inc. Certificate, Article V Section A.2.

[13] *See* ICE Inc. Certificate, Article V Sections A.3(c)(i), A.3(d)(i) and B.3(c)(i).

[14] 15 U.S.C. 78s(b).

[15] *See* ICE Inc. Certificate, Article V Section B.2.

• Will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);

• is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;

• for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm;

• for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;

• for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and

• neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person.

In order to allow ICE Inc. to own and vote all of the outstanding common stock of NYX Holdings after the Transfer, ICE Inc. has delivered written notice to the board of NYX Holdings pursuant to the procedures set forth in the NYX Holdings Operating Agreement requesting approval of its voting and ownership of NYX Holdings shares in excess of the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. Among other things, in this notice, ICE Inc. represented to the board of NYX Holdings that neither it, nor any of its related persons, is (1) an NYSE Member; (2) an NYSE MKT Member; (3) an ETP Holder; (4) an OTP Holder or OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person.

On December 13, 2013, the board of directors of ICE Group adopted the ICE Group 2013 Resolutions to authorize and instruct the transfer ownership of NYX Holdings to ICE Inc. On ——, 2014, the board of managers of NYX Holdings, acting by unanimous written consent, adopted the NYX Holdings Resolutions to permit ICE Inc., either alone or with its related persons, to exceed the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. In adopting such resolutions, the board of managers of NYX Holdings made the necessary determinations set forth in the NYX Holdings Operating Agreement (which are similar to those set forth above) and approved the submission of the Proposed Rule Change to the Commission.

5. Additional Matters To Be Addressed in the ICE Inc. Certificate and Bylaws [16]

Jurisdiction Over Individuals

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, and, to the extent that they are involved in the activities of the U.S. Regulated Subsidiaries, ICE Inc.'s officers and those of its employees whose principal place of business and residence is outside the United States, would be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. The ICE Inc. Bylaws would also provide that, with respect to any such suit, action, or proceeding brought by the Commission, ICE Inc. and its directors, officers and employees would (1) be deemed to agree that ICE Inc. may serve as U.S. agent for purposes of service of process in such suit, action, or proceedings relating to ICE Inc. or any of its subsidiaries; and (2) be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceedings is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts of the Commission.[17]

In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees of ICE Inc. will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[18]

The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting a position as an officer, director or employee, as applicable, of ICE Inc. to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.[19]

The Exchange anticipates that the functions and activities of each U.S. Regulated Subsidiary generally will be carried out by the officers and directors of such U.S. Regulated Subsidiary, over each of whom the Commission has direct authority pursuant to Section 19(h)(4) of the Exchange Act.[20]

Access to Books and Records

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[21] In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.[22] The ICE Inc. Bylaws also would provide that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and any U.S. Regulated Subsidiary to the extent they are related to the activities of the U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight.[23]

Additional Matters

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. will comply with the U.S. federal securities laws and the rules and regulations thereunder, and will cooperate with the Commission and with the U.S. Regulated Subsidiaries pursuant to and to the extent of their

[16] The ICE Inc. Certificate and Bylaws will also set forth certain restrictions and requirements relating to ICE Group's [sic] European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to ICE Group's [sic] U.S. Regulated Subsidiaries and U.S. regulatory matters.

[17] *See* ICE Inc. Bylaws, Section 7.1.

[18] *See* ICE Inc. Bylaws, Section 8.4.

[19] *See* ICE Inc. Bylaws, Section 9.3.

[20] 15 U.S.C. 78s(h)(4).

[21] *See* ICE Inc. Bylaws, Section 8.4.

[22] *See* ICE Inc. Bylaws, Sections 8.4 and 8.6.

[23] *See* ICE Inc. Bylaws, Section 8.3.

respective regulatory authority.[24] In addition, ICE Inc. would be required to take reasonable steps necessary to cause its agents to cooperate with the Commission and, where applicable, the U.S. Regulated Subsidiaries pursuant to their regulatory authority.[25] The ICE Inc. Bylaws would also provide that, in discharging his or her responsibilities as a member of the ICE Inc. board of directors or as an officer or employee of ICE Inc., each such director, officer or employee will (a) comply with the U.S. federal securities laws and the rules and regulations thereunder; (b) cooperate with the Commission; and (c) cooperate with the U.S. Regulated Subsidiaries pursuant to and to the extent of their regulatory authority (but this provision will not create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any such matters or to limit his or her consideration of such matters).[26]

The ICE Inc. Bylaws would also provide that all confidential information that comes into the possession of ICE Inc. pertaining to the self-regulatory function of any U.S. Regulated Subsidiary will (a) not be made available to any persons other than to those officers, directors, employees and agents of ICE Inc. that have a reasonable need to know the contents thereof; (b) be retained in confidence by ICE Inc. and the officers, directors, employees and agents of ICE Inc.; and (c) not be used for any commercial purposes.[27] In addition, the ICE Inc. Bylaws would provide that these obligations regarding such confidential information will not be interpreted so as to limit or impede (i) the rights of the Commission or the relevant U.S. Regulated Subsidiary to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees or agents of ICE Inc. to disclose such confidential information to the Commission or any U.S. Regulated Subsidiary.[28]

In addition, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, officers and employees will give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and to its obligations to investors and the general public, and will not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of any U.S. Regulated Subsidiary relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of such U.S. Regulated Subsidiary to carry out its responsibilities under the Exchange Act.[29]

Finally, the ICE Inc. Bylaws would provide that each director of ICE Inc. would, in discharging his or her responsibilities, to the fullest extent permitted by applicable law, take into consideration the effect that ICE Inc.'s actions would have on the ability of (a) the U.S. Regulated Subsidiaries to carry out their responsibilities under the Exchange Act; and (b) the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to (1) engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to prevent fraudulent and manipulative acts and practices in the securities markets; (2) promote just and equitable principles of trade in the securities markets; (3) foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (4) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (5) in general, protect investors and the public interest.[30]

Amendments to the ICE Inc. Certificate and Bylaws

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that, before any amendment to or repeal of any provision of the ICE Inc. Bylaws shall be effective, such amendment or repeal shall be submitted to the board of directors of each U.S. Regulated Subsidiary (or the boards of directors of their successors) and if any or all of such boards of directors determine that, before such amendment or repeal may be effectuated, the same must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Exchange Act and the rules promulgated thereunder, then the same will not be effectuated until filed with, or filed with and approved by, the Commission, as the case may be.[31] These requirements would also apply to any action by ICE Inc. that would have the effect of amending or repealing any provisions of the ICE Inc. Certificate.[32]

6. Proposed Amendment to the NYX Holdings Operating Agreement

In addition, the Exchange proposes that the NYX Holdings Operating Agreement be amended to reflect that ICE Inc. will be the sole member of the LLC as a result of ICE Group's transfer of the membership interest in NYX Holdings to ICE Inc.[33] The NYX Holdings Operating Agreement also would be amended to reflect that ICE Inc. previously was the ''Initial Member'', to delete references to NYSE Euronext LLC and to make nonsubstantive conforming changes to the recitals and definitions.

7. Proposed Amendment to the ICE Group Bylaws

The provisions in the ICE Group Certificate establishing the standard for each director's approval of ownership or voting rights in excess of the limitations in the ICE Group Certificate do not currently require a director to consider whether such approval would impair the ability of ICE Inc. and NYX Holdings to comply with the Exchange Act and the rules and regulations thereunder.[34] Also, the provisions in the ICE Group Bylaws establishing the standards for the Board's approval of any action by ICE Group does not currently require a director to take into consideration the effect that such action would have on the ability of ICE Inc. and NYX Holdings (a) to engage in conduct that fosters and does not interfere with the ability of each such entity to prevent fraudulent and manipulative acts and practices in the securities markets; (b) to promote just and equitable principles of trade in the securities markets; (c) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (d) to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (e) in general, to protect investors and the public interest.[35] Under the

[24] *See* ICE Inc. Bylaws, Section 9.l.

[25] *See id.*

[26] *See* ICE Inc. Bylaws, Section 3.14(b).

[27] *See* ICE Inc. Bylaws, Section 8.1.

[28] *See* ICE Inc. Bylaws, Section 8.2.

[29] *See* ICE Inc. Bylaws, Section 9.4.

[30] *See* ICE Inc. Bylaws, Section 3.14(a). This requirement would not, however, create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any of the foregoing matters or to limit his or her consideration to such matters. *See* ICE Inc. Bylaws, Section 3.14(c).

[31] *See* ICE Inc. Bylaws, Section 11.3.

[32] *See* ICE Inc. Certificate, Article IX(C).

[33] *See* NYX Holdings Operating Agreement, Preamble.

[34] ICE Group Certificate, Article V, Sections A.3(a)(i) and B.3(a)(i).

[35] ICE Group Bylaws, Section 3.14(a)(3).

Proposed Rule Change, the ICE Group Bylaws would be amended to add references to ICE Inc. and NYX Holdings in each such provision.[36]

2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b) of the Exchange Act[37] in general, and furthers the objectives of Section 6(b)(1)[38] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. With respect to the ability of the Commission to enforce the Exchange Act as it applies to the U.S. Regulated Subsidiaries after the Transfer, the U.S. Regulated Subsidiaries will operate in the same manner following the Transfer as they operate today. Thus, the Commission will continue to have plenary regulatory authority over the U.S. Regulated Subsidiaries, as is the case currently with these entities. The Proposed Rule Change is consistent with and will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to each U.S. Regulated Subsidiary, its direct and indirect parent entities and its directors, officers, employees and agents to the extent they are involved in the activities of such U.S. Regulated Subsidiary.

The Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act[39] because the Proposed Rule Change summarized herein would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the Proposed Rule Change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Proposed Rule Change relates to an internal reorganization of subsidiaries of ICE Group and is not designed to address any competitive issue in the U.S. securities markets, or have any impact on competition in those markets. The Proposed Rule Change is part of ICE Group's process to implement the Euronext Sale. The Euronext Sale will be subject to review and approval by multiple European regulators.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the Proposed Rule Change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days after publication (i) as the Commission may designate 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 or disapprove the 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 email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2014–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2014–04. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2014–04 and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01809 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

[36] Resolutions of the Board of Directors of ICE Group approving these amendments are attached to the Proposed Rule Change as Exhibit 5D–2 (the ''ICE Group 2014 Resolutions''). The proposed amendments to the ICE Group Bylaws are attached as Exhibit 5F to the Proposed Rule Change. *See* Proposed ICE Group Bylaws 3.14(a)(3) and 3.15(g).

[37] 15 U.S.C. 78f(b).

[38] 15 U.S.C. 78f(b)(1).

[39] 15 U.S.C. 78f(b)(5).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71395; File No. SR–NYSEMKT–2014–10]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Action in Which Its Indirect Parent, NYSE Euronext Holdings LLC, Will Become a Wholly Owned Subsidiary of IntercontinentalExchange, Inc.

January 24, 2014.

Pursuant to Section 19(b)(1) [1] of the U.S. Securities Exchange Act of 1934, as amended (the ''Exchange Act''), and Rule 19b–4 thereunder,[2] notice is hereby given that on January 22, 2014, NYSE MKT LLC (''NYSE MKT'') filed with the U.S. Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared substantially by NYSE MKT. 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

A. Overview of the Proposed Merger

NYSE MKT, a New York limited liability company, registered national securities exchange and self-regulatory organization, is submitting this rule filing (the ''*Proposed Rule Change*'') to the U.S. Securities and Exchange Commission (the ''Commission'') in connection with the contribution by IntercontinentalExchange Group, Inc., a Delaware corporation (''*ICE Group''*), of its 100% membership interest in NYSE Euronext Holdings LLC, a Delaware limited liability company (''*NYX Holdings*''), which is an indirect owner of a 100% interest in NYSE MKT, to another wholly owned subsidiary of ICE Group, IntercontinentalExchange, Inc., a Delaware corporation (''*ICE Inc.*'').

NYX Holdings owns 100% of the equity interest of NYSE Group, Inc., a Delaware corporation (''*NYSE Group*''), which in turn directly or indirectly owns (1) 100% of the equity interest of three registered national securities exchanges and self-regulatory organizations (together, the ''*NYSE Exchanges*'')—NYSE MKT, The New York Stock Exchange, LLC (the ''Exchange'') and NYSE Arca, Inc. (''*NYSE Arca*'')—and (2) 100% of the equity interest of NYSE Market (DE), Inc. (''*NYSE Market*''), NYSE Regulation, Inc. (''*NYSE Regulation*''), NYSE Arca L.L.C., NYSE Arca Equities, Inc. (''*NYSE Arca Equities*'') and NYSE Amex Options LLC (''*NYSE Amex Options*'') (the NYSE Exchanges, together with (x) NYSE Market, NYSE Regulation, NYSE Arca L.L.C., NYSE Arca Equities and NYSE Amex Options and (y) any similar U.S. regulated entity acquired, owned or created after the date hereof, the ''*U.S. Regulated Subsidiaries*'' and each, a ''*U.S. Regulated Subsidiary*''). Each of NYSE Arca and the Exchange will be separately filing a proposed rule change in connection with the matters addressed herein that will be substantially the same as the Proposed Rule Change.

Upon completion of ICE Group's contribution to ICE Inc. of 100% of NYX Holdings (the ''*Transfer*''), each U.S. Regulated Subsidiary will become an indirect wholly owned subsidiary of ICE Inc. ICE Inc. will remain a direct wholly owned subsidiary of ICE Group, a public company that is listed on the Exchange. The Transfer is strictly an internal reorganization that does not affect the interests of ICE Group's stockholders. The Transfer will not affect the operation of the U.S. Regulated Subsidiaries.

The Transfer is part of the process pursuant to which ICE Group will prepare for the previously announced sale of the continental European cash equity platforms and the derivatives trading on them (the ''*Euronext Sale*'') currently owned by Euronext N.V., a Dutch company with limited liability (''*Euronext*'') and a wholly owned subsidiary of ICE Group. The Transfer also will facilitate the transitioning of the derivatives businesses of another current subsidiary of Euronext, Liffe Administration and Management (''*LAM*''), to ICE Futures Europe, a subsidiary of ICE Inc., and will enable ICE Inc. to continue in compliance with certain debt covenants after the Euronext Sale. (The transitioning of the derivatives business of LAM is subject to regulatory approval in the United Kingdom.)

B. Summary of Proposed Rule Change

NYSE MKT is proposing that, in connection with the Transfer, the Commission approve the organizational documents of ICE Inc. and amendments to the Amended and Restated Limited Liability Company Agreement of NYX Holdings (''*NYX Holdings Operating Agreement*'') and the Amended and Restated Bylaws of ICE Group (''*ICE Group Bylaws*''). The Proposed Rule Change is summarized as follows:

Certificate of Incorporation and Bylaws of ICE Inc. ICE Inc. would take appropriate steps to incorporate voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries. Specifically, the Fifth Amended and Restated Certificate of Incorporation of ICE Inc. (the ''*ICE Inc. Certificate*'') [3] and the Second Amended and Restated Bylaws of ICE Inc. (the ''*ICE Inc. Bylaws*'') [4] would contain provisions to incorporate these concepts with respect to itself, as well as its directors, officers, employees and agents (as applicable):

- *Voting and Ownership Restrictions in the ICE Inc. Certificate.* The ICE Inc. Certificate would contain voting and ownership restrictions that will take effect only in the event ICE Group does not hold all of the issued and outstanding shares of stock of ICE Inc. The ICE Inc. Certificate would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cast more than 10% of the then outstanding votes entitled to be cast on a matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes entitled to be cast on a matter. The ICE Inc. Certificate would provide that ICE Inc. will be required to disregard any votes purported to be cast in excess of the voting restriction. In the event that any person(s) exceeds the ownership restrictions, it will be obligated to sell promptly, and ICE Inc. will be obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding. The ICE Inc. board of directors may waive the voting and ownership restrictions if it makes certain determinations and expressly resolves to permit the voting and ownership that is subject to such

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The text of the proposed ICE Inc. Certificate is attached to the Proposed Rule Change as Exhibit 5A.

[4] The text of the proposed ICE Inc. Bylaws is attached to the Proposed Rule Change as Exhibit 5B.

restrictions, and such resolutions have been filed with, and approved by, the Commission under Section 19(b) of the U.S. Securities Exchange Act of 1934, as amended (together, with the rules promulgated thereunder, the ''Exchange Act'') and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority. The ICE Inc. Certificate further provides that the board of directors may not approve either voting or ownership rights in excess of a 20% threshold with respect to any person that is a Member of the Exchange (an ''*NYSE Member*''), a Member of NYSE MKT (including any person who is a related person of such member, a ''*NYSE MKT Member*''), an ETP Holder of NYSE Arca Equities (an ''*ETP Holder*''), or an OTP Holder or OTP Firm of NYSE Arca, (an ''*OTP Holder*'' and ''*OTP Firm*,'' respectively), as each of these terms is defined in the ICE Inc. Certificate.

• *Jurisdiction.* The ICE Inc. Bylaws will provide that ICE Inc. and its directors, and, to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, its officers, and those of its employees whose principal place of business and residence is outside the United States will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceedings pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act. The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its officers, directors and employees to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.

• *Books and Records.* The ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act, and that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and by any U.S. Regulated Subsidiary to the extent they are related to the activities of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight. In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.

• *Restrictions on Amendments to ICE Inc. Certificate and Bylaws.* The ICE Inc. Certificate would provide that before any amendment to the ICE Inc. Certificate may be effectuated, such amendment would need to be submitted to the board of directors of each U.S. Regulated Subsidiary and, if so determined by any such board, would need to be filed with, or filed with and approved by, the Commission before such amendment may become effective. The ICE Inc. Bylaws would include the same requirement.

• *Additional Matters.* The ICE Inc. Bylaws would include provisions regarding cooperation with the Commission and the U.S. Regulated Subsidiaries, compliance with U.S. federal securities laws, confidentiality of information regarding the U.S. Regulated Subsidiaries' self-regulatory function, preservation of the independence of the U.S. Regulated Subsidiaries' self-regulatory function, and directors' consideration of the effect of ICE Inc.'s actions on the U.S. Regulated Subsidiaries' ability to carry out their respective responsibilities under the Exchange Act.

• *Proposed Amendments to NYX Holdings Operating Agreement.*[5] The NYX Holdings Operating Agreement currently provides that all membership interests in NYX Holdings must be held by ICE Group. In order that ICE Group may contribute all of the membership interests in NYX Holdings to ICE Inc., the NYX Holdings Operating Agreement would be amended to reflect that ICE Inc. is the ''Member'' and previously was the ''Initial Member'', as those terms are used throughout the NYX Holdings Operating Agreement, and to make nonsubstantive conforming changes to the recitals and definitions.

• *Proposed Approval of Transfer of NYX Holdings Membership Interests.* NYX Holdings Operating Agreement currently provides that ICE Group, as the sole member, may not transfer or assign any membership interests of NYX Holdings to any person or entity without the Commission's approval. ICE Group has adopted the resolutions in order to permit ICE Group to transfer its membership interest in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership (the ''ICE Group 2013 Resolutions'').[6] NYX Holdings has adopted resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. (the ''NYX Holdings Resolutions'').[7]

The proposed Fifth Amended and Restated Certificate of Incorporation of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Bylaws of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Limited Liability Company Agreement of NYSE Euronext Holdings LLC, effective as of the consummation of the Transfer; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc., adopted by the Board of Directors of IntercontinentalExchange Group, Inc. on December 13, 2013; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc. that will be adopted by the Board of Directors of IntercontinentalExchange Group, Inc. as of the consummation of the Transfer; the resolutions of the Board of Managers of NYSE Euronext Holdings LLC, that will be adopted by the Board of Directors of NYSE Euronext Holdings LLC; and the proposed Second Amended and Restated Bylaws of IntercontinentalExchange Group, Inc., effective as of the consummation of the Transfer are attached to the Proposed Rule Change as Exhibits 5A, 5B, 5C, 5D–1, 5D–2, 5E and 5F, respectively.

The text of the Proposed Rule Change is available at NYSE MKT, the Commission's Public Reference Room, and on the Web site of NYSE MKT (*www.nyse.com*). The text of Exhibits 5A through 5F to the Proposed Rule Change

[5] The text of the proposed Second Amended and Restated Limited Liability Company Operating Agreement of NYX Holdings is attached to the Proposed Rule Change as Exhibit 5C.

[6] A copy of the ICE Group 2013 Resolutions is attached to the Proposed Rule Change as Exhibit 5D–1.

[7] A copy of the NYX Holdings Resolutions is attached to the Proposed Rule Change as Exhibit 5E.

is also available on NYSE MKT's Web site and on the Commission's Web site (*www.sec.gov/rules/sro.shtml*).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE MKT has 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. NYSE MKT 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to adopt the rules necessary to permit ICE Group to effect the Transfer.

1. Overview of the Transfer

NYSE MKT is submitting the Proposed Rule Change to the Commission in connection with the transfer by ICE Group of all membership interests in NYX Holdings to ICE Inc. Other than as described herein and in the separate proposed rule changes filed by each NYSE Exchange, ICE Group, ICE Inc. and the NYSE Exchanges do not plan to make any changes to the regulated activities of the U.S. Regulated Subsidiaries in connection with the Transfer. If ICE Group or ICE Inc. determines to make any such changes to the regulated activities of any U.S. Regulated Subsidiary, it will seek the approval of the Commission. The Proposed Rule Change, if approved by the Commission, will not be effective until the consummation of the Transfer.

ICE Inc. is a wholly owned subsidiary of ICE Group and a sister subsidiary of NYX Holdings. ICE Group will contribute the equity interests in NYX Holdings to ICE Inc., at which point NYX Holdings will become a direct wholly owned subsidiary of ICE Inc., and the U.S. Regulated Subsidiaries owned by NYX Holdings will become indirect wholly owned subsidiaries of ICE Inc. ICE Group will continue as the ultimate parent entity of NYX Holdings through ICE Inc.

2. Overview of ICE Inc. Following the Transaction

Following the Transfer, ICE Group will continue to hold all of the equity interests in ICE Inc., and ICE Inc. will hold all the membership interests in NYX Holdings. NYX Holdings will continue to hold (1) 100% of the equity interests of NYSE Group (which, in turn, directly or indirectly holds 100% of the equity interests of the U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext (which, in turn, directly or indirectly holds 100% of the equity interests in certain regulated trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). The Transfer is part of the process pursuant to which ICE Group will prepare for the Euronext Sale.

The ICE Inc. Certificate and Bylaws will include ownership and voting limitations and certain other provisions to satisfy U.S. and European regulatory requirements as described in detail in the Proposed Rule Change. These provisions are modeled on provisions currently in the ICE Group Certificate of Incorporation and Bylaws, as well as those in the NYX Holdings Operating Agreement.

Other than certain modifications described herein, the current corporate structure, governance and self-regulatory independence and separation of each U.S. Regulated Subsidiary will be preserved.

ICE Group and ICE Inc. acknowledge that to the extent either becomes aware of possible violations of the rules of the Exchange, NYSE Arca or NYSE MKT, it will be responsible for referring such possible violations to each such exchange, respectively.

3. Proposed Approval of Transfer of NYX Holdings Membership Interests

Article VII of the current NYX Holdings Operating Agreement provides that the sole Member, ICE Group, may not transfer or assign any membership interests of NYX Holdings to any person or entity unless such transfer shall (1) be filed with and approved by the Commission under Section 19 of the Exchange Act and (2) filed with and approved by the relevant European Regulators under the Applicable European Exchange Regulations. ICE Group, as sole Member, has adopted the ICE Group 2013 Resolutions in order to permit ICE Group to transfer its membership interests in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership. NYX Holdings has adopted the NYX Holdings Resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. NYSE MKT is requesting approval by the Commission of the ICE Group 2013 Resolutions and the NYX Holdings Resolutions to allow the Transfer to take place.

4. Proposed Amendments to Ownership and Voting Restrictions after the Transfer

Overview

NYSE MKT is proposing that, effective as of the completion of the Transfer, the ICE Inc. Certificate would contain voting and ownership restrictions that are substantially identical to those currently in the ICE Group Certificate and the NYX Holdings Operating Agreement and would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cause more than 10% of the votes entitled to be cast on any matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes that may be cast on any matter. These limitations would apply only in the event that ICE Group does not own all of the issued and outstanding stock in ICE Inc. and only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary.

Voting and Ownership Restrictions in the ICE Inc. Certificate

Under the Proposed Rule Change, the ICE Inc. Certificate would provide that, in the event ICE Group does not own all of the issued and outstanding shares of stock of ICE Inc., (1) no person, either alone or together with its related persons (as defined in the ICE Inc. Certificate), may be entitled to vote or cause the voting of shares of stock of ICE Inc. beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter, and (2) no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons to refrain from voting shares of stock of ICE Inc. (the "*ICE Inc. Voting Restriction*").[8] The ICE Inc. Certificate will require ICE Inc. to disregard any votes purported to be cast in excess of the ICE Inc. Voting Restriction.

In addition, the ownership restrictions in the ICE Inc. Certificate would provide that, if such restrictions apply, no person, either alone or

[8] *See* ICE Inc. Certificate, Article V Section A.

together with its related persons, may at any time own beneficially shares of ICE Inc. representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the "*ICE Inc. Ownership Restrictions*").[9] If any person, either alone or together with its related persons, owns shares of ICE Inc. in excess of the ICE Inc. Ownership Restriction, then such person and its related persons are obligated to sell promptly, and ICE Inc. is obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.[10]

The ICE Inc. Certificate would provide that the ICE Inc. Voting Restriction and the ICE Inc. Ownership Restriction would apply only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary.

The ICE Inc. Voting Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to any vote, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of ICE Inc. stock beneficially owned by such person or its related persons in excess of the ICE Inc. Voting Restriction; (2) the board of directors of ICE Inc. has resolved to expressly permit such voting; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act[11] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[12] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that the exercise of such voting rights (or the entering into of a voting agreement), as applicable:

- Will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;
- for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm; and
- for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;
- for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and
- neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person (as such terms are defined in the ICE Inc. Certificate).[13]

The ICE Inc. Ownership Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to the acquisition of any shares of ICE Inc. that would cause such person, either alone or together with its related persons, to exceed the ICE Inc. Ownership Restriction, of such person's intention, either alone or together with its related persons, to acquire such ownership; (2) the board of directors of ICE Inc. has resolved to expressly permit such ownership; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act[14] and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.[15] Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that such ownership:

- Will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;
- for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm;
- for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;
- for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and
- neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person.

In order to allow ICE Inc. to own and vote all of the outstanding common stock of NYX Holdings after the Transfer, ICE Inc. has delivered written notice to the board of NYX Holdings pursuant to the procedures set forth in the NYX Holdings Operating Agreement requesting approval of its voting and ownership of NYX Holdings shares in excess of the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. Among other things, in this notice, ICE Inc. represented to the board of NYX Holdings that neither it, nor any of its related persons, is (1) an NYSE Member; (2) an NYSE MKT Member; (3) an ETP Holder; (4) an OTP Holder or OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person.

On December 13, 2013, the board of directors of ICE Group adopted the ICE Group 2013 Resolutions to authorize

[9] *See* ICE Inc. Certificate, Article V Section B.

[10] *See* ICE Inc. Certificate, Article V Section B.4.

[11] 15 U.S.C. 78s(b).

[12] *See* ICE Inc. Certificate, Article V Section A.2.

[13] *See* ICE Inc. Certificate, Article V Sections A.3(c)(i), A.3(d)(i) and B.3(c)(i).

[14] 15 U.S.C. 78s(b).

[15] *See* ICE Inc. Certificate, Article V Section B.2.

and instruct the transfer ownership of NYX Holdings to ICE Inc. On ——.2014, the board of managers of NYX Holdings, acting by unanimous written consent, adopted the NYX Holdings Resolutions to permit ICE Inc., either alone or with its related persons, to exceed the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. In adopting such resolutions, the board of managers of NYX Holdings made the necessary determinations set forth in the NYX Holdings Operating Agreement (which are similar to those set forth above) and approved the submission of the Proposed Rule Change to the Commission.

5. Additional Matters To Be Addressed in the ICE Inc. Certificate and Bylaws [16]

Jurisdiction Over Individuals

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, and, to the extent that they are involved in the activities of the U.S. Regulated Subsidiaries, ICE Inc.'s officers and those of its employees whose principal place of business and residence is outside the United States, would be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. The ICE Inc. Bylaws would also provide that, with respect to any such suit, action, or proceeding brought by the Commission, ICE Inc. and its directors, officers and employees would (1) be deemed to agree that ICE Inc. may serve as U.S. agent for purposes of service of process in such suit, action, or proceedings relating to ICE Inc. or any of its subsidiaries; and (2) be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceedings is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts of the Commission.[17]

In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees of ICE Inc. will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[18]

The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting a position as an officer, director or employee, as applicable, of ICE Inc. to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.[19]

NYSE MKT anticipates that the functions and activities of each U.S. Regulated Subsidiary generally will be carried out by the officers and directors of such U.S. Regulated Subsidiary, over each of whom the Commission has direct authority pursuant to Section 19(h)(4) of the Exchange Act.[20]

Access to Books and Records

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.[21] In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.[22] The ICE Inc. Bylaws also would provide that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and any U.S. Regulated Subsidiary to the extent they are related to the activities of the U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight.[23]

Additional Matters

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. will comply with the U.S. federal securities laws and the rules and regulations thereunder, and will cooperate with the Commission and with the U.S. Regulated Subsidiaries pursuant to and to the extent of their respective regulatory authority.[24] In addition, ICE Inc. would be required to take reasonable steps necessary to cause its agents to cooperate with the Commission and, where applicable, the U.S. Regulated Subsidiaries pursuant to their regulatory authority.[25] The ICE Inc. Bylaws would also provide that, in discharging his or her responsibilities as a member of the ICE Inc. board of directors or as an officer or employee of ICE Inc., each such director, officer or employee will (a) comply with the U.S. federal securities laws and the rules and regulations thereunder; (b) cooperate with the Commission; and (c) cooperate with the U.S. Regulated Subsidiaries pursuant to and to the extent of their regulatory authority (but this provision will not create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any such matters or to limit his or her consideration of such matters).[26]

The ICE Inc. Bylaws would also provide that all confidential information that comes into the possession of ICE Inc. pertaining to the self-regulatory function of any U.S. Regulated Subsidiary will (a) not be made available to any persons other than to those officers, directors, employees and agents of ICE Inc. that have a reasonable need to know the contents thereof; (b) be retained in confidence by ICE Inc. and the officers, directors, employees and agents of ICE Inc.; and (c) not be used for any commercial purposes.[27] In addition, the ICE Inc. Bylaws would provide that these obligations regarding such confidential information will not be interpreted so as to limit or impede (i) the rights of the Commission or the relevant U.S. Regulated Subsidiary to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees or agents of ICE Inc. to disclose such confidential information

[16] The ICE Inc. Certificate and Bylaws will also set forth certain restrictions and requirements relating to ICE Group's [sic] European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to ICE Group's [sic] U.S. Regulated Subsidiaries and U.S. regulatory matters.

[17] *See* ICE Inc. Bylaws, Section 7.1.

[18] *See* ICE Inc. Bylaws, Section 8.4.

[19] *See* ICE Inc. Bylaws, Section 9.3.

[20] 15 U.S.C. 78s(h)(4).

[21] *See* ICE Inc. Bylaws, Section 8.4.

[22] *See* ICE Inc. Bylaws, Sections 8.4 and 8.6.

[23] *See* ICE Inc. Bylaws, Section 8.3.

[24] *See* ICE Inc. Bylaws, Section 9.l.

[25] *See id.*

[26] *See* ICE Inc. Bylaws, Section 3.14(b).

[27] *See* ICE Inc. Bylaws, Section 8.1.

to the Commission or any U.S. Regulated Subsidiary.[28]

In addition, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, officers and employees will give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and to its obligations to investors and the general public, and will not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of any U.S. Regulated Subsidiary relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of such U.S. Regulated Subsidiary to carry out its responsibilities under the Exchange Act.[29]

Finally, the ICE Inc. Bylaws would provide that each director of ICE Inc. would, in discharging his or her responsibilities, to the fullest extent permitted by applicable law, take into consideration the effect that ICE Inc.'s actions would have on the ability of (a) the U.S. Regulated Subsidiaries to carry out their responsibilities under the Exchange Act; and (b) the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to (1) engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to prevent fraudulent and manipulative acts and practices in the securities markets; (2) promote just and equitable principles of trade in the securities markets; (3) foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (4) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (5) in general, protect investors and the public interest.[30]

Amendments to the ICE Inc. Certificate and Bylaws

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that, before any amendment to or repeal of any provision of the ICE Inc. Bylaws shall be effective, such amendment or repeal shall be submitted to the board of directors of each U.S. Regulated Subsidiary (or the boards of directors of their successors) and if any or all of such boards of directors determine that, before such amendment or repeal may be effectuated, the same must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Exchange Act and the rules promulgated thereunder, then the same will not be effectuated until filed with, or filed with and approved by, the Commission, as the case may be.[31] These requirements would also apply to any action by ICE Inc. that would have the effect of amending or repealing any provisions of the ICE Inc. Certificate.[32]

6. Proposed Amendment to the NYX Holdings Operating Agreement

In addition, NYSE MKT proposes that the NYX Holdings Operating Agreement be amended to reflect that ICE Inc. will be the sole member of the LLC as a result of ICE Group's transfer of the membership interest in NYX Holdings to ICE Inc.[33] The NYX Holdings Operating Agreement also would be amended to reflect that ICE Inc. previously was the ''Initial Member'', to delete references to NYSE Euronext LLC and to make nonsubstantive conforming changes to the recitals and definitions.

7. Proposed Amendment to the ICE Group Bylaws

The provisions in the ICE Group Certificate establishing the standard for each director's approval of ownership or voting rights in excess of the limitations in the ICE Group Certificate do not currently require a director to consider whether such approval would impair the ability of ICE Inc. and NYX Holdings to comply with the Exchange Act and the rules and regulations thereunder.[34] Also, the provisions in the ICE Group Bylaws establishing the standards for the Board's approval of any action by ICE Group does not currently require a director to take into consideration the effect that such action would have on the ability of ICE Inc. and NYX Holdings (a) to engage in conduct that fosters and does not interfere with the ability of each such entity to prevent fraudulent and manipulative acts and practices in the securities markets; (b) to promote just and equitable principles of trade in the securities markets; (c) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (d) to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (e) in general, to protect investors and the public interest.[35] Under the Proposed Rule Change, the ICE Group Bylaws would be amended to add references to ICE Inc. and NYX Holdings in each such provision.[36]

2. Statutory Basis

NYSE MKT believes that this filing is consistent with Section 6(b) of the Exchange Act[37] in general, and furthers the objectives of Section 6(b)(1)[38] in particular, in that it enables NYSE MKT to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of NYSE MKT. With respect to the ability of the Commission to enforce the Exchange Act as it applies to the U.S. Regulated Subsidiaries after the Transfer, the U.S. Regulated Subsidiaries will operate in the same manner following the Transfer as they operate today. Thus, the Commission will continue to have plenary regulatory authority over the U.S. Regulated Subsidiaries, as is the case currently with these entities. The Proposed Rule Change is consistent with and will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to each U.S. Regulated Subsidiary, its direct and indirect parent entities and its directors, officers, employees and agents to the extent they are involved in the activities of such U.S. Regulated Subsidiary.

NYSE MKT also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act[39] because the Proposed Rule Change summarized herein would be consistent with and facilitate a governance and regulatory

[28] *See* ICE Inc. Bylaws, Section 8.2.

[29] *See* ICE Inc. Bylaws, Section 9.4.

[30] *See* ICE Inc. Bylaws, Section 3.14(a). This requirement would not, however, create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any of the foregoing matters or to limit his or her consideration to such matters. *See* ICE Inc. Bylaws, Section 3.14(c).

[31] *See* ICE Inc. Bylaws, Section 11.3.

[32] *See* ICE Inc. Certificate, Article IX(C).

[33] *See* NYX Holdings Operating Agreement, Preamble.

[34] ICE Group Certificate, Article V, Sections A.3(a)(i) and B.3(a)(i).

[35] ICE Group Bylaws, Section 3.14(a)(3).

[36] Resolutions of the Board of Directors of ICE Group approving these amendments are attached to the Proposed Rule Change as Exhibit 5D–2 (the ''ICE Group 2014 Resolutions''). The proposed amendments to the ICE Group Bylaws are attached as Exhibit 5F to the Proposed Rule Change. *See* Proposed ICE Group Bylaws 3.14(a)(3) and 3.15(g).

[37] 15 U.S.C. 78f(b).

[38] 15 U.S.C. 78f(b)(1).

[39] 15 U.S.C. 78f(b)(5).

structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE MKT 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 Exchange Act. The Proposed Rule Change relates to an internal reorganization of subsidiaries of ICE Group and is not designed to address any competitive issue in the U.S. securities markets, or have any impact on competition in those markets. The Proposed Rule Change is part of ICE Group's process to implement the Euronext Sale. The Euronext Sale will be subject to review and approval by multiple European regulators.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NYSE MKT has neither solicited nor received written comments on the Proposed Rule Change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days after publication (i) as the Commission may designate 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 or disapprove the 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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2014–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2014–10. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2014–10, and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01811 Filed 1–29–14; 8:45 am]

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[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71386; File No. SR–NYSEArca–2014–07]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Updating the Description of the Data Included in the ArcaBook Equities Data Feed

January 24, 2014.

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 January 17, 2014, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NYSE Arca has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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

The Exchange proposes to update the description of the data included in the ArcaBook equities data feed. The text of the proposed rule change is available on the Exchange's Web site at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to proposes to [sic] update the description of the data included in the ArcaBook equities data feed. ArcaBook is a real-time market data product that is a compilation of all limit orders in the NYSE Arca limit order book. A 2010 rule filing stated that Exchange [sic] also makes available real-time information relating to transactions and limit orders in debt securities that are traded through the Exchange's facilities as part of ArcaBook.[4] The Exchange currently does not trade debt securities, and the ArcaBook data feed does not currently include any debt data. There are no separate or additional fees for debt securities data described in the current ArcaBook pricing structure. The Exchange notes that its affiliate, New York Stock Exchange LLC (''NYSE''), lists and trades debt securities under NYSE Rules 86–88. NYSE offers its debt security data for free.[5]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[6] of the Act, in general, and furthers the objectives of Section 6(b)(5)[7] of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange believes that updating the description of the ArcaBook product will benefit users by making clearer what data is included. The proposed rule change will have no impact on NYSE's debt data, which is provided free of charge.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to consumers of such data. It was believed that this authority would expand the amount of data available to users and consumers of such data and also spur innovation and competition for the provision of market data. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[8]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address any competitive issue but rather to update the description of the ArcaBook product so that it reflects the included data elements. The Exchange does not believe that the proposed rule change would burden competition. The Exchange further notes that the debt securities data of the Exchange's affiliate, NYSE, will continue to be available from NYSE without charge.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2014–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[4] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[5] *See* Securities Exchange Act Release No. 55496 (March 20, 2007), 72 FR 14631 (March 28, 2007) (SR–NYSE–2006–37).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7–10–04).

[9] 15 U.S.C. 78f(b)(8).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–07 and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01806 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71387; File No. SR–ISE–2014–03]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

January 24, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2014, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees to specify the frequency with which the Exchange may change the Options Regulatory Fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Schedule of Fees to specify the frequency with which the Exchange may change the Options Regulatory Fee (''ORF'').

The ORF is assessed by the Exchange to each member for all options transactions in both Standard Options and Mini Options executed or cleared by the member that are cleared by The Options Clearing Corporation (''OCC'') in the customer range, i.e., transactions that clear in the customer account of the member's clearing firm at OCC, regardless of the exchange on which the transaction occurs. The fee is collected indirectly from Members through their clearing firms by OCC on behalf of the Exchange. The dues and fees paid by Members go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation.

In response to feedback from Members requesting greater certainty as to when ORF changes may occur, the Exchange proposes to specify in the Schedule of Fees that the Exchange may only increase or decrease the ORF semi-annually, and any such fee change will be effective on the first business day of February or August.[3] In addition to submitting a proposed rule change to the Securities and Exchange Commission (''Commission'') as required by the Act to increase or decrease the ORF, the Exchange will notify members via circular of any anticipated change in the amount of the fee at least 30 calendar days prior to the effective date of the change. The Exchange believes that by providing guidance on the timing of any changes to the ORF, the Exchange would make it easier for Members to ensure their systems are configured to properly account for the ORF.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4) of the Act,[5] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it will give Members certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee. The Exchange notes that the proposed changes are consistent with recent fee changes made by NYSE Arca (''Arca'') and NYSE Amex Options (''Amex''), and will make it easier for members to ensure that their systems are configured to properly account for the ORF.[6]

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] *See* Securities Exchange Act Release Nos. 70500 (September 25, 2013), 78 FR 60361 (October 1, 2013) (SR–NYSEArca–2013–91); 70499 (September 25, 2013), 78 FR 60362 (October 1, 2013) (SR–NYSEMKT–2013–76); [sic]

The proposed change is not intended to address a competitive issue but rather to provide Members with better notice of any change that the Exchange may make to the ORF, which will make it easier for Members to ensure that their systems are configured to properly account for the ORF. Furthermore, as explained above, the proposed changes are substantially similar in all material respects to fee changes made by Arca and Amex.[7] For these reasons, the Exchange does not believe that the proposed change will impair the ability of Members, or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4 thereunder,[9] because it establishes a due, fee, or other charge imposed by ISE.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2014–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2014–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2014–03, and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01807 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71388; File No. SR–Topaz–2014–03]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

January 24, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2014, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the ''Exchange'' or ''Topaz'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Topaz is proposing to amend its Schedule of Fees to specify the frequency with which the Exchange may change the Options Regulatory Fee. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Schedule of Fees to specify the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

frequency with which the Exchange may change the Options Regulatory Fee (''ORF'').

The ORF is assessed by the Exchange to each member for all options transactions in both Standard Options and Mini Options executed or cleared by the member that are cleared by The Options Clearing Corporation (''OCC'') in the customer range, i.e., transactions that clear in the customer account of the member's clearing firm at OCC, regardless of the exchange on which the transaction occurs. The fee is collected indirectly from Members through their clearing firms by OCC on behalf of the Exchange. The dues and fees paid by Members go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation.

In response to feedback from Members requesting greater certainty as to when ORF changes may occur, the Exchange proposes to specify in the Schedule of Fees that the Exchange may only increase or decrease the ORF semi-annually, and any such fee change will be effective on the first business day of February or August.[3] In addition to submitting a proposed rule change to the Securities and Exchange Commission (''Commission'') as required by the Act to increase or decrease the ORF, the Exchange will notify members via circular of any anticipated change in the amount of the fee at least 30 calendar days prior to the effective date of the change. The Exchange believes that by providing guidance on the timing of any changes to the ORF, the Exchange would make it easier for Members to ensure their systems are configured to properly account for the ORF.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(4) of the Act,[5] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it will give Members certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee. The Exchange notes that the proposed changes are consistent with recent fee changes made by NYSE Arca (''Arca'') and NYSE Amex Options (''Amex''), and will make it easier for members to ensure that their systems are configured to properly account for the ORF.[6]

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not intended to address a competitive issue but rather to provide Members with better notice of any change that the Exchange may make to the ORF, which will make it easier for Members to ensure that their systems are configured to properly account for the ORF. Furthermore, as explained above, the proposed changes are substantially similar in all material respects to fee changes made by Arca and Amex.[7] For these reasons, the Exchange does not believe that the proposed change will impair the ability of Members, or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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)(ii) of the Act,[8] and subparagraph (f)(2) of Rule 19b–4 thereunder,[9] because it establishes a due, fee, or other charge imposed by Topaz.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Topaz–2014–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-Topaz-2014–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such

[3] The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] *See* Securities Exchange Act Release Nos. 70500 (September 25, 2013), 78 FR 60361 (October 1, 2013) (SR–NYSEArca–2013–91); 70499 (September 25, 2013), 78 FR 60362 (October 1, 2013) (SR–NYSEMKT–2013–76); [sic]

[7] *Id.*

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Topaz–2014–03, and should be submitted on or before February 20, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01808 Filed 1–29–14; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than March 31, 2014. Individuals can obtain copies of the collection instruments by writing to the above email address.

Medicare Income-Related Monthly Adjustment Amount—Life-Changing Event Form—0960–0784. Federally mandated reductions in the Federal Medicare Part B and prescription drug coverage subsidies result in selected Medicare recipients paying higher premiums with income above a specific threshold. The amount of the premium subsidy reduction is an income-related monthly adjustment amount (IRMAA). The Internal Revenue Service (IRS) transmits income tax return data to SSA for SSA to determine the IRMAA. SSA uses the Form SSA–44 to determine if a recipient qualifies for a reduction in the IRMAA. If affected Medicare recipients believe SSA should use more recent tax data because a life-changing event that significantly reduces their income, they can report these changes to SSA and ask for a new initial determination of their IRMAA. The respondents are Medicare Part B and prescription drug coverage recipients and enrollees with modified adjusted gross income over a high-income threshold who experience one of the eight significant life-changing events.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Personal Interview (SSA field office)	147,000	1	30	73,500
SSA–44 Paper Form	39,000	1	45	29,250
Totals	186,000			102,750

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 3, 2014. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Missing and Discrepant Wage Reports Letter and Questionnaire—26 CFR 31.6051–2—0960–0432. Each year employers report the wage amounts they paid their employees to the IRS for tax purposes, and separately to SSA for retirement and disability coverage purposes. The same figures should be reported to SSA and the IRS. However, each year some employer wage reports SSA receives are less than the wage amounts employers report to the IRS. SSA uses Forms SSA–L93–SM, SSA–L94–SM, SSA–95–SM, and SSA–97–SM to ensure employees receive full credit for their wages. Respondents are employers who reported lower wage amounts to SSA than they reported to the IRS.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–95–SM and SSA–97–SM (and accompanying cover letters SSA–L93, L94)	360,000	1	30	180,000

[10] 17 CFR 200.30–3(a)(12).

2. Benefit Offset National Demonstration—0960–0785. SSA is undertaking the Benefit Offset National Demonstration (BOND)—a demonstration and evaluation of policy changes and services on the Social Security Disability Insurance (SSDI) program—in an effort to produce strong evidence about the effectiveness of potential solutions that would improve the historically very low rate of return to work among SSDI beneficiaries. Under current law, Social Security beneficiaries lose their SSDI benefit if they have earnings or work activity above the threshold of Substantial Gainful Activity. The benefit-offset component of this demonstration reduces benefits by $1 for each $2 in earnings above the BOND threshold, resulting in a gradual reduction in benefits as earnings increase. The experimental design for BOND tests a benefit offset alone and in conjunction with enhanced work incentives counseling. The central research questions include:

• What is the effect of the benefit offset alone on employment and other outcomes?

• What is the effect of the benefit offset in combination with enhanced work incentives counseling on employment and other outcomes?

The public survey data collections have four components—an impact study, a cost-benefit analysis, a participation analysis, and a process study. The data collections are a primary source for data to measure the effects of a more generous benefit offset and the provision of enhanced work incentives counseling on SSDI beneficiaries' work efforts and earnings. Ultimately, these data will benefit researchers, policy analysts, policy makers and the United States Congress in a wide range of program areas. The effects of BOND on the well-being of SSDI beneficiaries could manifest themselves in many dimensions and could be relevant to an array of other public programs. This project offers the first opportunity to obtain reliable measures of these effects based upon a nationally representative sample. The long-term indirect benefits of this research are therefore likely to be substantial. Respondents are SSDI beneficiaries and concurrent SSDI beneficiaries and Supplemental Security Income recipients who we randomly assign to the study (Stage 1), and SSDI beneficiaries who agree to participate in the study (Stage 2).

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)
Participation Agreement	12,954	1	12,954	20	4,318
Baseline Survey	12,954	1	12,954	41	8,852
Stage 2, 12-month Interim Survey	10,363	1	10,363	29	5,009
Stage 1, 36-month Survey	8,000	1	8,000	49	6,533
Stage 2, 36-month Survey	10,363	1	10,363	60	10,363
Enhanced Work Incentives Assessment	3,089	1	3,089	35	1,802
Key Informant Interviews	100	7	700	60	700
Stage 2, Participant Focus Groups	600	1	600	90	900
Stage 1, First Contact Letter Survey	500	1	500	3	25
Totals	89,923		59,523		38,502

Dated: January 27, 2014.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2014–01828 Filed 1–29–14; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA)

Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than March 31, 2014. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Questionnaire About Employment or Self-Employment Outside the United States—20 CFR 404.401(b)(1), 404.415 & 404.417—0960–0050. When a Social Security beneficiary or claimant reports work outside the United States, SSA uses Form SSA–7163 to determine if foreign work deductions are applicable. Specifically, SSA uses Form SSA–7163 to determine: (1) Whether work performed by beneficiaries outside the United States is cause for deductions from their monthly benefits; (2) which of two work tests (foreign or regular test) is applicable; and (3) the number of months, if any, for SSA-imposed deductions. As the respondents are beneficiaries living and working outside the United States, SSA must determine whether the annual earnings test applies to all earnings from work covered by the Social Security Act (Act), including earnings from covered work performed outside the United States. However, because of the differences in foreign currency values, it is administratively

impractical to apply this test to earnings from non-covered work performed outside the United States and base it on United States dollars. Accordingly, the 45-hour work test provides for deductions from the benefits of employees under full retirement age who engage in non-covered remunerative activity for more than 45 hours in a calendar month. SSA asks beneficiaries working outside the United States to complete this form annually or every other year (depending on the country of residence).

Respondents for this collection are beneficiaries or claimants for Social Security benefits who are engaged in work outside the United States.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–7163	20,000	1	12	4,000

2. Statement of Death by Funeral Director—20 CFR 404.715 and 404.720—0960–0142. When an SSA-insured worker dies, the funeral director or funeral home responsible for the worker's burial or cremation completes Form SSA–721 and sends it to SSA. SSA uses this information for three purposes: (1) To establish proof of death for the insured worker; (2) to determine if the insured individual was receiving any pre-death benefits SSA needs to terminate; and (3) to ascertain which surviving family member is eligible for the lump-sum death payment or for other death benefits. The respondents are funeral directors who handled death arrangements for the insured individuals.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–721	319,811	1	4	21,321

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 3, 2014. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Statement of Agricultural Employer (Year Prior to 1988; and 1988 and later)—20 CFR 404.702, 404.802, 404.1056—0960–0036. If agricultural workers believe their employers (1) did not report their wages or (2) reported incorrect wage amounts, SSA will assist them in resolving this issue. Specifically, SSA will send Forms SSA–1002–F3 or SSA–1003–F3 to the agricultural employers to collect evidence of wages paid. The respondents are agricultural employers whose workers request wage verification or correction for their earnings records.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1002	7,500	1	30	3,750
SSA–1003	25,000	1	30	12,500
Total	32,500	.....	.....	16,250

2. Request for Waiver of Special Veterans Benefits (SVB) Overpayment Recovery or Change in Repayment Rate—20 CFR 408.900–408.950–0960–0698. Title VIII of the Act requires SSA to pay a monthly benefit to qualified World War II veterans who reside outside the United States. When an overpayment in this SVB occurs, the beneficiary can request a waiver of recovery of the overpayment or a change in the repayment rate. SSA uses the SSA–2032–BK to obtain the information necessary to establish whether the claimant meets the waiver of recovery provisions of the overpayment, and to determine the repayment rate if we do not waive repayment. Respondents are SVB beneficiaries who have overpayments on their Title VIII record and wish to file a claim for waiver of recovery or change in repayment rate.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–2032–BK	450	1	120	900

Dated: January 27, 2014.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2014–01827 Filed 1–29–14; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2014–0003]

Public Availability of Social Security Administration Fiscal Year (FY) 2013 Service Contract Inventory

AGENCY: Social Security Administration.

ACTION: Notice of Public Availability of FY 2013 Service Contract Inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), we are publishing this notice to advise the public of the availability of the FY 2013 Service Contract inventory. This inventory provides information on FY 2013 service contract actions over $25,000. We organized the information by function to show how we distribute contracted resources throughout the agency. We developed the inventory in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf*. You can access the inventory and summary of the inventory on our homepage at the following link: *http://www.socialsecurity.gov/sci*.

FOR FURTHER INFORMATION CONTACT: Mark Ploss, Office of Budget, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Phone (410) 965–4688, email *Mark.Ploss@SSA.gov*.

Dated: January 27, 2014.

Michelle King,

Deputy Associate Commissioner, Office of Budget, Office of Budget, Finance, Quality, and Management.

[FR Doc. 2014–01852 Filed 1–29–14; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8613]

Culturally Significant Object Imported for Exhibition Determinations: ''Goya and the Altamira Family''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition ''Goya and the Altamira Family,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at The Metropolitan Museum of Art, New York, NY, from on or about April 22, 2014, until on or about August 3, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit object, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 23, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–01887 Filed 1–29–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8614]

Culturally Significant Objects Imported for Exhibition Determinations: ''The Magna Carta'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''The Magna Carta,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Houston Museum of Natural Science, Houston, TX, from on or about February 14, 2014, until on or about August 17, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 23, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–01885 Filed 1–29–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8615]

Culturally Significant Objects Imported for Exhibition Determinations: ''Robert Heinecken: Object Matter'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Robert Heinecken: Object Matter,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at The Museum of Modern Art, New York, NY, from on or about March 15, 2014, until on or about June 22, 2014; the Armand Hammer

Museum of Art and Cultural Center, Los Angeles, CA, from on or about October 5, 2014, until on or about January 17, 2015, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 23, 2014.

Kelly Keiderling,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2014–01886 Filed 1–29–14; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Transfer of Federally Assisted Facility

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of intent to transfer Federally assisted facility.

SUMMARY: Section 5334(h) of the Federal Transit Laws, as codified, 49 U.S.C. 5301, *et. seq.,* permits the Administrator of the Federal Transit Administration (FTA) to authorize a recipient of FTA funds to transfer land or a facility to a public body for any public purpose with no further obligation to the Federal Government if, among other things, no Federal agency is interested in acquiring the asset for Federal use. Accordingly, FTA is issuing this Notice to advise Federal agencies that the City of Newark, Ohio, (City) intends to transfer a facility and land located at 295 Wilson Street, Newark, Ohio, to the Licking County Board of Commissioners. The City can no longer use the properties because they are no longer operating transit, and will no longer be the recipient of FTA grants. The buildings were purchased with the intention to be utilized for administrative offices and the storage of vehicles for the City's Transit Department. The buildings have been vacant for more than five (5) years in need of rehabilitation, and the transfer will allow the properties to be put to good use.

The Licking County Board of Commissioners will be utilizing the buildings for their Homeland Security & Emergency Management departments. The Homeland Security department will utilize one of the buildings for their administrative personnel. In addition, the buildings would allow for vehicle storage and is centrally located in the county to substantially improve emergency response times in the county. The site will also be used to store and protect seasonal equipment owned by the county as well. The County also agreed to ensuring that this use be maintained for no less than five (5) years.

DATES: *Effective Date:* Any Federal agency interested in acquiring the facility must notify the FTA Region V office of its interest no later than 30 days from the date of publication of the **Federal Register** notice.

ADDRESSES: Interested parties should notify the Regional Office by writing to Marisol Simon, Regional Administrator, Federal Transit Administration, 200 West Adams Street, Suite 320, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Nichole Neal, Transportation Program Specialist, (312) 353–2792.

SUPPLEMENTARY INFORMATION:

Background

49 U.S.C. 5334(h) provides guidance on the transfer of capital assets. Specifically, if a recipient of FTA assistance decides an asset acquired under this chapter at least in part with that assistance is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. 49 U.S.C. 5334(h)(1).

Determinations

The Secretary may authorize a transfer for a public purpose other than mass transportation only if the Secretary decides:

(A) The asset will remain in public use for at least 5 years after the date the asset is transferred;

(B) There is no purpose eligible for assistance under this chapter for which the asset should be used;

(C) The overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) Through an appropriate screening or survey process, that there is no interest in acquiring the asset for Government use if the asset is a facility or land.

Federal Interest in Acquiring Land or Facility

This document implements the requirements of 49 U.S.C. 5334(h)(1)(D) of the Federal Transit Laws. Accordingly, FTA hereby provides notice of the availability of the facility further described below. Any Federal agency interested in acquiring the affected facility should promptly notify the FTA. If no Federal agency is interested in acquiring the existing facility, FTA will make certain that the other requirements specified in 49 U.S.C. 5334(h)(1)(A) through (C) are met before permitting the asset to be transferred.

Additional Description of Land or Facility

The Parcel number is 054–217770–00.001 and consists of approximately 80,112 square feet of land. This property is approximately 1.8391 acres. There are two commercial warehouses on the property that are in good condition. One building is 60 feet x 100 feet, for a total of 6,000 square feet. This building has approximately 1,000 square feet of finished office area and 5,000 square feet of unfinished storage space with a finished concrete floor. The second building is 40 feet x 100 feet for a total of 4,000 square feet and it has approximately 1,000 square feet of finished/dry walled area with 3,000 square feet of unfinished storage space. The buildings are connected to city services of water and sewer. In addition, the electrical and telephone services are installed with natural gas lines access for each building on the parcel. Each of the buildings on the parcel has HVAC systems installed to service the finished areas. Phase 1 Hazardous Waste assessment surveys were conducted in 2009 and there were no issues associated with the site.

Marisol Simon,

Regional Administrator.

[FR Doc. 2014–01740 Filed 1–29–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Request for Comment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces that the Information Collection Request (ICR) abstracted below will be submitted to the Office of Management and Budget (OMB) for review. The ICR describes the nature of the information collection and its expected burden. A **Federal Register** Notice with a 60-day comment period soliciting public comments on the following information collection was published on October 30, 2013 (**Federal Register**/Vol. 78, No. 210/pp. 65038–65040).

DATES: Comments must be received on or before March 3, 2014.

FOR FURTHER INFORMATION CONTACT: Dr. Russell Pierce, Contracting Officer's Technical Representative, Office of Behavioral Safety Research (NTI–132), National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., W46–472, Washington, DC 20590. Dr. Pierce's phone number is (202) 366–5599 and his email address is *russell.pierce@dot.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: None.

Title: Medical Review Guidelines and Medical Advisory Board Practices.

Form No.: NHTSA 1228.

Type of Review: Regular.

Respondents: TransAnalytics (NHTSA's Contractor) plans to enlist the assistance of the American Association of Motor Vehicle Administrators (AAMVA) to identify the most appropriate contact in each State (and the District of Columbia), for distribution of the questionnaire and the narrative summary for review and update.

Estimated Number of Respondents: 51.

Estimated Time per Response: The average amount of time for each State to complete the questionnaire is estimated at 5 hours. This includes time for each medical review contact to review and edit the narrative describing their State's medical review structure and process and the time that may be required to respond to telephone contacts made by TransAnalytics if necessary, to follow-up or clarify questionnaire responses.

Total Estimated Annual Burden Hours: 255 hours.

Frequency of Collection: This census will administered a single time.

Abstract: As our population ages, age-related impairments in safe driving abilities will become more prevalent. The private automobile remains by far the most often used and most preferred means of meeting community mobility needs among older adults. Along with the increase in the number of older drivers, an increase in the driving exposure of older adults is likely, both in terms of the frequency of their trips and the distances they drive. In addition, due to increased physical frailty, older individuals are also most likely to be seriously injured or killed in an automotive crash. Therefore, driver medical review practices are likely to assume a more prominent role in the years ahead.

Medical review guidelines and practices can help evaluate drivers referred to a State motor vehicle licensing agency for reexamination due to concerns about unsafe driving performance possibly resulting from suspected age or medical condition related impairments in visual, physical, or mental abilities. Society has an interest in ensuring that these medical review guidelines and practices are in place and are effective in reducing motor vehicle crashes, injury, and death.

This project will collect information from an individual in the Medical Review Department in each of the 50 State Driver Licensing Agencies and The District of Columbia about their State's driver medical review structure and processes. The information collected will be used to produce a short narrative describing each State's medical review structure and processes, plus several appendices with tables displaying each individual State's responses to the questions, and totals for each response. Data will be collected, according to each respondent's preference, via a Microsoft Word document distributed and collected via email or a print version distributed and collected via U.S. mail, and the responses will consist primarily of checkbox response types and fill-in-the-blank options when non-standard checkboxes are selected. Additionally, questionnaire respondents will be provided with a short narrative that describes their State's medical review processes, and asked to review and edit/update the narrative as necessary to ensure its accuracy.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for Department of Transportation, National Highway Traffic Safety Administration, or by email at *oira_submission@omb.eop.gov,* or fax: 202–395–5806.

Comments Are Invited On: whether the proposed collection of information is necessary for the proper performance of the functions of the Department of Transportation, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication of this notice.

Authority: 44 U.S.C. Section 3506(c)(2)(A).

Issued in Washington, DC, on January 27, 2014.

Jeff Michael,

Associate Administrator, Research and Program Development.

[FR Doc. 2014–01854 Filed 1–29–14; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1109X]

City of Belfast, Me.—Abandonment Exemption—in Belfast, Me.

On January 10, 2014,[1] the city of Belfast, Maine (the City) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 2.0 miles of rail line known as the Belfast and Moosehead Lake Railroad, extending between milepost 0.33 in downtown Belfast at the U.S. Route 1 overpass and milepost 2.33, located approximately at Oak Hill Road in the City of Belfast, Waldo County, Me. (the Line). The Line

[1] The City originally submitted a verified notice of exemption seeking abandonment of the Line on June 25, 2013. However, this abandonment proceeding was held in abeyance on August 13, 2013, to permit the City to seek the requisite regulatory authority to acquire the Line. *City of Belfast, Me.—Acquis. Exemption—Certain Assets of Belfast & Moosehead Lake R.R.,* FD 35766 (STB Served Dec. 26, 2013). The acquisition exemption sought by the City in Docket No. FD 35766 became effective on January 9, 2014. On December 9, 2013, the City filed a verified statement and amendment in Docket No. AB 1109X asking the Board to convert the notice of exemption seeking abandonment into a petition for abandonment. By publication of this notice, the abandonment proceeding is removed from abeyance, and the petition for abandonment is deemed to have been filed on January 10, 2014.

traverses United States Postal Service Zip Code 04915 and includes the station of City Point at milepost 2.16.[2]

The City states that, based on information in its possession, the Line does not contain federally granted rights-of-way. Any documentation in the City's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued no later than April 30, 2014.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than May 9, 2014, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Each OFA must be accompanied by a $1,600 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than February 19, 2014.[3] Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1109X and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Kristin M. Collins, Kelly & Collins, LLC, 96 High Street, Belfast, ME 04915. Replies to the petition are due on or before February 19, 2014.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). The EA in this abandonment proceeding was made available on January 24, 2014. The deadline for submission of comments on the EA is February 3, 2014.

Board decisions and notices are available on our Web site at *WWW.STB.DOT.GOV.*

Decided: January 27, 2014.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2014–01884 Filed 1–29–14; 8:45 am]

BILLING CODE 4915–01–P

[2] The City states that there has been no freight traffic on the Line since 1990.

[3] The City states that it has determined that the best use of the line is a scenic recreational walking and bicycling trail and asks the Board to issue a notice of interim trail use (NITU). It is well established that OFAs to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking. *See, e.g., Mid-Michigan R.R.—Aban. Exemption—In Kent, Ionia, & Montcalm Cntys., Mich.,* AB 364 (Sub-No. 12X) (STB served Apr. 4, 2008). Thus, any NITU the Board may issue cannot take effect until after the OFA process has been allowed to proceed.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB 1095 (Sub-No. 1)]

Paulsboro Refining Company LLC—Adverse Abandonment—In Gloucester County, NJ.

On January 10, 2014, Paulsboro Refining Company LLC (PRC) filed an application under 49 U.S.C. 10903, requesting that the Surface Transportation Board (Board) authorize the third-party or adverse abandonment of approximately 5.8 miles of rail line (the Line) owned by PRC and currently operated by SMS Rail Service, Inc. (SMS). The Line is in Gloucester County, N.J., and traverses United States Postal Service Zip Code 08066. There are no mileposts or stations associated with the Line. The application is available on the Board's Web site at *http://www.stb.dot.gov*, or a copy can be secured from applicant's counsel, whose name and address appear below.

PRC owns a 970-acre refinery in Paulsboro, N.J. Within this facility, it owns the Line, which consists of approximately 5.8 miles of railroad tracks. SMS has provided service over the Line since August 2000, when it entered into an operating agreement with the facility's prior owner, Valero Refining Company—New Jersey (Valero-NJ).[1] Under the agreement, as amended, SMS provides common carrier service by interchanging traffic with Consolidated Rail Corporation (Conrail), on behalf of Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT). SMS also provides plant switching services under the agreement.

PRC states that it no longer needs or seeks to use the common carrier services of SMS, and it wishes to receive its common carrier service from NSR, CSXT, or their agent Conrail, and to have its internal switching performed by a noncarrier switching contractor. PRC states that SMS currently serves only it and, to a minor extent, ExxonMobil Corporation (ExxonMobil). PRC adds that ExxonMobil ''can also be served by PRC's contract switching carrier'' and does not object to the abandonment. PRC advises that it has given SMS proper notice of termination, as provided by their contract, but that SMS has refused to vacate the Line or file for abandonment authority to terminate its operations. According to PRC, it filed the instant application to remove Board jurisdiction from SMS's operation of the Line so that PRC can proceed to evict SMS under New Jersey state law.

In a decision served in this proceeding on July 26, 2012, PRC was granted exemptions from several statutory provisions as well as waivers of certain Board regulations at 49 CFR part 1152 that were not relevant to its adverse abandonment application or that sought information not available to it. Specifically, PRC was granted waivers of certain requirements pertaining to the notice of intent prescribed at 49 CFR 1152.21; exemption from 49 U.S.C. 10903(c) and waiver of 49 CFR 1152.22(a)(5) pertaining to System Diagram Maps; waiver of 49 CFR 1152.20(a)(2)(x) that notice be served on Amtrak; waiver of 49 CFR 1152.20(a)(2)(xii) that notice be served on the headquarters of all duly certified labor organizations; exemption from 49 U.S.C. 10903(a)(3)(B) and waiver of 49 CFR 1152.20(a)(3) concerning posting the notice of intent; waiver of 49 CFR 1152.33(d) pertaining to revenue and cost data; waiver of 49 CFR 1152.22(i) concerning the wording of this notice; exemption from 49 U.S.C. 10904 and waiver of 49 CFR 1152.27, which govern an offer of financial assistance (OFA) to continue common

[1] *See SMS Rail Service—Acquis. and Operation Exemption—Valero Refining Co.—N. J.,* FD 33927 (STB served Sept. 22, 2000).

carrier rail service; and exemption from the public use provisions of 49 U.S.C. 10905 and waiver of 49 CFR 1152.28.

PRC states that the line does not contain federally granted rights-of-way. Any documentation in PRC's possession will be made available promptly to those requesting it. PRC's entire case-in-chief for adverse abandonment was filed with the application.

The interests of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

Any interested person may file written comments concerning the proposed adverse abandonment or protests (including protestant's entire opposition case) by February 24, 2014. Persons who may oppose the proposed adverse abandonment but who do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments. Persons opposing the proposed adverse abandonment who wish to participate actively and fully in the process should file a protest, observing the filing, service, and content requirements of 49 CFR 1152.25. PRC's reply is due by March 10, 2014.

Any request for a trail use condition under 16 U.S.C. 1247(d) (49 CFR 1152.29) must be filed by February 24, 2014, and should address whether the issuance of a certificate of interim trail use in this case would be consistent with the grant of an adverse abandonment application. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1095 (Sub-No. 1) and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; (2) Eric M. Hocky, Clark Hill Thorp Reed, One Commerce Square, 2005 Market Street, Philadelphia, PA 19103, (215) 640–8500.

Filings may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's ''*www.stb.dot.gov*'' Web site, at the ''E–FILING'' link. Any person submitting a filing in the traditional paper format should send the original and 10 copies of the filing to the Board with a certificate of service. Except as otherwise set forth in 49 CFR pt. 1152, every document filed with the Board must be served on all parties to this adverse abandonment proceeding. 49 CFR 1104.12(a).

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Board's Office of Environmental Analysis (OEA) will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact OEA by phone at the number listed below. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245–0238 or refer to the full abandonment/discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: January 27, 2014.

By the Board,

Rachel D. Campbell,

Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2014–01989 Filed 1–29–14; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 27, 2014.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 3, 2014 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request maybe found at *www.reginfo.gov.*

Bureau of the Fiscal Service

OMB Number: 1510–0059.

Type of Review: Extension without change of a currently approved collection.

Title: Authorization Agreement for Preauthorized Payment.

Form: SF–5510.

Abstract: Preauthorized payment is used by remitters (individuals and corporations) to authorize electronic funds transfers from the bank accounts maintained at financial institutions for government agencies to collect monies.

Affected Public: Individuals or Households; Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 25,000.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2014–01830 Filed 1–29–14; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 27, 2014.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 3, 2014 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC

20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Bureau of the Fiscal Service

OMB Number: 1535–0069.

Type of Review: Revision of a currently approved collection.

Title: Legacy Treasury Direct Forms.

Form: PD Forms 5178, 5179, 5182, 5188, 5191, 5235, and 5236.

Abstract: Used to purchase and maintain Treasury Bills, Notes and Bonds.

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 4,528.

OMB Number: 1535–0122.

Type of Review: Extension without change of a currently approved collection.

Title: Voluntary Customer Satisfaction Survey to Implement Executive Order 12862.

Abstract: Voluntary Survey to determine customer satisfaction levels with current programs and explore ways to meet future needs of customers.

Affected Public: Individuals or Households.

Estimated Burden Hours: 876.

OMB Number: 1535–0128.

Type of Review: Revision of a currently approved collection.

Title: Direct Deposit Sign-Up Form.

Form: PD F 5396.

Abstract: Used to request the direct deposit of Series HH or Series H bond interest payments or a savings bond redemption payment.

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 9,167.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2014–01829 Filed 1–29–14; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 27, 2014.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 3, 2014 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8141, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by calling (202) 622–1295, emailing *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Financial Crimes Enforcement Network (FinCEN)

OMB Number: 1506–0046.

Type of Review: Extension without change of a currently approved collection.

Title: Financial Crimes Enforcement Network; Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts.

Abstract: The Financial Crimes Enforcement Network is renewing without change this Bank Secrecy Act regulation that implements section 5318(i)(2) of title 31, United States Code, as added by section 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (''Act''), which requires U.S. financial institutions to conduct enhanced due diligence with regard to correspondent accounts established, maintained, administered, or managed for certain types of foreign banks.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 56,326.

Brenda Simms,

Treasury PRA Clearance Officer.

[FR Doc. 2014–01873 Filed 1–29–14; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 27, 2014.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 3, 2014 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov*.

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov*.

Internal Revenue Service (IRS)

OMB Number: 1545–0035.

Type of Review: Extension without change of a currently approved collection.

Title: Employer's Annual Tax Return for Agricultural Employees.

Form: 943, 943–PR, 943A–PR, 943–X, 943X–PR.

Abstract: Agricultural employers must prepare and file Form 943 and Form 943–PR (Puerto Rico only) to report and pay FICA taxes and income tax voluntarily withheld (Form 943 only). Agricultural employees may attach Forms 943–A and 943A–PR to Forms 943 and 943–PR to show their tax liabilities for semiweekly periods. The information is used to verify that the correct tax has been paid.

Affected Public: Private Sector: Farms, Not-for-profit institutions.

Estimated Annual Burden Hours: 10,880,812.

OMB Number: 1545–1081.

Type of Review: Extension without change of a currently approved collection.

Title: Application for Extension of Time to File Information Returns.

Form: 8809.

Abstract: Form 8809 is used to request an extension of time to file Forms W–2, W–2G, 1042–S, 1097, 1098, 1099, 3921, 3922, 5498, and 8027. The IRS reviews the information contained on the form to determine whether an extension should be granted.

Affected Public: Private Sector: Businesses or other for-profits, Farms, Not-for-profit institutions.

Estimated Annual Burden Hours: 237,000.

OMB Number: 1545–1112.

Type of Review: Revision of a currently approved collection.

Title: 26 CFR 301.9100–8—Time and Manner of Making Certain Elections Under the Technical and Miscellaneous Revenue Act of 1988.

Abstract: Section 301.9100–8 establishes various elections with respect to which immediate interim guidance on the time and manner of making the elections is necessary. These regulations enable taxpayers to take advantage of the benefits of various Code provisions.

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 6,661.

OMB Number: 1545–1331.

Type of Review: Extension without change of a currently approved collection.

Title: TD 8566 (Final) General Asset Accounts Under the Accelerated Cost Recovery System.

Abstract: The regulations describe the time and manner of making the election described in IRC Section 168(i)(4). Basic information regarding this election is necessary to monitor compliance with the rules in the IRC Section 168.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 250.

OMB Number: 1545–1357.

Type of Review: Revision of a currently approved collection.

Title: Procedures for Monitoring Compliance with Low-Income Housing Credit Requirements; Rules to Carry Out the Purposes of Section 42 and for Correcting.

Abstract: These regulations concern the Secretary's authority to provide guidance under section 42, and provide for the correction of administrative errors and omissions made in connection with allocations of low-income housing credit dollar amounts and recordkeeping within a reasonable period after their discovery and affect State and local housing credit agencies, owners of building projects for which the low income housing credit is allocated, and taxpayers claiming the low-income housing credit.

Affected Public: Private Sector: Businesses or other for-profits; State and Local agencies.

Estimated Annual Burden Hours: 104,899.

OMB Number: 1545–1430.

Type of Review: Revision of a currently approved collection.

Title: Form 945 and 945V: Annual Return of Withheld Federal Income Tax/Voucher; Form 945–A: Annual Record of Federal Tax Liability; Form 945–X Annual Return of Withheld Federal Income Tax, Claim, Refund.

Forms: 945, 945–V, 945–A, 945–X.

Abstract: Form 945 is used to report income tax withholding on non-payroll payments including backup withholding and withholding on pensions, annuities, IRA's military retirement and gambling winnings. Form 945–V, Payment Voucher, is used if you are making a payment with Form 945, Annual Return of Withheld Federal Income Tax. Form 945–A is used to report non-payroll tax liabilities. Form 945–X is used to correct errors made on Form 945, Annual Return of Withheld Federal Income Tax, for one year only.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 1,619,603.

OMB Number: 1545–1537.

Type of Review: Extension without change of a currently approved collection.

Title: TD 9166—Final Regulations for Health Coverage Portability for Group Health Plans and Group Health insurance Issuers under HIPPA Titles I & IV.

Abstract: The regulations provide guidance for group health plans and the employers maintaining them regarding requirements imposed on plans relating to preexisting condition exclusions, discrimination based on health status, and access to coverage.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 262,289.

OMB Number: 1545–1597.

Type of Review: Extension without change of a currently approved collection.

Title: Revenue Procedure 2000–12, Application Procedures for Qualified Intermediary Status Under Section 1441; Final Qualified Intermediary Withholding Agreement.

Abstract: Revenue Procedure 2000–12 describes application procedures for becoming a qualified intermediary and the requisite agreement that a qualified intermediary must execute with the IRS. The information will be used by the IRS to ensure compliance with the U.S. withholding system under the 1441 regulations (especially proper entitlement to treaty benefits).

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 301,018.

OMB Number: 1545–1610.

Type of Review: Extension without change of a currently approved collection.

Title: Annual Return/Report of Employee Benefit Plan.

Form: 5500 and related schedules; 5500–SF.

Abstract: Form 5500 is an annual information return filed by employee benefit plans. The IRS uses this information to determine if the plan appears to be operating properly as required under the law or whether the plan should be audited.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 326,000.

OMB Number: 1545–1613.

Type of Review: Extension without change of a currently approved collection.

Title: REG–209446–82 (TD8852) (Final) Passthrough of Items of an S Corporation to its Shareholders.

Abstract: Section 1366 requires shareholders of an S corporation to take into account their pro rata share of separately stated items of the S corporation and non-separately computed income or loss. The regulations provide guidance regarding this reporting requirement.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 1.

OMB Number: 1545–1621.

Type of Review: Revision of a currently approved collection.

Title: W–8 BEN, W–8BEN–E, W–8EIC, W–8EXP, W–8IMY, W–8 MOU Program.

Abstract: The IRS uses these forms to determine from the information submitted whether the applicant plan qualifies under section 401(a) of the Internal Revenue Code for plan approval. The application is also used to determine if the related trust qualifies for tax exempt status under Code section 501(a).

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 25,721,305.

OMB Number: 1545–1883.

Type of Review: Revision of a currently approved collection.

Title: Election of Alternative Deficit Reduction Contribution and Planned Amendments.

Abstract: Procedures for electing an alternative deficit reduction contribution; guidance on notices that must be given by an employer to plan participants and their beneficiaries and to the Pension Benefit Guaranty Corporation; guidance on restrictions that are place on plan amendments. (Combines Announcements 2004–38 and 2004–43, Notice 2004–59 under this OMB control number.)

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 13,200.

OMB Number: 1545–1893.

Type of Review: Revision of a currently approved collection.

Title: REG–150562–03 (Final) TD 9353—Section 1045 Application to Partnerships.

Abstract: These regulations relating to the application of section 1045 of the Internal Revenue Code (Code) to partnerships and their partners and provide rules regarding the deferral of gain on a partnership's sale of qualified small business stock (QSB stock) and a partner's sale of QSB stock distributed by a partnership. These regulations also provide rules for a taxpayer (other than a C corporation) who sells QSB stock and purchases replacement QSB stock through a partnership.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 1,500.

OMB Number: 1545–1900.

Type of Review: Extension without change of a currently approved collection.

Title: (TD 9212) Final, Source of Compensation for Labor or Personal Services.

Abstract: The regulation describes the appropriate bases for determining the source of income from labor or personal services performed partly within and partly without the United States. The information required in Sec. 1.861–4(b)(2)(ii)(D) and (D)(6) will enable an employee to source certain fringe benefits on a geographical basis. The collections of information will allow the IRS to verify these determinations.

Affected Public: Individuals or Households.

Estimated Annual Burden Hours: 10,000.

OMB Number: 1545–2058.

Type of Review: Extension without change of a currently approved collection.

Title: U.S. Electronic Large Partnership Declaration for an I.R.S. e-file return.

Form: 8453–B.

Abstract: Form 8453–B is used to authenticate an electronic Form 1065–B, and to authorize an electronic return originator or intermediate service provider to transmit via a third party transmitter.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 144.

OMB Number: 1545–2059.

Type of Review: Extension without change of a currently approved collection.

Title: TD 9312 (Temp), Deduction for Qualified Film and Television Production Costs.

Abstract: This document contains temporary regulations relating to deductions for the cost of producing film and television productions under section 181. These temporary regulations reflect changes to the law made by the American Jobs Creation Act of 2004 and the Gulf Opportunity Zone Act of 2005, and affect taxpayers that produce films and television productions within the United States.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Annual Burden Hours: 1,600.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2014–01875 Filed 1–29–14; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection: U.S. Treasury Auction Submitter Agreement

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 Fiscal Service within the Department of the Treasury is soliciting comments concerning the U.S. Treasury Auction Submitter Agreement .

DATES: Written comments should be received on or before March 26, 2014 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street A4–A, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.* The opportunity to make comments online is also available at *www.pracomment.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies should be directed to Bruce A. Sharp, Bureau of the Fiscal Service, 200 Third Street A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Resolution for Transactions Involving Treasury Securities,

OMB Number: 1535–0137.

Form Number: PD F 5441.

Abstract: The information is requested from entities wishing to participate in U.S. Treasury Securities auctions via TAAPSLink.

Current Actions: None.

Type of Review: Extension.

Affected Public: Depository Institutions, Brokers/Dealers, Assessment Management Companies, Pension Funds, and other Institutional Investors.

Estimated Number of Respondents: 1000.

Estimated Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 80.

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: January 24, 2014.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2014–01783 Filed 1–29–14; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Publication of Guidance Relating to the Provision of Certain Temporary Sanctions Relief

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice, publication of guidance.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing Guidance Relating to the Provision of Certain Temporary Sanctions Relief in Order to Implement the Joint Plan Of Action (JPOA) Reached on November 24, 2013, Between the P5+1 and the Islamic Republic of Iran (Guidance), issued on January 20, 2014. The Guidance sets out how, in furtherance of the U.S. Government's (USG) commitments under the JPOA, the Department of State and the Department of the Treasury will implement sanctions relief relating to certain activities and associated services taking place exclusively during the six-month period beginning on January 20, 2014, and ending July 20, 2014.

DATES: *Effective Date:* January 20, 2014.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Licensing, tel.: 202–622–2480, Assistant Director for Policy, tel.: 202–622–2402, Assistant Director for Regulatory Affairs, tel.: 202–622–4855, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202–622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, tel.: 202–622–0077.

Background

On November 24, 2013, the United States and its partners in the P5+1 reached an initial understanding with Iran, outlined in a JPOA, that halts progress on Iran's nuclear program and rolls it back in key respects. In return for Iran's commitment to place meaningful limits on its nuclear program, the P5+1 committed to provide Iran with limited, targeted, and reversible sanctions relief for a six-month period. In furtherance of the USG's commitments under the JPOA, the Department of State and the Department of the Treasury will implement sanctions relief relating to certain activities and associated services taking place exclusively during the six-month period beginning on January 20, 2014, and ending July 20, 2014, as set out in the Guidance. The USG retains the authority to revoke this limited sanctions relief at any time if Iran fails to meet its commitments under the JPOA.

The Department of State and the Department of the Treasury jointly issued the Guidance on January 20, 2014. At the time of its issuance on January 20, 2014, OFAC made the Guidance available on the OFAC Web site: *www.treasury.gov/ofac* and the Department of State made the Guidance available on its Web site: *www.state.gov.* With this notice, OFAC is publishing the Guidance in the **Federal Register**.

Guidance

U.S. DEPARTMENT OF THE TREASURY

U.S. DEPARTMENT OF STATE

GUIDANCE RELATING TO THE PROVISION OF CERTAIN TEMPORARY SANCTIONS RELIEF IN ORDER TO IMPLEMENT THE JOINT PLAN OF ACTION REACHED ON NOVEMBER 24, 2013, BETWEEN THE P5+1 AND THE ISLAMIC REPUBLIC OF IRAN

On November 24, 2013, the United States and its partners in the P5+1 reached an initial understanding with Iran, outlined in a Joint Plan of Action (JPOA), that halts progress on Iran's nuclear program and rolls it back in key respects. In return for Iran's commitment to place meaningful limits on its nuclear program, the P5+1 committed to provide Iran with limited, targeted, and reversible sanctions relief for a six-month period. In furtherance of the U.S. Government's (USG) commitments under the JPOA, the U.S. Department of State and the U.S. Department of the Treasury will implement sanctions relief relating to certain activities and associated services taking place exclusively during the six-month period beginning on January 20, 2014, and ending July 20, 2014 (the ''JPOA Period''), as set out below. The USG retains the authority to revoke this limited sanctions relief at any time if Iran fails to meet its commitments under the JPOA.

For purposes of the JPOA sanctions relief, the USG interprets the term ''associated service'' to mean any necessary service—including any insurance, transportation, or financial service—ordinarily incident to the underlying activity covered by the JPOA, provided, however, that unless otherwise noted, such services may not involve persons identified on the Department of the Treasury's Office of Foreign Assets Control's (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List).

The USG retains the authority to continue imposing sanctions under the authorities identified below during the JPOA Period for activities that occurred prior to January 20, 2014. Moreover, the USG retains the authority to impose sanctions under the authorities outlined below for activities occurring during the JPOA Period to the extent such activities are materially inconsistent with sanctions relief described in the JPOA and outlined in this guidance. The USG also retains the authority to continue imposing sanctions during the JPOA Period for activities occurring before and during the JPOA Period under other authorities, such as those used to combat terrorism and the proliferation of weapons of mass destruction. During the JPOA Period, the USG will continue to vigorously enforce our sanctions against Iran, including by taking action against those who seek to evade or circumvent our sanctions.

Please note that, with the exception of civil aviation activities described in section IV and the humanitarian channel described in section VI below, none of the sanctions relief outlined in this guidance may involve a U.S. person, or, as applicable, a foreign entity owned or controlled by a U.S. person,[1] if otherwise prohibited under any sanctions program administered by the USG.

I. Sanctions Related to Iran's Export of Petrochemical Products

The JPOA provides for the temporary suspension of U.S. sanctions on ''*Iran's petrochemical exports, as well as sanctions on any associated services.*'' To implement this provision of the JPOA, the USG will take the following steps to allow for the export of petrochemical products from Iran, as well as associated services, by non-U.S. persons not otherwise subject to section 560.215 of the Iranian Transactions and Sanctions Regulations, 31 CFR part 560 (ITSR), (hereinafter ''non-U.S. persons not otherwise subject to the ITSR''):

[1] Consistent with section 218 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (TRA) and with section 560.215 of the Iranian Transactions and Sanctions Regulations, 31 CFR part 560 (ITSR), foreign entities that are owned or controlled by U.S. persons (''U.S.-owned or -controlled foreign entities'') are subject to the ITSR.

1. *Correspondent or Payable-Through Account Sanctions:* The USG will not impose correspondent or payable-through account sanctions under section 1(a)(iii) of Executive Order (E.O.) 13622 (as amended by section 16(b) of E.O. 13645); section 3(a)(i) of E.O. 13645; and sections 561.204(a) and 561.204(b)(3) of the Iranian Financial Sanctions Regulations, 31 CFR part 561 (IFSR), on foreign financial institutions that conduct or facilitate transactions that are initiated and completed entirely within the JPOA Period by non-U.S. persons not otherwise subject to the ITSR for exports of petrochemical products [2] from Iran that are initiated and completed entirely within the JPOA Period, including transactions involving the petrochemical companies listed in the Annex to this guidance, provided that the transactions do not involve persons on the SDN List other than the petrochemical companies listed in the Annex to this guidance or any Iranian depository institutions [3] listed solely pursuant to E.O. 13599.

2. *Blocking Sanctions:* The USG will not impose blocking sanctions under section 2(a)(i)–(ii) of E.O. 13645 with respect to persons that, exclusively during the JPOA Period, materially assist, sponsor, or provide financial, material, or technological support for, or goods or services to or in support of, the petrochemical companies listed in the Annex to this guidance for exports of petrochemical products from Iran that are initiated and completed entirely within the JPOA Period, provided that the activities do not involve persons on the SDN List other than the petrochemical companies listed in the Annex to this guidance or any Iranian depository institutions listed solely pursuant to E.O. 13599.

3. *Menu-based Sanctions:* [4] The USG will not impose sanctions under section 2(a)(ii) of E.O. 13622 (as amended by section 16(d) of E.O. 13645) on non-U.S. persons not otherwise subject to the ITSR who engage in transactions exclusively during the JPOA Period for exports of petrochemical products from Iran that are initiated and completed entirely within the JPOA Period, including transactions involving the petrochemical companies listed in the Annex to this guidance, provided that the activities do not involve persons on the SDN List other than the petrochemical companies listed in the Annex to this guidance or any Iranian depository institutions listed solely pursuant to E.O. 13599.

In addition, please see section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

II. Sanctions Related to Iran's Auto Industry

The JPOA provides for the temporary suspension of U.S. sanctions on *''Iran's auto industry, as well as sanctions on associated services.''* To implement this provision, the USG will take the following steps to allow for the sale, supply, or transfer to Iran of significant goods or services used in connection with the automotive sector of Iran, as well as the provision of associated services by non-U.S. persons not otherwise subject to the ITSR:

1. *Correspondent or Payable-through Account Sanctions:* The USG will not impose correspondent or payable-through account sanctions under section 3(a)(ii) of E.O. 13645 with respect to foreign financial institutions that, exclusively during the JPOA Period, knowingly conduct or facilitate financial transactions for the sale, supply, or transfer to Iran of significant goods or services used in connection with the automotive sector of Iran that are initiated and completed entirely within the JPOA Period, provided that the transactions do not involve persons on the SDN List other than any Iranian depository institutions listed solely pursuant to E.O. 13599.

2. *Menu-based Sanctions:* The USG will not impose sanctions described in section 6 of E.O. 13645 with respect to persons that, as described in section 5(a) of E.O. 13645, knowingly engage in transactions for the sale, supply, or transfer to Iran of significant goods or services used in connection with the automotive sector of Iran that are initiated and completed entirely within the JPOA Period, provided that the transactions do not involve persons on the SDN List other than any Iranian depository institutions listed solely pursuant to E.O. 13599.

In addition, please see section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

III. Sanctions Related to Gold and Other Precious Metals

The JPOA provides for the temporary suspension of U.S. sanctions on *''gold and precious metals, as well as sanctions on associated services.''* To implement this provision of the JPOA, the USG will take the following steps to allow for the sale of gold and other precious metals to or from Iran, as well as the provision of associated services, by non-U.S. persons not otherwise subject to the ITSR:

1. *Correspondent or Payable-through Account Sanctions:* The USG will not impose correspondent or payable-through account sanctions under section 3(a)(i) of E.O. 13645 with respect to foreign financial institutions that, exclusively during the JPOA Period, conduct or facilitate transactions by non-U.S. persons not otherwise subject to the ITSR for the purchase or acquisition of precious metals to or from Iran that are initiated and completed entirely within the JPOA Period, provided that the funds for these purchases of gold and other precious metals may not be drawn from Restricted Funds,[5] and further provided that the transactions do not involve persons on the SDN List other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599 or any Iranian depository institutions listed solely pursuant to E.O. 13599.

2. *Blocking Sanctions:* The USG will not impose blocking sanctions under section 5(a) of E.O. 13622; sections 2(a)(i)–(ii) of E.O. 13645; and section 560.211(c)(2) of the ITSR, with respect to persons that, exclusively during the JPOA Period, materially assist, sponsor, or provide financial, material, or technological support for, or goods or services in support of, the purchase or

[2] For purposes of this guidance, the USG is interpreting the term ''petrochemicals,'' as used in the JPOA, as having the meaning given to the term ''petrochemical products'' in, *inter alia,* section 10(m) of E.O. 13622; therefore, the term includes any aromatic, olefin, and synthesis gas, and any of their derivatives, including ethylene, propylene, butadiene, benzene, toluene, xylene, ammonia, methanol, and urea. For further information on what products are considered to fall within this definition of ''petrochemical products'' see the November 13, 2012 State Department Sanctions Information and Guidance, 77 FR 67726–67731.

[3] For purposes of this guidance, as defined in section 14(g) of E.O. 13645, the term ''Iranian depository institution'' means any entity (including foreign branches), wherever located, organized under the laws of Iran or any jurisdiction within Iran, or owned or controlled by the Government of Iran, or in Iran, or owned or controlled by any of the foregoing, that is engaged primarily in the business of banking (for example, banks, savings banks, savings associations, credit unions, trust companies, and bank holding companies).

[4] E.O. 13622 and 13645, among others, describe menus of sanctions that the USG may impose in response to certain conduct specified within other sections of the relevant E.O. For the purposes of this guidance, such sanctions are termed ''Menu-based Sanctions.''

[5] For the purposes of this guidance, the term ''Restricted Funds'' refers to: (i) any existing and future revenues from the sale of Iranian petroleum or petroleum products, wherever they may be held, and (ii) any Central Bank of Iran (CBI) funds, with certain exceptions for non-petroleum CBI funds held at a foreign country's central bank.

acquisition of precious metals to or from Iran or by the Government of Iran if such activities are initiated and completed entirely within the JPOA Period, provided that the funds for these purchases of gold and other precious metals are not drawn from Restricted Funds, and further provided that the transactions do not involve persons on the SDN List other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599 or any Iranian depository institutions listed solely pursuant to E.O. 13599.

In addition, please see section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

IV. Sanctions Related to Civil Aviation

The JPOA provides for the temporary licensing of *''the supply and installation in Iran of spare parts for safety of flight for Iranian civil aviation and associated services. License safety related inspections and repairs in Iran as well as associated services.''* To implement this provision, the USG will take the following steps:

1. *Statement of Licensing Policy:* OFAC will issue a new Statement of Licensing Policy (SLP) that covers certain activities related to the safety of Iran's civil aviation industry. The SLP will establish, during the JPOA Period, a favorable licensing policy regime under which U.S. persons, U.S.-owned or -controlled foreign entities, and non-U.S. persons involved in the export of U.S.-origin goods can request specific authorization from OFAC to engage in transactions that are initiated and completed entirely within the JPOA Period to ensure the safe operation of Iranian commercial passenger aircraft, including transactions involving Iran Air.

2. *Correspondent or Payable-through Account Sanctions:* The USG will not impose correspondent or payable-through account sanctions under section 3(a)(i) of E.O. 13645 and section 561.201(a)(5)(ii) of the IFSR on foreign financial institutions that, exclusively during the JPOA Period, conduct or facilitate financial transactions relating to the type of activities covered by the SLP that are conducted on behalf of non-U.S. persons not otherwise subject to the ITSR, provided such activities are initiated and completed entirely within the JPOA Period, and further provided that the transactions do not involve persons on the SDN List other than Iran Air or any Iranian depository institutions listed solely pursuant to E.O. 13599.

3. *Blocking Sanctions:* The USG will not impose blocking sanctions under section 1(a)(iii) of E.O.13382; sections 2(a)(i)–(ii) of E.O. 13645; and section 544.201(a)(3) of the Weapons of the Mass Destruction Proliferators Sanctions Regulations, 31 CFR part 544 (WMDPSR), with respect to persons that, exclusively during the JPOA Period, materially assist, sponsor, or provide financial, material, or technological support for, or goods or services to or in support of, Iran Air in connection with activities intended to ensure the safe operation of Iranian commercial passenger aircraft, provided such activities are outlined in the JPOA and are initiated and completed entirely within the JPOA Period and do not involve persons on the SDN List other than Iran Air or any Iranian depository institutions listed solely pursuant to E.O. 13599.

In addition, please see Section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

V. Sanctions Related to Iran's Export of Crude Oil

The JPOA provides for certain sanctions relief related to Iran's crude oil sales. Under the JPOA, the USG will ''*pause efforts to further reduce Iran's crude oil sales, enabling Iran's current customers to purchase their current average amounts of crude oil. Enable the repatriation of an agreed amount of revenue held abroad. For such oil sales, suspend U.S. sanctions on associated insurance and transportation services.*'' To implement this provision of the JPOA, the USG will take the following steps to allow for China, India, Japan, the Republic of Korea, Taiwan, and Turkey to maintain their current average level of imports from Iran during the JPOA Period and to render non-sanctionable a limited number of transactions for the release in installments of an agreed amount of revenue to Iran for receipt at participating foreign financial institutions in selected jurisdictions:

1. *Correspondent or Payable-through Account Sanctions:* The USG will not impose correspondent or payable-through account sanctions under sections 1(a)(i)–(ii) of E.O. 13622 (as amended by section 16(a) of E.O. 13645); section 3(a)(i) of E.O. 13645; sections 561.201(a)(5), 561.204(a), and 561.204(b)(1)–(2) of the IFSR with respect to foreign financial institutions that conduct or facilitate transactions exclusively during the JPOA Period by non-U.S. persons not otherwise subject to the ITSR for exports of petroleum and petroleum products from Iran to China, India, Japan, the Republic of Korea, Taiwan, or Turkey, and associated insurance and transportation services, that are initiated and completed entirely within the JPOA Period, including transactions involving the National Iranian Oil Company (NIOC) or the National Iranian Tanker Company (NITC), provided that the transactions do not involve persons on the SDN List other than NIOC, NITC, or any Iranian depository institutions listed solely pursuant to E.O. 13599.[6]

2. *Blocking Sanctions:* The USG will not impose blocking sanctions under section 1(a)(iii) of E.O. 13382; section 5(a) of E.O. 13622; sections 2(a)(i)–(ii) of E.O. 13645; section 544.201(a)(3) of the WMDPSR; and section 560.211(c)(2) of the ITSR with respect to non-U.S. persons not otherwise subject to the ITSR that, exclusively during the JPOA Period, materially assist, sponsor, or provide financial, material, or technological support for, or goods or services in support of, exports of petroleum and petroleum products from Iran to China, India, Japan, the Republic of Korea, Taiwan, or Turkey, and associated insurance and transportation services, including for activities involving NIOC or NITC, provided such activities are initiated and completed entirely within the JPOA Period, and further provided that the activities do not involve persons on the SDN List other than NIOC, NITC, or any Iranian depository institutions listed solely pursuant to E.O. 13599.

3. *Menu-based Sanctions:* The USG will not impose sanctions under section 2(a)(i) of E.O. 13622 (as amended by section 16(c) of E.O. 13645) on non-U.S. persons not otherwise subject to the ITSR who engage in transactions exclusively during the JPOA Period for exports of petroleum and petroleum products from Iran to China, India, Japan, the Republic of Korea, Taiwan, or Turkey, and associated insurance and transportation services, including transactions involving NIOC or NITC, provided such activities are initiated and completed entirely within the JPOA Period, and further provided that the activities do not involve persons on the SDN List other than NIOC, NITC, or any Iranian depository institutions listed solely pursuant to E.O. 13599.

[6] For the purposes of the sanctions relief with respect to Iran's exports of crude oil described in this section, the term ''associated insurance and transportation services'' means insurance and transportation services ordinarily incident to the underlying activity covered by the JPOA, provided, however, such services may not involve persons on the SDN List other than NIOC, NITC, or any Iranian depository institutions listed solely pursuant to E.O. 13599.

In addition, please see Section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

VI. Facilitation of Humanitarian and Certain Other Transactions

The JPOA provides for the establishment of ''*a financial channel to facilitate humanitarian trade for Iran's domestic needs using Iranian oil revenues held abroad. Humanitarian trade [is] defined as transactions involving food and agricultural products, medicine, medical devices, and medical expenses incurred abroad. This channel could also enable transactions required to pay Iran's UN obligations . . . and direct tuition payments to universities and colleges for Iranian students studying abroad.*'' In furtherance of the JPOA, the P5 + 1 and Iran are establishing mechanisms to further facilitate the purchase of, and payment for, the export of food, agricultural commodities, medicine, and medical devices to Iran, as well as to facilitate Iran's payments of UN obligations, Iran's payments for medical expenses incurred abroad by Iranian citizens, and Iran's payments of an agreed amount of governmental tuition assistance for Iranian students studying abroad. Foreign financial institutions whose involvement in hosting these new mechanisms is sought by Iran will be contacted directly by the U.S. Department of the Treasury and provided specific guidance.

Please note that the new mechanism for humanitarian trade transactions is not the exclusive way to finance or facilitate the sale of food, agricultural commodities, medicine, and medical devices to Iran by non-U.S. persons not otherwise subject to the ITSR, which is not generally sanctionable so long as the transaction does not involve persons designated in connection with Iran's support for international terrorism or Iran's proliferation of weapons of mass destruction (WMD) or WMD delivery systems. Therefore, transactions for the export of food, agricultural commodities, medicine, and medical devices to Iran generally may be processed pursuant to pre-existing exceptions and are not required to be processed through the new mechanism.

In addition, please see Section VII below, which describes the exercise of certain waiver authorities relevant to the activities and transactions described in this section.

VII. Waivers

To enable the implementation of the sanctions relief outlined in the JPOA and described in detail in sections I through VI of this guidance, the USG has issued limited waivers of sanctions under: section 1245(d)(1) of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) in connection with exports of crude oil from Iran to China, India, Japan, the Republic of Korea, Taiwan, and Turkey and for transactions related to the release in installments of an agreed amount of revenues to Iran for receipt at participating foreign financial institutions in selected jurisdictions and the establishment of the financial channel provided for in the JPOA; section 302(a) of the TRA with respect to certain transactions involving NIOC; section 5(A)(7) of ISA with respect to certain transactions involving NIOC and NITC; and the following sub-sections of IFCA:

1. 1244(c)(1)—to the extent required for transactions by non-U.S. persons (and, in the case of the civil aviation activities described in section IV, U.S. persons): (i) For Iran's export of crude oil to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, excluding any transactions involving persons on the SDN List other than NIOC and NITC; (ii) for the export from Iran of petrochemical products, excluding any transactions involving persons on the SDN List other than the petrochemical companies listed in the Annex to this guidance; (iii) for the sale of precious metals to or from Iran, excluding any transactions involving persons on the SDN List other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599; and (iv) for the supply and installation of spare parts necessary for the safety of Iranian civil aviation flights and for safety-related inspections and repairs in Iran, excluding any transactions involving persons on the SDN List other than Iran Air.

2. 1244(d)—to the extent required for transactions by non-U.S. persons related to Iran's export of crude oil to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, excluding any transactions involving persons on the SDN List other than NIOC and NITC.

3. 1245(a)(1)(A) and 1245(c)—to the extent required for transactions by non-U.S. persons for the sale, supply, or transfer of precious metals to or from Iran, provided that such transactions do not involve persons on the SDN List other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599 or any Iranian depository institutions listed solely pursuant to E.O. 13599, and further provided that such transactions do not involve funds credited to an account located outside Iran pursuant to section 1245(d)(4)(D)(ii)(II) of NDAA.

4. 1246(a)—to the extent required for transactions by non-U.S. persons (and, in the case of the civil aviation activities described in section IV, U.S. persons) for: (i) Iran's exports of crude oil to China, India, Japan, the Republic of Korea, Taiwan, and Turkey, excluding any transactions involving persons on the SDN List other than NIOC and NITC; (ii) the export from Iran of petrochemical products, excluding any transactions involving persons on the SDN List other than the petrochemical companies listed in the Annex to this guidance; (iii) the sale of precious metals to or from Iran, excluding any transactions involving persons on the SDN List other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to E.O. 13599; (iv) the sale, supply, or transfer to Iran of goods and services used in connection with the automotive sector of Iran, excluding any transactions involving persons on the SDN List; and (v) the supply and installation of spare parts necessary for the safety of Iranian civil aviation flights and for safety-related inspections and repairs in Iran, excluding any transactions involving persons on the SDN List other than Iran Air.

5. 1247(a)—to the extent required for transactions by foreign financial institutions on behalf of: (i) NIOC and NITC related to Iran's exports of crude oil to China, India, Japan, the Republic of Korea, Taiwan, and Turkey; (ii) the entities listed in the Annex to this guidance for the export of petrochemical products from Iran; (iii) any political subdivision, agency, or instrumentality of the Government of Iran on the SDN List solely pursuant to E.O. 13599 for the sale of precious metals to or from Iran; and (iv) Iran Air for the supply and installation of spare parts necessary for the safety of Iranian civil aviation flights and for safety-related inspections and repairs in Iran.

Issued: January 20, 2014.

Annex

1. Bandar Imam Petrochemical Company;
2. Bou Ali Sina Petrochemical Company;
3. Ghaed Bassir Petrochemical Products Company;
4. Iran Petrochemical Commercial Company;
5. Jam Petrochemical Company;
6. Marjan Petrochemical Company;
7. Mobin Petrochemical Company;
8. National Petrochemical Company;
9. Nouri Petrochemical Company;

10. Pars Petrochemical Company;
11. Sadaf Petrochemical Assaluyeh Company;
12. Shahid Tondgooyan Petrochemical Company;
13. Shazand Petrochemical Company; and
14. Tabriz Petrochemical Company.

Dated: January 23, 2014.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2014–01939 Filed 1–29–14; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0711]

Proposed Information Collection (VBA Loan Guaranty Service Lender Satisfaction Survey) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine lenders satisfaction with VA Loan Guaranty Service.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 31, 2014.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0711'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or Fax (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Veterans Benefits Administration (VBA) Loan Guaranty Service Lender Satisfaction Survey.

OMB Control Number: 2900–0711.

Type of Review: Revision of a currently approved collection.

Abstract: The survey will be used to gather information from lenders about VA Loan Guaranty Program. The information collected will allow the VA to determine lenders satisfaction with the VA's processes and to make improvements to the program to better serve the needs of eligible veterans.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 251.5 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1006.

Dated: January 24, 2014.

By direction of the Secretary.

Crystal Rennie, Department

Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014–01769 Filed 1–29–14; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Voluntary Service National Advisory Committee; Notice of Meeting

Late Notice: Due to exceptional circumstances, namely, because of the Government shut down, the **Federal Register** was unable to timely publish the original notice for this meeting. In the interest of promoting openness and transparency—the goals of the Federal Advisory Committee Act (FACA)—we are publishing a late notice in the **Federal Register** to inform the public that the meeting was held on the dates and times listed in the original notice below. The meeting records can be viewed by the public at *http://www.volunteer.va.gov/NAC.asp* and the public may submit written comments as described below.

The Department of Veterans Affairs (VA) gives notice under FACA, 5 U.S.C. App. 2, that the Executive Committee of the VA Voluntary Service (VAVS) National Advisory Committee (NAC) will meet October 24–25, 2013, at the Embassy Suites Raleigh-Durham Research Triangle Park, 201 Harrison Oaks Boulevard, Cary, North Carolina. The sessions will begin at 8:30 a.m. each day and end at 4:30 p.m. on October 24, and at 12 noon on October 25, 2013. The meeting is open to the public. Please note that less than 15 calendar days' notice of this meeting is being provided due to exceptional circumstances, namely, that because of the Government shut down, the **Federal Register** was unable to timely publish the original notice for this meeting. See 41 CFR 102–3.150(b).

The Committee, comprised of fifty-four National voluntary organizations, advises the Secretary, through the Under Secretary for Health, on the coordination and promotion of volunteer activities within VA health care facilities. The Executive Committee consists of twenty representatives from the NAC member organizations.

On October 24, agenda topics will include NAC goals and objectives; review of the March 2013 NAC annual meeting minutes; VAVS update on the Voluntary Service program's activities; Parke Board update; evaluations of the 2013 NAC annual meeting; review of membership criteria and process; and plans for 2014 NAC annual meeting (to include workshops and plenary sessions).

On October 25, agenda topics will include subcommittee reports; review of standard operating procedures; review of Fiscal Year 2013 organization data; 2015 NAC annual meeting plans; and any new business.

No time will be allocated at this meeting for receiving oral presentations from the public. However, the public may submit written statements for the Committee's review to Mrs. Sabrina C. Clark, Designated Federal Officer, Voluntary Service Office (10B2A), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or email at *Sabrina.Clark@VA.gov*. Any member of the public

wishing to attend the meeting or seeking additional information should contact Mrs. Clark at (202) 461–7300.

By Direction of the Secretary.

Rebecca Schiller,

Committee Management Officer.

[FR Doc. 2014–01881 Filed 1–29–14; 8:45 am]

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FEDERAL REGISTER

Vol. 79 Thursday,

No. 20 January 30, 2014

Part II

Environmental Protection Agency

40 CFR Part 52

Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2012–0026, FRL9905–42–R08]

Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving a State Implementation Plan (SIP) submitted by the State of Wyoming on January 12, 2011, that addresses regional haze. This SIP was submitted to address the requirements of the Clean Air Act (CAA or ''the Act'') and rules that require states to address in specific ways any existing anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the ''regional haze program''). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is approving several aspects of Wyoming's regional haze SIP that we had proposed to disapprove in our June 10, 2013 proposed rule in light of public comments and newly available information indicating the adequacy of the SIP with respect to those aspects. EPA is also approving some aspects of the State's SIP that we proposed to approve. EPA is promulgating a Federal Implementation Plan (FIP) to address some of the deficiencies identified in our proposed partial disapproval of Wyoming's regional haze SIP issued on June 10, 2013. EPA is taking this action pursuant to sections 110 and 169A of the CAA.

DATES: This final rule is effective March 3, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2012–0026. All documents in the docket are listed on the *www.regulations.gov* Web site.

Publicly available docket materials are available either electronically through *www.regulations.gov,* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if, at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6144, *dygowski.laurel@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

i. The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

ii. The initials *AFUDC* mean or refer to Allowance for Funds Utilized During Construction.

iii. The initials *APA* mean or refer to the Administrative Procedures Act.

iv. The initials *AQRV* mean or refer to Air Quality Related Value.

v. The initials *BACT* mean or refer to Best Available Control Technology.

vi. The initials *BART* mean or refer to Best Available Retrofit Technology.

vii. The initials *CAMD* mean or refer to Clean Air Markets Division.

viii. The initials *CAMx* mean or refer to Comprehensive Air Quality Model.

ix. The initials *CCM* mean or refer to EPA's Control Cost Manual.

x. The initials *CLRC* mean or refer to the Construction Labor Research Council.

xi. The initials *CMAQ* mean or refer to Community Multi-Scale Air Quality modeling system.

xii. The initials *CSAPR* mean or refer to the Cross-State Air Pollution Rule.

xiii. The initial *DEQ* mean or refer to the Wyoming Department of Environmental Quality.

xiv. The initials *EGUs* mean or refer to Electric Generating Units.

xv. The initials *EIS* mean or refer to Environmental Impact Statement.

xvi. The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

xvii. The initials *ESP* mean or refer to electrostatic precipitator.

xviii. The initials *FIP* mean or refer to Federal Implementation Plan.

xix. The initials *FLM* mean or refer to Federal Land Managers.

xx. The initials *FR* mean or refer to the **Federal Register**.

xxi. The initials *GAQM* mean or refer to Guidance on Air Quality Models.

xxii. The initials *IMPROVE* mean or refer to Interagency Monitoring of Protected Visual Environments monitoring network.

xxiii. The initials *IPM* mean or refer to Integrated Planning Model.

xxiv. The initials *IWAQM* mean or refer to Interagency Workgroup on Air Quality Modeling.

xxv. The initials *LNB* mean or refer to low NO_X burners.

xxvi. The initials *LRS* mean or refer to Laramie River Station.

xxvii. The initials *LTS* mean or refer to long term strategy.

xxviii. The initials *MATS* mean or refer to the Mercury and Air Toxics Standard.

xxix. The initials *MW* mean or refer to megawatts.

xxx. The initials *NAAQS* mean or refer to National Ambient Air Quality Standards.

xxxi. The initials *NEPA* mean or refer to National Environmental Policy Act.

xxxii. The initials NH_3 mean or refer to ammonia.

xxxiii. The initials NO_X mean or refer to nitrogen oxides.

xxxiv. The initials *OFA* mean or refer to overfire air.

xxxv. The initials *PM* mean or refer to particulate matter.

xxxvi. The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers.

xxxvii. The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter of less than 10 micrometers.

xxxviii. The initials *PTE* mean or refer to potential to emit.

xxxix. The initials *RAVI* mean or refer to reasonably attributable visibility impairment.

xl. The initials *RHR* mean or refer to the Regional Haze Rule.

xli. The initials *RIS* mean or refer to Regulatory Impact Statement.

xlii. The initials *RPG* mean or refer to reasonable progress goals.

xliii. The initials *RPO* mean or refer to Regional Planning Organization.

xliv. The initials *SCR* mean or refer to selective catalytic reduction.

xlv. The initials *SIP* mean or refer to State Implementation Plan.

xlvi. The initials *SNCR* mean or refer to selective non-catalytic reduction.

xlvii. The initials SO_2 mean or refer to sulfur dioxide.

xlviii. The initials *SOFA* mean or refer to separated overfire air.

xlix. The initials *UMRA* mean or refer to the Unfunded Mandates Reform Act.

l. The initials *URP* mean or refer to Uniform Rate of Progress.

li. The initials *VOC* mean or refer to volatile organic compounds.

lii. The initials *WAQSR* mean or refer to the Wyoming Air Quality Standards and Regulations.

liii. The initials *WRAP* mean or refer to the Western Regional Air Partnership.

liv. The words *Wyoming* and *State* mean the State of Wyoming.

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VII. Statutory and Executive Order Reviews

I. Background

The CAA requires each state to develop plans, referred to as SIPs, to meet various air quality requirements. A state must submit its SIP and SIP revisions to us for approval. Once approved, a SIP is enforceable by EPA and citizens under the CAA, also known as being federally enforceable. If a state fails to make a required SIP submittal or if we find that a state's required submittal is incomplete or unapprovable, then we must promulgate a FIP to fill this regulatory gap. CAA section 110(c)(1). This action involves the requirement that states have SIPs that address regional haze.

Few states submitted a regional haze SIP prior to the December 17, 2007 deadline, and on January 15, 2009, EPA found that 37 states, including Wyoming,[1] the District of Columbia, and the Virgin Islands, had failed to submit SIPs addressing the regional haze requirements. 74 FR 2392. Once EPA has found that a state has failed to make a required submission, EPA is required to promulgate a FIP within two years unless the state submits a SIP and the Agency approves it within the two-year period. CAA section 110(c)(1). Wyoming subsequently submitted a SIP addressing regional haze on January 12, 2011.

States in the west were given the option to meet the requirements of the RHR either under 40 CFR 51.309 or 40 CFR 51.308. Wyoming chose to adopt the requirements of 40 CFR 51.309. Section 309 requires states to adopt regional haze strategies that are based on recommendations from the Grand Canyon Visibility Transport Commission for protecting the 16 Class I areas in the Colorado Plateau area, including a sulfur dioxide (SO_2) backstop cap and trade program, SO_2 milestones, and other requirements such as smoke management, a program to address mobile sources, and pollution prevention. Also, section 309(g) includes requirements for SIP provisions, including NO_X BART, to address visibility impairment at other Class I areas. On December 12, 2012, we finalized approval of Wyoming's 309 regional haze SIP for the requirements relating to the SO_2 backstop cap and trade program, milestones and the other requirements.[2] Today's action addresses the remaining portion of Wyoming's SIP, including the Best Available Retrofit Technology (BART) determinations for nitrogen oxides (NO_X) and particulate matter (PM).

In a lawsuit in the U.S. District Court for the District of Colorado, environmental groups sued EPA for our failure to take timely action with respect to the regional haze requirements of the CAA and our regulations.[3] In particular, the lawsuits alleged that we had failed to promulgate FIPs for these requirements within the two-year period allowed by CAA section 110(c) or, in the alternative, fully approve SIPs addressing these requirements.

As a result of these lawsuits, we entered into a consent decree. The consent decree requires that we sign a notice of final rulemaking addressing the regional haze requirements for Wyoming by January 10, 2014.[4] We are meeting that requirement with the signing of this final rule

A. Regional Haze

Regional haze is visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit fine particles ($PM_{2.5}$) (e.g., sulfates, nitrates, organic carbon (OC), elemental carbon (EC), and soil dust), and their precursors (e.g., sulfur dioxide (SO_2),

[1] We issued a finding of failure to submit for Wyoming only for the requirements of 40 CFR 51.309(g)) regarding required SIP provisions, including NO_X BART, to address visibility at Class I areas other than the 16 areas covered by the Grand Canyon Visibility Transport Commission Report. Wyoming had submitted a SIP for the rest of the requirements under 40 CFR 51.309 prior to our January 15, 2009 finding.

[2] 77 FR 73926 (Dec. 12, 2012).

[3] *WildEarth Guardians* v. *Jackson,* 1:11–cv–CMA–MEH (D. Colo.).

[4] *WildEarth Guardians* v. *Jackson,* 1:11–cv–CMA–MEH (D. Colo.) (Dkt. Nos. 73, 74).

NO_X, and in some cases, ammonia (NH_3) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form $PM_{2.5}$, which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range [5] in many Class I areas (i.e., national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100–150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. 64 FR 35715 (July 1, 1999).

i. Requirements of the CAA and EPA's Regional Haze Rule (RHR)

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas [6] which impairment results from manmade air pollution.'' On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources, i.e., ''reasonably attributable visibility impairment.'' 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999. 64 FR 35714 (July 1, 1999), codified at 40 CFR part 51, subpart P. The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–51.309. Some of the main elements of the regional haze requirements are summarized in section III of this preamble. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands. 40 CFR 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.[7]

Few states submitted a regional haze SIP prior to the December 17, 2007 deadline, and on January 15, 2009, EPA found that 37 states (including Wyoming), the District of Columbia, and the Virgin Islands, had failed to submit SIPs addressing the regional haze requirements. 74 FR 2392. Once EPA has found that a state has failed to make a required submission, EPA is required to promulgate a FIP within two years unless the state submits a SIP and the Agency approves it within the two-year period. CAA section110(c)(1).

ii. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments, and various federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze can originate from sources located across broad geographic areas, EPA has encouraged the states and tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address regional haze and related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of pollutants that lead to regional haze.

The Western Regional Air Partnership (WRAP) RPO is a collaborative effort of state governments, tribal governments, and various federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility and other air quality issues in the western United States. WRAP member state governments include: Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. Tribal members include Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall.

B. Requirements for Regional Haze SIPs

The following is a summary of the requirements of the RHR. See 40 CFR 51.308 for further detail regarding the requirements of the rule.

i. The CAA and the Regional Haze Rule

Regional haze SIPs must assure reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in

[5] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

[6] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[7] EPA's regional haze regulations require subsequent updates to the regional haze SIPs. 40 CFR 51.308(g)–(i).

existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

ii. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview as the principal metric or unit for expressing visibility. *See* 70 FR 39104, 39118. This visibility metric expresses uniform changes in the degree of haze in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light extinction using a logarithmic function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.[8]

The deciview is used in expressing RPGs (which are interim visibility goals towards meeting the national visibility goal), defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure ''reasonable progress'' toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution by reducing anthropogenic emissions that cause regional haze. The national goal is a return to natural conditions, i.e., anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submittal and periodically review progress every five years midway through each 10-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20 percent least impaired (''best'') and 20 percent most impaired (''worst'') visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. We have provided guidance to states regarding how to calculate baseline, natural and current visibility conditions.[9]

For the first regional haze SIPs that were due by December 17, 2007, ''baseline visibility conditions'' were the starting points for assessing ''current'' visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the amount of progress made. In general, the 2000–2004 baseline period is considered the time from which improvement in visibility is measured.

iii. Determination of Reasonable Progress Goals

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two RPGs (i.e., two distinct goals, one for the ''best'' and one for the ''worst'' days) for every Class I area for each (approximately) 10-year implementation period. *See* 40 CFR 51.308(d), (f). The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the most impaired days over the (approximately) 10-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period. *Id.*

In establishing RPGs, states are required to consider the following factors established in section 169A of the CAA and in our RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to as the ''uniform rate of progress'' (URP) or the ''glidepath'') and the emission reduction measures needed to achieve that rate of progress over the 10-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress, which states are to use for analytical comparison to the amount of progress they expect to achieve. In setting RPGs, each state with one or more Class I areas (''Class I state'') must also consult with potentially ''contributing states,'' i.e., other nearby states with emission sources that may be affecting visibility impairment at the state's Class I areas. 40 CFR 51.308(d)(1)(iv). In determining whether a state's goals for visibility improvement provide for reasonable progress toward natural visibility conditions, EPA is required to evaluate the demonstrations developed by the state pursuant to paragraphs 40 CFR 51.308(d)(1)(i) and (d)(1)(ii). 40 CFR 51.308(d)(1)(iii).

iv. Best Available Retrofit Technology

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major

[8] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999).

[9] *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, EPA–454/B–03–005, *available* at *http://www.epa.gov/ttncaaa1/t1/memoranda/Regional_Haze_envcurhr_gd.pdf,* (hereinafter referred to as ''our 2003 Natural Visibility Guidance''); and *Guidance for Tracking Progress Under the Regional Haze Rule,* (September 2003, EPA–454/B–03–004, available at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf,* (hereinafter referred to as our ''2003 Tracking Progress Guidance'').

stationary sources[10] built between 1962 and 1977 procure, install, and operate the ''Best Available Retrofit Technology'' as determined by the state. Under the RHR, states are directed to conduct BART determinations for such ''BART-eligible'' sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at appendix Y to 40 CFR part 51 (hereinafter referred to as the ''BART Guidelines'') to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. 70 FR 39104. In making a BART determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts (MW), a state must use the approach set forth in the BART Guidelines. Generally, a state is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources. Regardless of source size or type, a state must meet the requirements of the CAA and our regulations for selection of BART, and the state's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.

The process of establishing BART emission limitations can be logically broken down into three steps: First, states identify those sources which meet the definition of ''BART-eligible source'' set forth in 40 CFR 51.301; [11] second, states determine which of such sources ''emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area'' (a source which fits this description is ''subject to BART''); and third, for each source subject-to-BART, states then identify the best available type and level of control for reducing emissions.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are SO_2, NO_X, and PM. EPA has stated that states should use their best judgment in determining whether VOC or NH_3 emissions impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Any exemption threshold set by the state should not be higher than 0.5 deciview. 40 CFR part 51, appendix Y, section III.A.1.

In their SIPs, states must identify the sources that are subject-to-BART and document their BART control determination analyses for such sources. In making their BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors when evaluating potential control technologies: (1) The costs of compliance; (2) the energy and non-air quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject-to-BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of EPA approval of the regional haze SIP. CAA section 169(g)(4) and 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source. See e.g. CAA section 110(a). As noted above, the RHR allows states to implement an alternative program in lieu of BART so long as the alternative program can be demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART.

v. Long-Term Strategy

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15-year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include a LTS in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include ''enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals'' for all Class I areas within, or affected by emissions from, the state. 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. *Id.* at (d)(3)(ii). The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to sufficiently address interstate visibility issues. This is especially true where two states belong to different RPOs.

States should consider all types of anthropogenic sources of visibility impairment in developing their long-term strategy, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net

[10] The set of ''major stationary sources'' potentially subject-to-BART is listed in CAA section 169A(g)(7).

[11] BART-eligible sources are those sources that have the potential to emit 250 tons or more of a visibility-impairing air pollutant, were not in operation prior to August 7, 1962, but were in existence on August 7, 1977, and whose operations fall within one or more of 26 specifically listed source categories. 40 CFR 51.301.

effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. 40 CFR 51.308(d)(3)(v).

vi. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment

As part of the RHR, EPA revised 40 CFR 51.306(c) regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze, and the state must submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTS's, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both regional haze and RAVI impairment and must be submitted to EPA as a SIP revision.

vii. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through ''participation'' in the IMPROVE network, i.e., review and use of monitoring data from the network. The monitoring strategy is due with the first regional haze SIP, and it must be reviewed every five years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible, in electronic format;
- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject-to-BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

viii. Consultation With States and Federal Land Managers (FLMs)

The RHR requires that states consult with FLMs before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

C. Our Proposal

We signed our notice of proposed rulemaking on May 23, 2013,[12] and it was published in the **Federal Register** on June 10, 2013 (78 FR 34738). In our 2013 proposal, we proposed to approve many of Wyoming's regional haze SIP, including the State's identification of its BART sources, its identification of those BART sources that may be anticipated to cause or contribute to visibility impairment, and the State's BART determinations for PM. Because of deficiencies in Wyoming's NO_X BART analyses, however, we proposed to disapprove the NO_X BART emissions limitations for a number of sources, as well as the reasonable progress goals and long-term strategy. We proposed to address the NO_X BART requirements for these sources and the other deficiencies in the Wyoming plan in a FIP, based on our analysis of the relevant factors. For several BART sources we also asked in the proposed rulemaking if interested parties had additional information regarding the BART factors and EPA's proposed determinations, for example our weighing of average costs, incremental costs, visibility improvement, and timing of installation of such controls, and in light of such information, whether the interested parties thought the Agency should consider another BART control technology option that could be finalized either instead of, or in conjunction with, BART as proposed.[13]

In our 2013 proposal we proposed to disapprove the following:

[12] On May 15, 2012 the EPA signed the first proposed rule on the Wyoming Regional Haze SIP which proposed to partially approve and partially disapprove the Wyoming state plan. The EPA published the proposed rule in the **Federal Register** for public comment on June 4, 2012. This public **Federal Register** notice may be found at 77 FR 33022 (June 4, 2012). EPA then obtained an extension to the Consent Decree deadline in order to re-propose the Wyoming regional haze plan based on data generated after the conclusion of the original comment period. In this document, all references to ''proposal'' or ''proposal notice'' refer to the notice published on June 10, 2013 unless otherwise stated.

[13] *E.g.,* 78 FR 34777. The proposed notice also explained that ''[t]he Agency will take the comments and testimony received, as well as any further SIP revisions submitted by the State, into consideration in our final promulgation. Supplemental information received may lead the Agency to adopt final SIP and/or FIP regulations that reflect a different BART control technology option, or impact other proposed regulatory provisions, which differ from this proposal.'' 78 FR 34777.

• The State's nitrogen oxides (NO_X) best available retrofit technology (BART) determinations for PacifiCorp Dave Johnston Units 3 and 4, PacifiCorp Naughton Units 1 and 2, PacifiCorp Wyodak Unit 1, and Basin Electric Laramie River Units 1, 2, and 3.

• The State's NO_X reasonable progress determinations for PacifiCorp Dave Johnston Units 1 and 2.

• Wyoming's reasonable progress goals (RPGs).

• The State's monitoring, recordkeeping, and reporting requirements in Chapter 6.4 of the SIP.

• Portions of the State's long-term strategy (LTS) that rely on or reflect other aspects of the regional haze SIP that we are disapproving.

• The provisions necessary to meet the requirements for the coordination of the review of the reasonably attributable visibility impairment (RAVI) and the regional haze LTS.

We proposed the promulgation of a FIP to address the deficiencies in the Wyoming regional haze SIP that we identified in the proposed notice. The proposed FIP included the following elements:

• NO_X BART determinations and limits for PacifiCorp Dave Johnston Units 3 and 4, PacifiCorp Naughton Units 1 and 2, PacifiCorp Wyodak Unit 1, and Basin Electric Laramie River Units 1, 2, and 3.

• NO_X reasonable progress determinations and limits for PacifiCorp Dave Johnston Units 1 and 2.

• RPGs consistent with the SIP limits proposed for approval and the proposed FIP limits.

• Monitoring, recordkeeping, and reporting requirements applicable to all BART and reasonable progress sources for which there is a SIP or FIP emissions limit.

• LTS elements pertaining to emission limits and compliance schedules for the proposed BART and reasonable progress FIP emission limits.

• Provisions to ensure the coordination of the RAVI and regional haze LTS.

We also requested comment on an alternative proposal, related to the State's NO_X BART determinations, for PacifiCorp Jim Bridger Units 1 and 2, that would involve disapproval and the promulgation of a FIP.

D. Public Participation

We requested comments on all aspects of our proposed action. In our proposed rulemaking, we provided a 60-day comment period, with the comment period closing on August 9, 2013. We also held a public hearing on June 24, 2013, in Cheyenne, Wyoming. We received requests from Wyoming's governor, congressional delegation, and Department of Environmental Quality (DEQ), among others, for additional public hearings and an extended public comment period. As a result, we held two more public hearings. We held a hearing on July 17, 2013, in Cheyenne, Wyoming, and on July 26, 2013, in Casper, Wyoming. We also extended the comment period to August 26, 2013. We provided public notice of the additional hearings and extension of the public comment period on July 8, 2013. 78 FR 40654.

II. Final Action

Based upon comments received on our proposed action, in this final action we are partially approving and partially disapproving Wyoming's regional haze SIP submitted on January 12, 2011. We are approving the majority of the State's regional haze determinations. For the fifteen coal fired power plant units in Wyoming subject to the regional haze requirements, we are approving the State's NO_X emission control technology decisions for 10 of those units. We are also approving the State's plan for the non-power plant facilities subject to regional haze requirements and the State's plan for control of PM. We are approving all aspects of Wyoming's SIP, except for the following elements which we are disapproving:

• The State's NO_X BART determinations for PacifiCorp Dave Johnston Unit 3, PacifiCorp Wyodak Unit 1, and Basin Electric Laramie River Units 1, 2, and 3.

• Wyoming's RPGs.

• The State's monitoring, recordkeeping, and reporting requirements in Chapter 6.4 of the SIP.

• Portions of the State's LTS that rely on or reflect other aspects of the regional haze SIP that we are disapproving.

• The provisions necessary to meet the requirements for the coordination of the review of the RAVI and the regional haze LTS.

The final FIP includes the following elements:

• NO_X BART determinations and emission limits for PacifiCorp Dave Johnston Unit 3, Wyodak Unit 1, and Basin Electric Laramie River Units 1, 2, and 3.

• RPGs consistent with the SIP emission limits finalized for approval and the finalized FIP emission limits.

• Monitoring, recordkeeping, and reporting requirements applicable to all BART sources for which there is a SIP or FIP emissions limit.

• LTS elements pertaining to emission limits and compliance schedules for the finalized FIP emission limits.

• Provisions to ensure the coordination of the RAVI and regional haze LTS.

Although we are promulgating a Federal plan, a state may always submit a new regional haze SIP to EPA for review and we would welcome such a submission. The CAA requires EPA to take action on such a SIP submittal that is determined to be complete within 12 months. If the State were to submit a revision meeting the requirements of the CAA and the regional haze regulations, we would propose approval of the State's plan as expeditiously as practicable. We are mindful of the costs of our final action but have considered the costs and visibility improvement that other states and EPA have required for BART controls.

Table 1 shows the NO_X BART control technologies, associated cost, and emission reductions for each source that is subject to the FIP.

TABLE 1—CONTROL TECHNOLOGIES, COSTS, EMISSION LIMITS, AND COST EFFECTIVENESS FOR SOURCES SUBJECT TO THE FIP

Source	Technology *	Emission limit—lb/MMBtu (30-day rolling average)	Total capital cost ($)	Total annualized cost ($)	Average cost-effectiveness ($/ton)
Dave Johnston Unit 3.	New low-NO_X burners (LNBs) with overfire air (OFA) and shut down in 2027; or new LNBs with OFA and selective catalytic reduction (SCR) **.	0.28 (for LNBs with OFA).	$15,976,696 (for LNBs with OFA).	$1,828,137 (for LNBs with OFA).	$644 (for LNBs with OFA).

TABLE 1—CONTROL TECHNOLOGIES, COSTS, EMISSION LIMITS, AND COST EFFECTIVENESS FOR SOURCES SUBJECT TO THE FIP—Continued

Source	Technology *	Emission limit—lb/MMBtu (30-day rolling average)	Total capital cost ($)	Total annualized cost ($)	Average cost-effectiveness ($/ton)
Laramie River Unit 1.	New LNBs/OFA and SCR	0.07	$180,254,572	$21,770,134	$4,461.
Laramie River Unit 2.	New LNBs with OFA and SCR	0.07	$188,826,333	$22,691,467	$4,424.
Laramie River Unit 3.	New LNBs with OFA and SCR	0.07	$188,437,953	$22,666,982	$4,375.
Wyodak Unit 1	New LNBs with OFA and SCR	0.07	$119,501,862	$12,714,153	$4,036.

* The technology listed is the technology evaluated as BART, but sources can choose to use another technology or combination of technologies to meet established limits.

** As used in this and the following tables, ''new'' means replacing the control technology that was in place at the time of the State's BART analyses in May 2009 with new control technology, most of which was installed post-2009.

III. Changes From Proposed Rule and Reasons for Changes

A. Changes to Proposed Costs and Visibility Improvements

As described in this section and elsewhere in today's final rule, we have revised our cost of compliance analysis and visibility improvement modeling from our June 10, 2013 proposed action for all of the BART and reasonable progress electric generating units (EGUs).

EPA revised the cost analyses from those found in the proposed rule based upon input from various commenters. Some of factors that caused us to revise our cost estimates included accounting for site elevation in the SCR capital cost, change in SCR reagent to anhydrous ammonia from urea, change in auxiliary electrical cost from market price to generating cost, change in urea SNCR chemical utilization for some units due to high furnace temperatures, and consideration of shorter plant lifetimes in some instances. In addition, EPA incorporated some of the costs provided by commenters in their site specific cost estimates where we found those costs to be sufficiently supported. Per EPA's Control Cost Manual (CCM), use of site specific cost estimates is preferable to the use of generalized costs where those site specific costs can be supported and are appropriate.

EPA addressed comments on the visibility improvement modeling in the proposed rule by developing a new protocol that makes several improvements in the modeling, including the use of the current regulatory version of the CALPUFF model (version 5.8), the use of an improved method to assess the effects of pollutants on light scattering and visibility impairment (Method 8), the use of lower background ammonia concentrations, and the use of an ammonia limiting correction for BART sources with multiple units. In particular, we have used new values for ammonia background that reflect robust monitoring data and the appropriate default concentrations for the geography in the state.

The results of our revised cost analysis, along with the revised visibility impacts, are presented in Tables 2 through 17 below and summarized for each source below the set of tables for that source. Details regarding our revised cost analysis and visibility improvement modeling can be found in the docket.[14] [15]

TABLE 2—SUMMARY OF EPA'S LARAMIE RIVER UNIT 1 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Badlands National Park)
New LNBs with OFA	0.19	1,556	$2,268,806	$1,458		0.18
New LNBs with OFA and selective non-catalytic reduction (SNCR)	0.15	2,445	8,554,896	3,485	$6,993	0.28
New LNBs with OFA and SCR	0.05	4,880	21,770,134	4,461	5,449	0.57

[14] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013; Wyoming EGU BART and Reasonable Progress Costs for Jim Bridger—10/28/2013.

[15] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan, U.S. EPA, January, 2014.

TABLE 3—SUMMARY OF EPA'S LARAMIE RIVER UNIT 2 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Badlands National Park)
New LNBs with OFA	0.19	1823	$2,268,806	$1,244	.....	0.18
New LNBs with OFA and SNCR	0.15	2,717	8,531,631	3,140	$7,006	0.27
New LNBs with OFA and SCR	0.05	5,129	22,691,467	4,424	5,871	0.53

TABLE 4—SUMMARY OF EPA'S LARAMIE RIVER UNIT 3 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Badlands National Park)
New LNBs with OFA	0.19	1789	$2,268,806	$1,268	.....	0.18
New LNBs with OFA and SNCR	0.15	2,706	8,643,839	3,194	$6,951	0.27
New LNBs with OFA and SCR	0.05	5,181	22,666,982	4,375	5,667	0.52

EPA's January 2014 modeling protocol, Appendix H, shows the model predicted visibility improvement for each emissions control technology at each of the Class I areas that we modeled in our analysis. For Laramie River we modeled visibility impairment at Badlands National Park, Wind Cave National Park, Rawah Wilderness Area, and Rocky Mountain National Park. At Laramie River Unit 1 the model visibility improvements with LNB/OFA/SCR were 0.57 deciviews at Badlands National Park, 0.47 deciviews at Wind Cave National Park, 0.25 deciviews at Rawah Wilderness Area, and 0.39 at Rocky Mountain National Park. At Laramie River Unit 2 the model visibility improvements with LNB/OFA/SCR were 0.53 deciviews at Badlands, 0.43 deciviews at Wind Cave, 0.26 deciviews at Rawah, and 0.31 at Rocky Mountain. At Laramie River Unit 3 the model visibility improvements with LNB/OFA/SCR were 0.52 deciviews at Badlands, 0.44 deciviews at Wind Cave, 0.23 deciviews at Rawah, and 0.28 at Rocky Mountain.

TABLE 5—SUMMARY OF EPA'S JIM BRIDGER UNIT 1 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Bridger Wilderness Area) **
New LNBs with SOFA	0.18	4,558	$1,167,297	$256	.....	0.17/*0.23*
New LNBs with SOFA and SNCR	0.14	5,332	4,330,052	812	$4,088	0.20/*0.27*
New LNBs with SOFA and SCR	0.05	7,352	19,372,105	2,635	7,447	0.27/*0.37*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

TABLE 6—SUMMARY OF EPA'S JIM BRIDGER UNIT 2 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Bridger Wilderness Area) *
New LNBs with SOFA	0.19	3,787	$1,167,297	$308	.....	0.16/*0.21*
New LNBs with SOFA and SNCR	0.15	4,545	4,291,184	944	$4,122	0.19/*0.25*
New LNBs with SOFA and SCR	0.05	6,554	22,307,492	3,403	8,968	0.27/*0.36*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

TABLE 7—SUMMARY OF EPA'S JIM BRIDGER UNIT 3 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Bridger Wilderness Area) *
New LNBs with SOFA	0.20	3,710	$1,167,297	$315	.....	0.14*/0.19*
New LNBs with SOFA and SNCR	0.16	4,539	4,458,776	982	$3,972	0.17*/0.23*
New LNBs with SOFA and SCR	0.05	6,799	22,573,920	3,320	8,015	0.26*/0.35*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

TABLE 8—SUMMARY OF EPA'S JIM BRIDGER UNIT 4 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Rawah Wilderness Area) *
New LNBs with SOFA	0.19	4,161	$1,167,297	$281	.....	0.25*/0.23*
New LNBs with SOFA and SNCR	0.15	4,956	4,372,457	882	$4,035	0.30*/0.28*
New LNBs with SOFA and SCR	0.05	7,108	19,494,417	2,743	7,027	0.45*/0.42*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

EPA's January 2014 modeling protocol, Appendix H, shows the model predicted visibility improvement for each emissions control technology at each of the Class I areas that we modeled in our analysis of Jim Bridger. Model simulations were performed using a monthly varying background ammonia concentration and using the IWAQM default concentration for forested areas of 0.5 ppb. For Jim Bridger we modeled visibility impairment at Bridger Wilderness Area, Fitzpatrick Wilderness Area, Mt Zirkel Wilderness Area, Rawah Wilderness Area, Rocky Mountain National Park, Grand Teton National Park, Teton Wilderness Area, Washakie Wilderness Area and Yellowstone National Park. Under the State's LTS, LNB/OFA/SCR would be required on Jim Bridger Units 1 and 2 in 2022 and 2021. Under the State's LTS, LNB/OFA/SCR would be required on Jim Bridger Units 3 and 4 in 2015 and 2016.

For Jim Bridger Unit 1, using monthly varying ammonia concentrations, model visibility improvements with LNB/OFA/SCR were: 0.37 deciviews at Bridger; 0.26 deciviews at Fitzpatrick; 0.29 deciviews at Mt Zirkel; 0.35deciviews at Rawah; 0.36 deciviews at Rocky Mountain; 0.17 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.19 deciviews at Washakie; and 0.15 deciviews at Yellowstone.

For Jim Bridger Unit 1, using a constant 0.5 ppb ammonia concentration, model visibility improvements with LNB/OFA/SCR were: 0.37 deciviews at Bridger; 0.26 deciviews at Fitzpatrick; 0.29 deciviews at Mt Zirkel; 0.35 deciviews at Rawah; 0.36 deciviews at Rocky Mountain; 0.17 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.19 deciviews at Washakie; and 0.15 deciviews at Yellowstone.

For Jim Bridger Unit 2, using monthly varying ammonia concentrations, model visibility improvements with LNB/OFA/SCR were: 0.36 deciviews at Bridger; 0.26 deciviews at Fitzpatrick; 0.28 deciviews at Mt Zirkel; 0.35 deciviews at Rawah; 0.36 deciviews at Rocky Mountain; 0.16 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.19 deciviews at Washakie; and 0.14 deciviews at Yellowstone.

For Jim Bridger Unit 2, using a constant 0.5 ppb ammonia concentration, model visibility improvements with LNB/OFA/SCR were: 0.36 deciviews at Bridger; 0.26 deciviews at Fitzpatrick; 0.28 deciviews at Mt Zirkel; 0.35 deciviews at Rawah; 0.36 deciviews at Rocky Mountain; 0.16 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.19 deciviews at Washakie; and 0.14 deciviews at Yellowstone.

For Jim Bridger Unit 3, using monthly varying ammonia concentrations, model visibility improvements with LNB/OFA/SCR were: 0.35 deciviews at Bridger; 0.25 deciviews at Fitzpatrick; 0.28 deciviews at Mt Zirkel; 0.33 deciviews at Rawah; 0.34 deciviews at Rocky Mountain; 0.16 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.18 deciviews at Washakie; and 0.14 deciviews at Yellowstone.

For Jim Bridger Unit 3, using a constant 0.5 ppb ammonia concentration, model visibility improvements with LNB/OFA/SCR were: 0.35 deciviews at Bridger; 0.25 deciviews at Fitzpatrick; 0.28 deciviews at Mt Zirkel; 0.33 deciviews at Rawah; 0.34 deciviews at Rocky Mountain; 0.16 deciviews at Grand Teton; 0.14 deciviews at Teton; 0.18 deciviews at Washakie; and 0.14 deciviews at Yellowstone.

For Jim Bridger Unit 4, using monthly varying ammonia concentrations, model visibility improvements with LNB/OFA/SCR were: 0.38 deciviews at Bridger; 0.28 deciviews at Fitzpatrick; 0.19 deciviews at Mt Zirkel; 0.42 deciviews at Rawah; 0.38 deciviews at Rocky Mountain; 0.32 deciviews at Grand Teton; 0.15 deciviews at Teton; 0.30 deciviews at Washakie; and 0.16 deciviews at Yellowstone.

For Jim Bridger Unit 4, using a constant 0.5 ppb ammonia concentration, model visibility improvements with LNB/OFA/SCR were: 0.38 deciviews at Bridger; 0.28

deciviews at Fitzpatrick; 0.27 deciviews at Mt Zirkel; 0.42 deciviews at Rawah; 0.38 deciviews at Rocky Mountain; 0.32 deciviews at Grand Teton; 0.15 deciviews at Teton; 0.30 deciviews at Washakie; and 0.16 deciviews at Yellowstone.

TABLE 9—SUMMARY OF EPA'S DAVE JOHNSTON UNIT 3 NO_X BART ANALYSIS

[9 Year remaining useful life]

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
New LNBs with OFA	0.22	2,837	$1,828,137	$644	.....	0.33
New LNBs with OFA and SNCR	0.16	3,356	3,898,930	1,162	$3,988	0.39
New LNBs with OFA and SCR	0.05	4,433	16,591,006	3,742	11,781	0.51

TABLE 10—SUMMARY OF EPA'S DAVE JOHNSTON UNIT 3 NO_X BART ANALYSIS

[20 Year remaining useful life]

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
New LNBs with OFA	0.22	2,837	$1,699,807	$599	.....	0.33
New LNBs with OFA and SNCR	0.16	3,356	3,510,589	1,046	$3,488	0.39
New LNBs with OFA and SCR	0.05	4,433	11,680,144	2,635	7,583	0.51

TABLE 11—SUMMARY OF EPA'S DAVE JOHNSTON UNIT 4 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
New LNBs with OFA	0.14	3,114	$767,342	$246	.....	0.41
New LNBs with OFA and SNCR	0.11	3,505	2,541,600	725	$4,535	0.46
New LNBs with OFA and SCR	0.05	4,377	14,158,899	3,235	13,312	0.57

EPA's January 2014 modeling protocol, Appendix H, shows the model predicted visibility improvement for each emissions control technology at each of the Class I areas that we modeled in our analysis of Dave Johnston. For Dave Johnston we modeled visibility impairment at Badlands National Park, Wind Cave National Park, Mt Zirkel Wilderness Area, Rawah Wilderness Area, and Rocky Mountain National Park. At Dave Johnston Unit 3 the model visibility improvements with LNB/OFA/SCR were 0.47 deciviews at Badlands National Park, 0.51 deciviews at Wind Cave National Park, 0.20 deciviews at Mt Zirkel Wilderness Area, 0.40 deciviews at Rawah Wilderness Area, and 0.28 at Rocky Mountain National Park. At Dave Johnston Unit 4 the model visibility improvements with LNB/OFA were 0.55 deciviews at Badlands National Park, 0.57 deciviews at Wind Cave National Park, 0.24 deciviews at Mt Zirkel Wilderness Area, 0.34 deciviews at Rawah Wilderness Area, and 0.33 deciviews at Rocky Mountain National Park.

TABLE 12—SUMMARY OF EPA'S NAUGHTON UNIT 1 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the Maximum 98th percentile impact at Bridger Wilderness Area) *
New LNBs with OFA	0.21	2,100	$932,466	$444	.....	0.22/*0.26*
New LNBs with OFA and SNCR	0.16	2,463	2,234,827	907	$3,584	0.26/*0.30*
New LNBs with OFA and SCR	0.05	3,209	9,974,616	3,109	10,384	0.33/*0.39*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

TABLE 13—SUMMARY OF EPA'S NAUGHTON UNIT 2 NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the Maximum 98th percentile impact at Bridger Wilderness Area) *
New LNBs with OFA	0.21	2,586	$883,900	$342	.....	0.28/*0.32*
New LNBs with OFA and SNCR	0.16	3,024	2,480,832	820	$3,647	0.34/*0.38*
New LNBs with OFA and SCR	0.05	3,922	10,062,750	2,566	8,440	0.42/*0.46*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

TABLE 14—SUMMARY OF EPA'S NAUGHTON UNIT 3 NO_X BART ANALYSIS

[In lieu of conversion of Naughton Unit 3 to natural gas per PacifiCorp request]

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (Delta deciview for the Maximum 98th percentile impact at Bridger Wilderness Area) *
Existing LNBs with OFA**	0.33	442	$106,393	$240	.....	0.05/*0.07*
Existing LNBs with OFA and SNCR	0.23	1,673	3,852,377	2,303	$3,045	0.20/*0.29*
Existing LNBs with OFA and SCR	0.05	3,922	13,604,702	3,469	4,335	0.49/*0.60*

* Values shown are model results using ammonia based on monitoring and default data; values in straight font are model results using a monitored monthly varying concentration/*values in italics are model results using an IWAQM default 0.5 ppb background ammonia.*

** As used in this table, "existing" means the control technology that was in place at the time of the State's BART analyses in May 2009.

EPA's January 2014 modeling protocol, Appendix H, shows the model predicted visibility improvement for each emissions control technology at each of the Class I areas that we modeled in our analysis of Naughton. For Naughton we modeled visibility impairment at Bridger Wilderness Area, Fitzpatrick Wilderness Area, North Absaroka Wilderness Area, Washakie Wilderness Area, Teton Wilderness Area, Grand Teton National Park and Yellowstone National Park. Model simulations were performed using a monthly varying background ammonia concentration and using the IWAQM default concentration for forested areas of 0.5 ppb.

For Naughton Unit 1 model visibility improvements, using monthly varying ammonia concentrations, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.22 and 0.33 deciviews at Bridger; 0.19 and 0.29 deciviews at Fitzpatrick; 0.10 and 0.14 at North Absaroka; 0.10 and 0.15 deciviews at Washakie; 0.10 and 0.16 deciviews at Teton; 0.15 and 0.23 deciviews at Grand Teton; and 0.12 and 0.18 deciviews at Yellowstone.

For Naughton Unit 1 model visibility improvements, using a constant 0.5 ppb ammonia concentration, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.26 and 0.39 deciviews at Bridger; 0.22 and 0.30 deciviews at Fitzpatrick; 0.10 and 0.14 at North Absaroka; 0.12 and 0.17 deciviews at Washakie; 0.13 and 0.19 deciviews at Teton; 0.19 and 0.29 deciviews at Grand Teton; and 0.13 and 0.19 deciviews at Yellowstone.

For Naughton Unit 2 model visibility improvements, using monthly varying ammonia concentrations, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.28 and 0.42 deciviews at Bridger; 0.25 and 0.36 deciviews at Fitzpatrick; 0.12 and 0.17 at North Absaroka; 0.15 and 0.22 deciviews at Washakie; 0.14 and 0.21 deciviews at Teton; 0.18 and 0.28 deciviews at Grand Teton; and 0.16 and 0.22 deciviews at Yellowstone.

For Naughton Unit 2 model visibility improvements, using a constant 0.5 ppb ammonia concentration, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.32 and 0.46 deciviews at Bridger; 0.26 and 0.38 deciviews at Fitzpatrick; 0.12 and 0.17 at North Absaroka; 0.16 and 0.22 deciviews at Washakie; 0.17 and 0.25 deciviews at Teton; 0.25 and 0.38 deciviews at Grand Teton; and 0.17 and 0.24 deciviews at Yellowstone.

For Naughton Unit 3 model visibility improvements, using monthly varying ammonia concentrations, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.05 and 0.49 deciviews at Bridger; 0.05 and 0.42 deciviews at Fitzpatrick; 0.03 and 0.24 at North Absaroka; 0.05 and 0.37 deciviews at Washakie; 0.04 and 0.38 deciviews at Teton; 0.04 and 0.38 deciviews at Grand Teton; and 0.04 and 0.39 deciviews at Yellowstone.

For Naughton Unit 3 model visibility improvements, using a constant 0.5 ppb ammonia concentration, with LNB/OFA and LNB/OFA/SCR were, respectively: 0.07 and 0.60 deciviews at Bridger; 0.05 and 0.44 deciviews at Fitzpatrick; 0.03 and 0.24 at North Absaroka; 0. and 0. deciviews at Washakie; 0.05 and 0.39 deciviews at Teton; 0.06 and 0.41 deciviews at Grand Teton; and 0.05 and 0.40 deciviews at Yellowstone.

TABLE 15—SUMMARY OF EPA'S WYODAK NO_X BART ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
New LNBs with OFA	0.19	1,239	$1,272,427	$1,027	.....	0.21
New LNBs with OFA and SNCR	0.15	1,914	3,726,573	1,947	3,635	0.32
New LNBs with OFA and SCR	0.05	3,735	15,073,502	4,036	6,233	0.61

EPA's January 2014 modeling protocol, Appendix H, shows the model predicted visibility improvement for each emissions control technology at each of the Class I areas that we modeled in our analysis of Wyodak . For Wyodak we modeled visibility impairment at Badlands National Park and Wind Cave National Park. At Wyodak Unit 1 the model visibility improvements with LNB/OFA/SCR were 0.61 deciviews at Wind Cave and 0.38 deciviews at Badlands National Park.

TABLE 16—SUMMARY OF EPA'S DAVE JOHNSTON UNIT 1 NO_X REASONABLE PROGRESS ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
LNBs with OFA *	0.20	1,226	$1,214,000	$990	.....	0.12
LNBs with OFA and SNCR	0.15	1,466	2,096,430	1,430	3,670	0.14
LNBs with OFA and SCR	0.05	1,947	6,808,374	3,496	9,798	0.18

* As used in this and the following tables, control technology that is not preceded by either ''new'' or ''existing'' (as in the above tables) means the control technology will be installed for the first time.

TABLE 17—SUMMARY OF EPA'S DAVE JOHNSTON UNIT 2 NO_X REASONABLE PROGRESS ANALYSIS

Control technology	Emission rate (lb/MMBtu; annual average)	Emission reduction (tpy)	Annualized costs	Average cost effectiveness ($/ton)	Incremental cost effectiveness ($/ton)	Visibility improvement (delta deciview for the maximum 98th percentile impact at Wind Cave National Park)
LNBs with OFA	0.20	1,180	$1,441,146	$1,221	.....	0.11
LNBs with OFA and SNCR	0.15	1,425	2,335,022	1,638	3,645	0.14
LNBs with OFA and SCR	0.05	1,916	7,037,969	3,673	9,588	0.18

B. Changes to Our Proposed Determinations

1. Dave Johnston Unit 3

We proposed to require PacifiCorp Dave Johnston Unit 3 to meet a FIP emission limit of 0.07 lb/MMBtu (30-day rolling average) for NO_X BART (assumes the installation of LNBs/OFA plus SCR). Based on our revised costs of compliance and visibility impacts, we would still conclude that NO_X BART is an emission limit of 0.07 lb/MMBtu (30-day rolling average). PacifiCorp submitted comments on our proposed rulemaking on August 26, 2013. In those comments, PacifiCorp indicated in various places (e.g., page 37) that instead of installing SCR, it would shut down Dave Johnston Unit 3 in 2027. Our regulatory language now provides PacifiCorp two alternative paths to compliance with the FIP. The first path includes a requirement for Dave Johnston Unit 3 to cease operation by December 31, 2027. For this path, we are requiring Dave Johnston Unit 3 to meet a FIP limit of 0.28 lb/MMBtu (30-day rolling average) no later than five years after the date of our final action. This emission limit assumes the installation of LNBs/OFA. The second compliance path gives PacifiCorp the option to instead meet a 0.07 lb/MMBtu emission limit (assumes installation of SCR) within five years of our final action with no requirement for shut down.

EPA met with PacifiCorp on October 31, 2013, to clarify the comments submitted by PacifiCorp (see October 31, 2013 memo to docket). Specifically, EPA asked if, in lieu of a requirement for SCR, PacifiCorp was asking for EPA to include an enforceable requirement in the FIP for Dave Johnston Unit 3 to shut down in 2027, and for EPA to make a BART determination based on that limited remaining useful life. PacifiCorp confirmed that it did want EPA to include an enforceable requirement in the FIP for PacifiCorp to shut down Dave Johnston Unit 3 by December 31, 2027, and to make a BART determination accordingly. As detailed in the following section, we determined that if the unit shuts down by December 31, 2027, SCR would no longer be NO_X BART.

Generally, EPA does not interpret the regional haze rule to provide us with authority to make a BART determination that requires the shutdown of a source. In other states, we have approved state-adopted requirements for the shutdown of a source, which have usually been negotiated between the source operator and the state, and we have accordingly approved BART determinations that took into account the resulting shorter useful life of the affected source. In the case of Dave Johnson Unit 3, the State has not submitted a SIP revision to require the shutdown that PacifiCorp intends to implement, so there is no enforceable shutdown commitment that we can approve. We believe that without an enforceable requirement for the shutdown, we cannot make a BART determination that reflects the shorter planned useful life of the unit. Therefore, we are incorporating the shutdown requirement into one of the two compliance paths available to PacifiCorp, in order to allow it to only be required to install and maintain the less expensive LNBs/OFA emission controls rather than the more expensive SCR controls. We welcome a SIP revision that would make the shutdown requirement State law, and we would withdraw the shutdown requirement from the SIP upon approving such a SIP revision.

2. Dave Johnston Unit 4

We proposed to require PacifiCorp Dave Johnston Unit 4 to meet a FIP emission limit of 0.12 lb/MMBtu (30-day rolling average) for NO_X BART (assuming the installation of LNBs/OFA with SNCR). Based on our revised costs of compliance and visibility impacts, we no longer conclude that NO_X BART is an emission limit of 0.12 lb/MMBtu (30-day rolling average). Based on our new cost and visibility improvement numbers, we conclude that NO_X BART is represented by the SIP emission limit of 0.15 lb/MMBtu (30-day rolling average) for this unit. This emission limit assumes the installation of LNBs/OFA. As such, we are approving Wyoming's NO_X BART determination for Dave Johnston Unit 4.

3. Naughton Units 1 and 2

We proposed to require PacifiCorp Naughton Units 1 and 2 to meet a FIP emission limit of 0.07 lb/MMBtu (30-day rolling average) for NO_X BART (assuming the installation of LNBs/OFA with SCR). As detailed in the next section, based on our revised costs of compliance and visibility impacts, we no longer conclude that NO_X BART is an emission limit of 0.07 lb/MMBtu (30-day rolling average). Based on our new cost and visibility improvement numbers, we conclude that NO_X BART is represented by the SIP emission limit of 0.26 lb/MMBtu (30-day rolling average) for each unit. This emission limit assumes the installation of LNBs/OFA. As such, we are approving Wyoming's NO_X BART determination for Naughton Units 1 and 2.

4. Naughton Unit 3

We proposed to approve the State's NO_X BART determination for Naughton Unit 3, which was an emission limit of 0.07 lb/MMBtu (30-day rolling average) (assumes the installation of LNBs/OFA with SCR). PacifiCorp submitted comments on our proposed rulemaking on August 26, 2013. In those comments, PacifiCorp indicated (page 72) that instead of installing SCR as required by the SIP, it plans to convert Naughton Unit 3 to natural gas in 2018 without installation of any post-combustion control of NO_X emissions. Conversion to natural gas in this manner can be expected to result in NO_X emissions that are higher than the 0.07 lb/MMBtu limit in the SIP combined with much lower SO_2 and PM emissions, with a substantially lower overall remaining impact on visibility. On July 5, 2013, Wyoming issued Air Quality permit MD–14506 to PacifiCorp that reflects the conversion of Naughton Unit 3 to natural gas in June of 2018. EPA met with PacifiCorp on October 31, 2013, to clarify the comments submitted by PacifiCorp (see October 31, 2013 memo to docket). PacifiCorp requested that EPA include in its final action the emission limits for SO_2, PM, and NO_X that the State had in its permit MD–14506 that it issued to PacifiCorp. EPA supports PacifiCorp's conversion of Naughton Unit 3 to natural gas. However, we have the authority and obligation to take action on the SIP as submitted by the State, and there is no basis to disapprove the SIP. Since we are approving the SIP, we do not have authority to impose FIP limits even if independently requested by a source. Therefore, we cannot use the FIP to relieve Naughton Unit 3 of the obligation to achieve the 0.07 lb/MMBtu NO_X emission limit in the SIP nor to impose emission limits for SO_2 and PM that reflect the planned conversion to natural gas. Under the terms of the SIP, the compliance deadlines for the emission limits in the SIP for Naughton Unit 3 do not become effective until five years after our final action. We understand that Wyoming intends to submit a revision to their regional haze SIP for Naughton Unit 3 that reflects the BART NO_X emission limits in its permit MD–14506 as soon as practicable. EPA intends to act on this SIP revision in an expedited timeframe to reflect the conversion of Naughton Unit 3 to natural gas and a revised BART NO_X limit. In our final action we are approving Wyoming's NO_X BART determination for Naughton Unit 3. Our regulatory language reflects the following emission limit for Naughton

Unit 3 for NO_X: 0.07 lb/MMBtu (30-day rolling average).

5. Wyodak

We proposed to require PacifiCorp Wyodak Unit 1 to meet a FIP emission limit of 0.17 lb/MMBtu (30-day rolling average) for NO_X BART (assuming the installation of LNBs/OFA with SNCR). Based on our revised costs of compliance and visibility impacts, as well as comments received during the public comment period (see section V), we no longer conclude that NO_X BART is an emission limit of 0.17 lb/MMBtu (30-day rolling average). Based on our new cost and visibility improvement numbers, we conclude that NO_X BART is a FIP emission limit of 0.07 lb/MMBtu (30-day rolling average) for this unit. This emission limit assumes the installation of LNBs/OFA with SCR. As detailed in the next section, based on our weighing of the five factors, we find that the average cost-effectiveness of SCR ($4,036/ton) and the incremental cost-effectiveness ($6,233/ton), combined with a visibility improvement of 0.61 deciviews at the most impacted Class I area, makes the selection of SCR for BART reasonable.

6. Jim Bridger

In our proposal, we proposed to approve the State's NO_X BART and LTS determinations for Jim Bridger Units 1 and 2. The State's BART determination required each unit to meet an emissions limit of 0.26 lb/MMBtu (30-day rolling average) within five years of our approval of the SIP, based on new LNB plus OFA. The LTS determination required each unit to meet an emission limit of 0.07 lb/MMBtu (30-day rolling average) by December 31, 2022, and December 31, 2021, respectively. EPA proposed to approve these compliance dates for numerous reasons as discussed in detail in our proposed rulemaking. 78 FR 34755. We also proposed an alternative FIP BART determination that would require Jim Bridger Units 1 and 2 to meet an emission limit of 0.07 lb/MMBtu (30-day rolling average) within five years of our final rulemaking. 78 FR 34780. We are finalizing our proposed approval of the State's BART and LTS determinations for Jim Bridger Units 1 and 2, although the reasons for our final action on Jim Bridger Units 1 and 2 have changed from our proposed action.

In our proposed rulemaking, we stated:

> EPA is proposing to determine that BART for all units at Jim Bridger would be SCR if the units were considered individually, based on the five factors, without regard for the controls being required at other units in the PacifiCorp system. However, when the cost of BART controls at other PacifiCorp owned EGUs is considered as part of the cost factor for the Jim Bridger Units, EPA is proposing that Wyoming's determination that NO_X BART for these units is new LNB plus OFA for is reasonable. Considering costs broadly, it would be unreasonable to require any further retrofits at this source within five years of our final action. We note that the CAA establishes five years at the longest period that can be allowed for compliance with BART emission limits.'' 78 FR 34756. However, as discussed in detail in section V.D.2 below, we do not think PacifiCorp has presented ample evidence to show that it would be unreasonable or not feasible for them to install numerous SCRs within the five year BART period. Nonetheless, we are approving the State's BART determination and LTS for Jim Bridger Units 1 and 2 based on our consideration of the five factors, as detailed in the next section.

We are approving the State's SIP requirement that Jim Bridger Units 1 and 2 meet an emission limit of 0.07 lb/MMBtu (30-day rolling average) by 2022 and 2021, respectively. We are also approving the State's BART determination that requires Jim Bridger Units 1 and 2 to meet a NO_X emission limit of 0.26 lb/MMBtu (30-day rolling average) within five years of our final action.

For Jim Bridger Units 3 and 4 we proposed to approve the SIP with regard to the State's determination that the appropriate level of NO_X control for Units 3 and 4 for purposes of reasonable progress is the SCR-based emission limit in the SIP of 0.07 lb/MMBtu, with compliance dates of December 31, 2015 for Unit 3 and December 31, 2016 for Unit 4. In our proposal we noted that since the State is requiring PacifiCorp to install the LTS controls within the timeline that BART controls would have to be installed pursuant to 40 CFR 51.308(e)(iv), we proposed to approve the State's compliance schedule and emission limit of 0.07 lb/MMBtu for Jim Bridger Units 3 and 4 as meeting the BART requirements.

We are finalizing our proposed approval of the State's BART and LTS determinations for Jim Bridger Units 3 and 4, although, similar to Units 1 and 2, the reasons for our final action on Units 3 and 4 have changed from our proposed action.

7. Dave Johnston Units 1 and 2

We proposed to require PacifiCorp Dave Johnston Units 1 and 2 to meet a FIP emission limit of 0.22 lb/MMBtu (30-day rolling average) for NO_X under reasonable progress (assuming the installation of LNBs/OFA). As detailed in the next section, based on our revised costs and visibility impacts, we no longer conclude that an emission limit of 0.22 lb/MMBtu (30-day rolling average) is warranted. We are approving Wyoming's NO_X reasonable progress determinations for Dave Johnston Units 1 and 2 (i.e., no controls).

IV. Basis for Our Final Action

We have fully considered all significant comments on our proposal and have concluded that no changes from our proposal other than those discussed in detail above are warranted. Our action is based on an evaluation of Wyoming's regional haze SIP against the regional haze requirements at 40 CFR 51.300–51.309 and CAA sections 169A and 169B. All general SIP requirements contained in CAA section 110, other provisions of the CAA, and our regulations applicable to this action were also evaluated. The purpose of this action is to ensure compliance with these requirements. Our authority for action on Wyoming's SIP submittal is based on CAA section 110(k). Our authority to promulgate a FIP is based on CAA section 110(c).

In our proposal, EPA asked interested parties to provide additional information on both our evaluation of the BART factors and our proposed determinations. 78 FR 38745. We provided notice that any supplemental information we received could lead us to select BART control technologies or compliance deadlines that differed from our proposal. In response to this request, we received extensive comments on the visibility modeling and cost estimates that we provided in the proposal for NO_X BART control technologies. As a result of these comments, we have revised our visibility modeling and cost estimates. The details of these changes and our reasons for making them are provided elsewhere in this document and in our responses to the comments. Based on these changes, we have reassessed our proposed action on the State's NO_X BART determinations for each of the subject-to-BART sources by re-evaluating the five statutory factors.[16] We have also reassessed our proposed action on the State's NO_X reasonable progress determination for Dave Johnston Units 1 and 2. In this section, we describe in detail our reassessment of the statutory factors for these sources based on our revised visibility modeling and cost estimates. For two sources—Jim Bridger and Wyodak—we also received additional comments, explained below, that caused us to

[16] We are finalizing our proposed approval of the State's PM BART determinations. We did not receive any adverse comments that were sufficient to convince us that reexamination of the State's control costs was warranted.

reconsider certain aspects of our decision for those sources.

EPA notes that, in considering the visibility improvements reflected in our revised modeling, EPA interprets the BART Guidelines to require consideration of the visibility improvement from BART applied to the entire BART-eligible source. The BART Guidelines explain that, ''[i]f the emissions from the list of emissions units at a stationary source exceed a potential to emit of 250 tons per year for any visibility-impairing pollutant, then that collection of emissions units is a BART-eligible source.'' In other words, the BART-eligible source (the list of BART emissions units at a source) is the collection of units for which one must make a BART determination. The BART Guidelines state ''you must conduct a visibility improvement determination for the source(s) as part of the BART determination.'' This requires consideration of the visibility improvement from BART applied to the BART-eligible source as a whole.

We note, however, that while our regulations require states and EPA to assess visibility improvement on a source-wide basis, they provide flexibility to also consider unit-specific visibility improvement in order to more fully inform the reasonableness of a BART determination, but that does not replace the consideration of visibility benefit from the source (facility) as a whole. In making the BART determinations in this final action we have considered visibility improvements at the source, and then also at the units that comprise the source.

As explained in more detail later in this decision, we received during the comment period significant input on expected costs associated with different control technologies. We discuss in the section above and in our response to comments, the changes we made in response to comments received on costs of different control technologies. As discussed above and in our response to comments, we have revised our modeling analysis in light of the input we received during the public comment period. This additional information and analysis result in different costs and visibility benefits, two of the five BART factors. In some cases this leads us to finalize our proposal, and in other cases to reach a different conclusion.

This decision, which addresses multiple facilities in a state where numerous Class 1 areas are impacted to a greater or lesser degree, illustrates clearly the case-by-case nature of the BART determination process. The interplay among the five factors, and in particular the cost and visibility factors, is highly significant and determinative of the outcome. In considering this information, as we have noted in prior decisions, our first assessment is whether the state's determination is reasonable in light of the facts and consistent with the requirements of the Clean Air Act and implementing regulations. If we determine that it is, even if we might have reached a different outcome if it were our decision to make in the first instance, we will approve the SIP.

Below is a more specific discussion of our determinations in the final decision. As stated above more detailed information on our determinations can be found in the response to comments sections of this rulemaking.

A. Laramie River

The State's regional haze SIP determined that NO_X BART for Laramie River Units 1, 2, and 3 is new LNB/SOFA. We proposed to disapprove the State's determination because the State neglected to reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines. 78 FR 34766. After revising the State's costs and modeling and re-evaluating the statutory factors, we proposed to determine that NO_X BART is LNB/SOFA + SCR, with an emissions limit of 0.07 lb/MMBtu for each unit. We sought comment generally on the BART factors and our control determinations and indicated that we could revise our control determinations depending on any new information that we received.

As the result of the comments received on our proposal, we have further revised our calculation of the costs of compliance and visibility modeling. We have considered any comments on the other BART factors but we have not changed our assessment of the other BART factors. The revised visibility modeling for the most impacted Class I area (Badlands) is presented in the following table.

TABLE 18—VISIBILITY MODELING FOR LARAMIE RIVER STATION

Laramie River Station	LNB/SOFA	LNB/SOFA + SNCR	LNB/SOFA + SCR
Unit 1	0.18 deciviews	0.28 deciviews	0.57 deciviews
Unit 2	0.18 deciviews	0.27 deciviews	0.53 deciviews
Unit 3	0.18 deciviews	0.27 deciviews	0.52 deciviews
Total *	0.54 deciviews	0.82 deciviews	1.62 deciviews

* The total visibility improvement was estimated as the sum of the visibility improvement from each unit.

We also considered the visibility improvement at other impacted Class I areas (Wind Cave, Rawah, and Rocky Mountain), which range from 0.25 to 0.47 deciviews, 0.26 to 0.43 deciviews, and 0.23 to 0.44 deciviews, for Units 1, 2, and 3, respectively. Further details regarding our revised visibility modeling and cost estimates were provided in section III.A.

After re-evaluating the BART factors, we continue to find that LNB/SOFA + SCR is reasonable as BART and are therefore finalizing our proposal. The visibility improvement associated with LNB/SOFA + SCR at the most impacted Class I area is significant on both a source-wide (1.62 deciviews) and unit-specific (0.52–0.57 deciviews) basis. The significant visibility improvement at three other impacted Class I areas also supports the selection of this option. Finally, we believe that the incremental visibility improvement at the most impacted Class I area of SCR over SNCR (nearly double in all cases) warrants the selection of the most stringent control.

In regards to the costs of compliance, we found that the revised average and incremental cost-effectiveness of LNB/SOFA + SCR is in line with what we have found to be acceptable in our other FIPs. The average cost-effectiveness per unit ranges from $4,375 to $4,461/ton, while the incremental cost-effectiveness ranges from $5,449 to $5,871/ton. We believe that these costs are reasonable, especially in light of the significant visibility improvement associated with LNB/SOFA + SCR. As a result, we are finalizing our proposed disapproval of the State's NO_X BART determination for Laramie River Station and finalizing our proposed FIP that includes a NO_X BART determination of LNB/SOFA + SCR,

with an emission limit of 0.07 lb/MMBtu (30-day rolling average).

B. Jim Bridger

The State's regional haze SIP determined that NO_X BART for Jim Bridger Units 1–4 is new LNBs with SOFA. The State also determined that SCR should be installed at each unit as part of the State's long-term strategy to achieve reasonable progress at several Class I areas, and set compliance dates of December 31, 2022, December 31, 2021, December 31, 2015, and December 31, 2016 for Units 1–4, respectively.

In our proposal, we indicated that the State had neglected to reasonably assess the costs of compliance and visibility improvement for Jim Bridger in accordance with the BART Guidelines. We nonetheless proposed to approve the State's BART and reasonable progress determinations for Units 3 and 4 because the compliance deadlines to install SCR on these units were sufficient to meet the requirements of BART. We are now finalizing our proposed action for Units 3 and 4.

We also proposed to approve the State's BART and reasonable progress determinations for Units 1 and 2, but on a different basis. There, we indicated that given the number of SCR retrofits PacifiCorp had to perform in Wyoming and in other states, it might not be affordable for PacifiCorp to install two additional SCRs on Jim Bridger Units 1 and 2 within the five-year BART compliance period. We requested additional information from commenters regarding whether the affordability provisions of the BART Guidelines should be applied to Units 1 and 2. In the alternative, we proposed to find that NO_X BART for Units 1 and 2 was an emission limit of 0.07 lb/MMBtu (30-day rolling average) based on the installation of LNB/SOFA + SCR with a compliance deadline of five years. Under this scenario, we acknowledged that the cost-effectiveness of LNB/SOFA + SCR at Units 1 and 2 was within the range of what EPA and the State itself had found reasonable in other BART determinations. We also considered the significant visibility improvement demonstrated by the State's modeling to warrant LNB/SOFA + SCR as BART. Finally, we sought comment generally on the BART factors and our control determinations and indicated that we could revise our control determinations depending on any new information that we received.

In response to our proposal, we received both supportive and adverse comments regarding whether the affordability provisions of the BART Guidelines should apply to Units 1 and 2. As explained in more detail in our responses to these comments, we agree that PacifiCorp did not make a sufficient showing that it could not afford to install LNB/SOFA + SCR on Units 1 and 2 within the five-year compliance period. Nevertheless, we also received new information regarding the costs of compliance and visibility benefits associated with Jim Bridger and have revised our cost estimates and visibility modeling for all four units accordingly. We have considered any comments on the other BART factors but we have not changed our assessment of the other BART factors.

The revised visibility modeling for the most impacted Class I area (Bridger) is presented in the following table (with straight font representing modeled results using an ammonia background based on a monitored monthly varying concentration, italicized font representing modeled results using IWAQM default 0.5 ppb background ammonia).[17]

TABLE 19—VISIBILITY MODELING FOR JIM BRIDGER

Jim Bridger	LNB/SOFA	LNB/SOFA + SNCR	LNB/SOFA + SCR
Unit 1	0.17/0.23 deciviews	0.20/0.27 deciviews	0.27/0.37 deciviews
Unit 2	0.16/0.21 deciviews	0.19/0.25 deciviews	0.27/0.36 deciviews
Unit 3	0.14/0.19 deciviews	0.17/0.23 deciviews	0.26/0.35 deciviews
Unit 4	0.25/0.23 deciviews	0.30/0.28 deciviews	0.45/0.42 deciviews
Total *	0.72/0.86 deciviews	0.86/1.03 deciviews	1.25/1.5 deciviews

* The total visibility improvement was estimated as the sum of the visibility improvement from each unit.

We also considered the visibility improvements at other impacted Class I areas (Bridger, Fitzpatrick, Rawah, Rocky Mountain, Grand Teton, Teton, Washakie, and Yellowstone), which range from 0.26 to 0.91 deciviews, 0.26 to 0.89 deciviews, 0.24 to 0.87 deciviews, and 0.27 to 1.0 deciviews, for Units 1–4, respectively. Further details regarding our revised visibility modeling and cost estimates are provided in section III.A.

After re-evaluating the BART factors, we are approving the State's determination that LNB/SOFA is NO_X BART for Units 1–4. The visibility improvement associated with LNB/SOFA + SCR at the most impacted Class I area is significant on a source-wide basis (1.25 to 1.5 deciviews). The fact that Jim Bridger Station affects a number of other Class I areas, which also would see appreciable visibility improvement with the installation of LNB/SOFA + SCR, also weighs in favor of selecting this option as BART. The unit-specific benefits for Units 1 and 2 are somewhat more modest (0.27–0.37 deciviews), however, especially considering the low incremental improvement over SNCR (0.07–0.11 deciviews). The incremental visibility improvement of SNCR over LNB/SOFA is even smaller (0.03–0.04 deciviews).

In regards to the costs of compliance, we found that the revised average cost-effectiveness of LNB/SOFA + SCR is in line with what we have found to be acceptable in our other FIPs. The average cost-effectiveness is $4,088 and $4,461/ton at Units 1 and 2, respectively. The incremental cost-effectiveness, on the other hand, is on the high end of what we have found to be reasonable in our other FIPs. The incremental cost-effectiveness is $7,477 and $8,986/ ton at Units 1 and 2, respectively.

Ultimately however, while we believe that these costs and visibility improvements could potentially justify LNB/SOFA + SCR as BART, because this is a close call and because the State has chosen to require SCR as a reasonable progress control, we believe deference to the State is appropriate in this instance. We are therefore finalizing

[17] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan, U.S. EPA, January, 2014.

our approval of the State's determination to require SCR at Jim Bridger Units 1–4, with an emission limit of 0.07 lb/MMBtu (30-day rolling average), as part of its long-term strategy. We are also finalizing our approval of the compliance dates of December 31, 2022, December 31, 2021, December 31, 2015, and December 31, 2016 for Units 1- 4 respectively.

C. Dave Johnston Units 3 and 4

The State's regional haze SIP determined that NO_X BART for Dave Johnston Units 3 and 4 is LNB/OFA. We proposed to disapprove the State's determination because the State neglected to reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines. 78 FR 34778. After revising the State's costs and modeling and re-evaluating the statutory factors, we proposed to determine that NO_X BART for Unit 3 is LNB/SOFA + SCR, with an emission limit of 0.07 lb/ MMBtu (30-day rolling average). We proposed that NO_X BART for Unit 4 is LNB/SOFA + SNCR, with an emission limit of 0.12 lb/ MMBtu. We sought comment generally on the BART factors and our control determinations and indicated that we could revise our control determinations depending on any new information that we received.

As the result of the comments received on our proposal, we have further revised our calculation of the costs of compliance and visibility modeling. We have considered any comments on the other BART factors but we have not changed our assessment of the other BART factors. The revised visibility modeling for the most impacted Class I area (Wind Cave) is presented in the following table.

TABLE 20—VISIBILITY MODELING FOR DAVE JOHNSTON (BART UNITS)

Dave Johnston	LNB/OFA	LNB/OFA + SNCR	LNB/OFA + SCR
Unit 3	0.33 deciviews	0.39 deciviews	0.51 deciviews
Unit 4	0.41 deciviews	0.46 deciviews	0.57 deciviews
Total *	0.74 deciviews	0.85 deciviews	1.08 deciviews

* The total visibility improvement was estimated as the sum of the visibility improvement from each unit.

We also considered the visibility improvement at other impacted Class I areas (Badlands, Mt Zirkel, Rawah, and Rocky Mountain), which range from 0.20 to 0.47 deciviews and 0.24 to 0.55 deciviews, for Units 3 and 4, respectively. Further details regarding our revised visibility modeling and cost estimates were provided in section III.A.

After re-evaluating the BART factors, we no longer believe that LNB/OFA + SNCR is NO_X BART for Dave Johnston Unit 4. As we explained in the proposal, the incremental cost-effectiveness of LNB/OFA + SCR was and continues to be excessive ($13,312), so we have eliminated this control option. While the revised average and incremental costs of LNB/OFA + SNCR continue to be reasonable, the incremental visibility improvement of SNCR over LNB/OFA is now only 0.05 deciviews. In light of this new visibility information, we believe that the State's determination that LNB/ OFA is NO_X BART for Unit 4 was reasonable and are approving it accordingly.

In regards to Dave Johnston Unit 3, we continue to believe that LNB/OFA + SCR is NO_X BART. The visibility improvement associated with LNB/ SOFA + SCR at the most impacted Class I area is significant (0.51 deciviews). The visibility improvement at several other impacted Class I areas also supports the selection of this option. Finally, we do not believe that the incremental visibility improvement at the most impacted Class I area of SCR over SNCR (0.12 deciviews) is sufficiently insignificant to warrant the elimination of the most stringent control in this instance.

In regards to the costs of compliance, we found that the revised average and incremental cost-effectiveness of LNB/ SOFA + SCR is in line with what we have found to be acceptable in our other FIPs. The average cost-effectiveness is $2,635/ton, while the incremental cost-effectiveness is $7,583/ton. We believe that these costs are reasonable, especially in light of the significant visibility improvement associated with LNB/SOFA + SCR.

In response to other comments we received, we also considered an alternative BART analysis for Unit 3 based on PacifiCorp's commitment to retire Unit 3 by 2027 in lieu of installing SCR. Using a 9-year remaining useful life as the amortization period for Unit 3, the incremental cost-effectiveness of LNB/OFA + SCR becomes excessive ($11,781). Furthermore, the incremental visibility improvement at the most impacted Class I area from use of LNB/ OFA to use of LNB/OFA+ SNCR is only 0.06 deciviews. Thus, taking all five factors into account, including the remaining useful life of nine years, we conclude that the NO_X BART would be LNB/OFA in this scenario.

To provide flexibility, we are finalizing both scenarios in a FIP for Dave Johnston Unit 3. Under the first scenario, we are finalizing a NO_X BART determination of LNB/OFA + SCR, with an emission limit of 0.07 lbs/ MMBtu (30-day rolling average). Under the alternative scenario, based on a commitment to retire Unit 3 by 2027, we are finalizing a NO_X BART determination of LNB/OFA, with an emission limit of 0.28 lbs/ MMBtu (30-day rolling average).

D. Naughton

The State's regional haze SIP determined that NO_X BART is new LNB/OFA for Naughton Units 1 and 2 and LNB/OFA + SCR for Naughton Unit 3. We proposed to approve the State's determination for Unit 3, but proposed to disapprove the State's determination for Units 1 and 2 because the State neglected to reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines. 78 FR 34748. After revising the State's costs and modeling and re-evaluating the statutory factors, we proposed to determine that NO_X BART for Units 1 and 2 is LNB/SOFA + SCR, with an emissions limit of 0.07 lb/MMBtu for each unit. We sought comment generally on the BART factors and our control determinations and indicated that we could revise our control determinations depending on any new information that we received.

As the result of the comments received on our proposal, we have further revised our calculation of the costs of compliance and visibility modeling. We have considered any comments on the other BART factors but we have not changed our assessment of the other BART factors. The revised visibility modeling for the most impacted Class I area (Bridger) is presented in the following table (with straight font representing modeled

results using an ammonia background based on a monitored monthly varying concentration, italicized font representing modeled results using IWAQM default 0.5 ppb background ammonia).

TABLE 21—VISIBILITY MODELING FOR NAUGHTON

Naughton	LNB/OFA	LNB/OFA + SNCR	LNB/OFA + SCR
Unit 1	0.22/*0.26* deciviews	0.26/*0.30* deciviews	0.33/*0.39* deciviews.
Unit 2	0.28/*0.32* deciviews	0.34/*0.38* deciviews	0.42/*0.46* deciviews.
Unit 3	0.05/*0.07* deciviews	0.20/*0.29* deciviews	0.49/*0.60* deciviews.
Total *	0.55/*0.65* deciviews	0.80/*0.97* deciviews	1.24/*1.45* deciviews

* The total visibility improvement was estimated as the sum of the visibility improvement from each unit.

We also considered the visibility improvement at other impacted Class I areas (Fitzpatrick, North Absaroka, Washakie, Teton, Grand Teton, and Yellowstone), which range from 0.10 to 0.30 deciviews, 0.08 to 0.42 deciviews, and 0.13 to 0.49 deciviews, for Units 1, 2, and 3, respectively. Further details regarding our revised visibility modeling and cost estimates were provided in section III.A.

After re-evaluating the BART factors, we no longer believe that LNB/OFA + SCR is NO_X BART for Naughton Units 1 and 2. The visibility improvement associated with LNB/SOFA + SCR at the most impacted Class I area remains significant on a source-wide basis (1.24–1.45 deciviews) but more modest on a unit-specific basis (0.33–0.46 deciviews). The visibility improvement at six other impacted Class I areas continues to support the selection of this option as well. In regards to the costs of compliance, however, we found that while the revised average cost-effectiveness values for LNB/OFA + SCR were acceptable, the revised incremental cost-effectiveness values were beyond the upper end of the range (higher even than Jim Bridger) of what we have found to be acceptable in our other FIPs. For Units 1 and 2, respectively, the average cost-effectiveness per unit is $3,109 and $2,566/ ton, while the incremental cost-effectiveness is $10,384 and $8,440/ ton. Consequently, we believe that it was not unreasonable for the State to reject LNB/OFA + SCR as BART. Furthermore, we cannot say the State acted unreasonably in rejecting LNB/OFA + SNCR at Units 1 and 2 because the incremental visibility improvement of SNCR over LNB/OFA, while possibly appreciable, is very low at just 0.10 deciviews across both units. Therefore, based on our analysis we believe that the State's determination that LNB/OFA is NO_X BART for Units 1 and 2, with an emission limit of 0.28 lbs/ MMBtu, was ultimately reasonable and are approving it accordingly.

E. Wyodak

The State's regional haze SIP determined that NO_X BART for Wyodak Unit 1 is new LNBs with OFA. We proposed to disapprove the State's determination because the State neglected to reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines. 78 FR 34784–34785. As a result, we also proposed a FIP for NO_X BART. After considering the BART factors, we noted that the cost-effectiveness and visibility improvement of the most stringent control option, LNB/OFA + SCR, were within the range of values that EPA had found reasonable in other FIPs. However, we proposed not to require LNB/OFA + SCR as NO_X BART for Wyodak Unit 1. Instead, we proposed to require LNB/OFA + SNCR based on the reasoning that the cumulative visibility improvement of SCR across all Class I areas was low when compared to the cumulative visibility improvement associated with SCR at Dave Johnston Unit 3, Laramie River Units 1–3, and Naughton Units 1 and 2. We sought comment generally on the BART factors and our control determinations and indicated that we could revise our control determinations depending on any new information that we received. Based on our discussion of LNB/OFA + SCR at Wyodak, that control option was among those that we invited comment on.

In response to our proposal for Wyodak, we received comments that cumulative visibility improvement should not be used as a basis to reject a control option that has already been deemed reasonable based on visibility improvement at the most impacted Class I area. The commenters pointed out that such an approach would have the illogical effect of allowing an added benefit (visibility improvement at multiple Class I areas) to weigh in favor of less stringent controls. We agree with this criticism and want to make clear today that where a control is warranted as BART based on the costs of controls and visibility benefits at the most impacted area alone, cumulative visibility benefits can only strengthen the case for that control, not suggest that it is unwarranted. Similarly, where a control might not be warranted as BART based on the improvement at a single Class I area, significant cumulative benefits are an additional consideration that could warrant that the control be selected as BART.

In addition, we have further revised our calculation of the costs of compliance and visibility modeling for Wyodak Unit 1. We have not changed our assessment of the other BART factors. The revised visibility modeling for the most impacted Class I area (Wind Cave) is presented in the following table.

TABLE 22—VISIBILITY MODELING FOR WYODAK

Wyodak	LNB/SOFA	LNB/SOFA + SNCR	LNB/SOFA + SCR
Unit 1	0.21 deciviews	0.32 deciviews	0.61 deciviews.

We also considered the visibility improvement at a second impacted Class I area (Badlands), which is a maximum of 0.38 deciviews for LNB/SOFA + SCR. Further details regarding our revised visibility modeling and cost estimates were provided in the previous section.

After re-evaluating the BART factors and dismissing our earlier rationale for rejecting an otherwise reasonable control, we find that LNB/SOFA + SCR is reasonable as BART. As the BART-eligible source in this case is a single unit, the source-wide and unit-specific visibility improvements associated with the various control options are the same. The visibility improvement associated with LNB/SOFA + SCR at the most impacted Class I area (0.61 deciviews) is significant. There is also a more modest visibility improvement (0.38 deciviews) at a second impacted Class I area that supports the selection of this option. Finally, we believe that the incremental visibility improvement at the most impacted Class I area of SCR over SNCR (nearly double) warrants the selection of the most stringent control.

In regards to the costs of compliance, we found that the revised average and incremental cost-effectiveness of LNB/SOFA + SCR is in line with what we have found to be acceptable in our other FIPs. The average cost-effectiveness is $4,036/ton, while the incremental cost-effectiveness of SCR over SNCR is $6,223/ton. We believe that these costs are reasonable, especially in light of the significant visibility improvement associated with LNB/SOFA + SCR at Wind Cave. As a result, we are finalizing our proposed disapproval of the State's NO_X BART determination for Wyodak Unit 1. Additionally, after carefully considering adverse comments, we have decided not to finalize our proposed NO_X determination of LNB/SOFA + SNCR, but rather are finalizing a NO_X BART determination of LNB/SOFA + SCR, with an emission limit of 0.07 lb/MMBtu (30-day rolling average).

F. Dave Johnston Units 1 and 2 (Reasonable Progress)

We proposed to disapprove the State's determination to not impose LNB/OFA as reasonable progress controls for NO_X at Dave Johnston Units 1 and 2. Based on our original cost estimates and visibility modeling, we also proposed to require PacifiCorp Dave Johnston Units 1 and 2 to meet a FIP emission limit of 0.22 lb/MMBtu (30-day rolling average) (assuming the installation of LNB/OFA). Based on our revised cost estimates and visibility modeling that we developed in response to comments, however, we no longer conclude that reasonable progress controls are warranted this planning period. While we continue to disagree with the State's reasoning for not imposing controls (as detailed in our response to comments), we are not prepared to say the State's ultimate decision was unreasonable. In evaluating the four reasonable progress factors and the visibility improvement associated with potential controls, we found that the average and incremental cost-effectiveness of LNB/OFA ($990/ton and $1,221/ton, respectively), while reasonable if viewed in isolation, was not necessarily justified this planning period in light of the relatively modest visibility improvement predicted by the revised modeling (0.11 deciviews—0.12 deciviews at the most impacted Class I area). As a result, we are approving the State's reasonable progress determination of no new controls for Dave Johnston Units 1 and 2, but we expect the State to revisit the issue during the next planning period.

V. Issues Raised by Commenters and EPA's Responses

A. Legal Issues

1. EPA Authority and State Discretion

Comment: Multiple commenters stated that CAA Section 169A and the Regional Haze Rule (RHR) give the states the lead in developing their regional haze SIPs. Some commenters went further in stating that Wyoming is given almost complete discretion in creating its regional haze SIP. These commenters argued that, because Wyoming is given such discretion, EPA lacks the statutory authority to disapprove the State's regional haze SIP. Specifically, some commenters pointed to the flexibility the State is granted in developing its BART determinations and other RHR requirements. The commenters stated that the CAA anticipates that EPA will create guidance and that the states, using their discretion, will use this guidance to develop regional haze SIPs. The State of Wyoming and other parties argued that each factor in the five-factor analysis used to make its BART determinations was appropriately weighed based on the State's own discretion. The commenters therefore argue that EPA has no basis on which to disapprove the five-factor analysis and that EPA does not have authority to reject a state's BART determination solely because EPA would have conducted the analysis in a different way or reached a different conclusion. The commenters went on to say that the State, after considering all statutory factors, made BART determinations for all subject-to-BART sources in a manner consistent with 40 CFR Part 51 Appendix Y, the established CAA requirements, and the interests of the State of Wyoming.

Numerous commenters went on to say that the U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining BART is limited and that a state's role is paramount. The court found that the CAA ''calls for states to play the lead role in designing and implementing regional haze programs.'' *Am. Corn Growers Ass'n* v. *EPA,* 291 F.3d 1, 2 (D.C. Cir. 2002). The commenters stated that the court also reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory BART factors and was ''inconsistent with the Act's provisions giving the states broad authority over BART determinations.'' *Id., see also Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination ''requires states to determine the particular technology that an individual source 'subject to BART' must install.'').

The commenters asserted that states have the primary responsibility for preventing air pollution under the CAA. CAA section 101(a)(3), 42 U.S.C. 7401(a)(3). Pursuant to this principle, states, not EPA, have always had primary control over decisions to impose specific emission limits (and therefore specific pollution control technologies) for individual facilities. By congressional design, EPA ''is relegated . . . to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary [to meet] national standards.'' *Train* v. *NRDC,* 421 U.S. 60, 79 (1975). This basic division of responsibilities between EPA and the states remained unchanged when Congress amended the Act in 1977 and again in 1990. *See Virginia* v. *EPA,* 108 F.3d 1397, 1408–09 (D.C. Cir. 1997).

Response: Congress crafted the CAA to provide for states to take the lead in developing SIPs, but balanced that decision by requiring EPA to review the SIPs to determine whether they meet the requirements of the CAA. EPA's review of SIPs is not limited to a ministerial type of automatic approval of a state's decisions. *See North Dakota* v. *EPA,* 730 F.3d 750, 760–61 (8th Cir. 2013) (''Although the CAA grants states the primary role of determining the appropriate pollution controls within their borders, EPA is left with more than the ministerial task of routinely approving SIP submissions.'') (hereinafter ''*North Dakota*''). EPA must consider not only whether the State considered the appropriate factors, but whether the State acted reasonably in doing so. In undertaking such a review, EPA does not ''usurp'' the State's authority, but ensures that such authority is reasonably exercised. EPA has the authority to issue a FIP either

when EPA has made a finding that the state has failed to timely submit a SIP or when EPA has found a SIP deficient. Here, EPA has authority on both grounds, and we have approved as much of the Wyoming regional haze SIP as possible, while promulgating a FIP only to fill the remaining gaps. Our action today is consistent with the statute.

Our action does not contradict the Supreme Court's decision in *Train.* States have significant responsibilities in the implementation of the CAA and meeting the requirements of the RHR. We recognize that states have the primary responsibility of drafting a SIP to address the requirements of the CAA's visibility program. We also recognize that we have the responsibility of ensuring that SIPs, including regional haze SIPs, conform to CAA requirements. We cannot approve a regional haze SIP that fails to address BART with a reasoned consideration of the statutory and regulatory requirements of the CAA and the RHR. *See Oklahoma* v. *EPA,* 723 F.3d 1201, 1207 (10th Cir. 2013) (''We agree with the EPA that the statute provides the agency with the power to review Oklahoma's BART determination for these four units.'') (hereinafter ''*Oklahoma''*).

Contrary to the commenters' assertions, we recognize the State's primary responsibility in drafting a SIP. In fact, we have approved many of the State's determinations, including the entirety of Wyoming's Section 309 BART alternative for SO_2 emissions. We are disapproving the State's NO_X BART determinations, as the CAA requires, because the State neglected to properly consider the costs of compliance and the visibility benefits associated with several of the available control options.

We also disagree that our proposal is inconsistent with the *American Corn Growers* and *Utility Air Regulatory Group* decisions. These cases dealt with EPA's authority to issue broad regulations that prescribed how states must conduct their BART determinations. They did not address EPA's authority to review regional haze SIPs for compliance with the mandates of the CAA or EPA's now finalized implementing regulations. The Tenth Circuit, in concluding that EPA had authority to disapprove a BART determination that did not follow the BART Guidelines, stated that the *American Corn Growers* opinion ''does not alter this conclusion.'' *Oklahoma* v. *EPA,* 723 F.3d 1201, 1208 (10th Cir. 2013).

Because the CAA sets certain mandatory statutory deadlines and provides for citizen suits when the Administrator fails to perform a mandatory duty, we are required by the terms of a consent decree to ensure that Wyoming's CAA requirements for regional haze are finalized by January 10, 2014. Because we have found that the State's regional haze SIP did not satisfy CAA and RHR requirements in full and because we have previously found that Wyoming failed to timely submit its regional haze SIP, we have not only the authority, but a statutory duty to promulgate a FIP that meets those requirements. We have reviewed this decision in light of other decisions made by us, as well as decisions made in other states SIPs. Our action today in large part approves the regional haze SIP submitted by Wyoming. Our disapproval of Wyoming's NO_X BART and reasonable progress determinations and imposition of a FIP is not intended to encroach on State authority. Rather, our action today is required by the CAA to ensure that the State has a complete plan in place to address the CAA's visibility requirements.

Comment: The fact that Congress gave states primacy in making BART determinations is noteworthy and related to the fact that the regional haze program is focused on an aesthetic benefit, not a public health standard. Under other sections of the CAA, primarily those dealing with health-based standards, Congress directed EPA to establish standards that do not take costs into consideration. States then develop plans to meet those health-based standards. Under the New Source Performance Standards program (section 111 of the CAA) and National Emission Standards for Hazardous Air Pollutants program (section 112), EPA routinely establishes specific emission limits for large industrial sources. The regional haze program, which deals with an aesthetic standard, was clearly laid out by Congress to be different in its approach, to avoid establishing emission limits, to give states authority to decide appropriate controls, and allow states to weigh the costs against the benefits.

Response: We do not agree with this commenter's characterization of the regional haze program or the CAA's visibility requirements. While it is true that the goal of CAA sections 169A and 169B is to improve visibility in national parks and wilderness areas rather than to prevent adverse human health effects, Congress structured the program so that states' decisions had to be made in the form of SIPs, which EPA has the authority to review for compliance with all CAA requirements. Furthermore, Congress did not create an approach that would allow states to avoid establishing emission limits. On the contrary, Congress specifically directed EPA's regulations to require states to devise ''emission limits . . . necessary to make reasonable progress,'' CAA section 169A(b)(2), including the requirement to establish BART, which the RHR defines as ''an emission limitation.'' 40 CFR 51.301.

Comment: EPA's actions leave nothing under the CAA's framework by which Wyoming could make an approvable BART determination. EPA has overreached and exceeded its statutory authority by proposing a FIP that replaces Wyoming's considered judgment with EPA's priorities and policy choices.

Response: We disagree with this comment. EPA is not substituting its judgment for that of the State of Wyoming or issuing a FIP merely to advance priorities and policy choices. Rather, we have determined that Wyoming did not properly follow the BART Guidelines or the CCM in conducting its BART analyses and, therefore, did not correctly consider the costs of compliance or the visibility benefits associated with available control technologies as the CAA requires. Consequently, we are finalizing a FIP in today's action to remedy the gaps left by these inadequacies. We note, however, that the CAA's framework provides Wyoming with the opportunity to submit a SIP revision at any time that could replace all or a portion of EPA's FIP, and we encourage Wyoming to do so.

Comment: EPA clearly gave the states more discretion through rulemaking when it split the universe of BART sources impacted by the BART Guidelines into power plants greater than 750 megawatts (MW) and all others. States were merely encouraged to follow the BART Guidelines for the smaller BART sources. EPA says in the preamble ''that states should view the guidelines as helpful guidance for these other categories.'' In saying this, EPA is affording even more discretion to the states in making BART determinations for the smaller BART sources. EPA has proposed disapproval of Wyoming's BART determination and proposed a FIP for one of these smaller sources, the Wyodak Unit 1 335 MW power plant. The State believes that the EPA is again overreaching in its action by proposing a FIP for Wyodak Unit 1, where Wyoming was not even required to follow the BART Guidelines in arriving at its BART determination.

Response: We agree that the BART Guidelines are only mandatory for

''fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts.'' 40 CFR 51.308(e)(1)(ii)(B). However, the fact that a state may deviate from the procedures in the BART Guidelines when selecting BART for smaller EGUs does not mean that a state has unfettered discretion to act unreasonably or inconsistently with the CAA or the RHR. Ultimately, a state must still adopt the ''*best available* retrofit technology,'' CAA section 169A(b)(2)B); 40 CFR 51.308(e)(1)(ii)(A), while reasonably considering the five statutory factors.

The RHR further defines BART to mean ''an emission limitation based on the degree of reduction achievable through the application of the *best system* of continuous emission reduction for each pollutant which is emitted by an existing stationary facility.'' 40 CFR 51.301 (emphasis added). We do not interpret this requirement to allow a state to dismiss the best system of continuous emission reduction under the mantle of unlimited state discretion. As we discuss elsewhere in this document, Wyoming erroneously evaluated costs and visibility benefits when analyzing the various control options available for Wyodak, and thereby did not reasonably consider the statutory factors and select the best system of control.

Comment: EPA's RHR gave states the flexibility to choose alternatives to the BART process, such as participation in a trading program. EPA spells out in the preamble that this ''substantial flexibility'' provides the ''states the ability to choose the least costly and least burdensome alternative.'' EPA and 28 states on the east coast took advantage of this flexibility when it declared that the cap and trade program for ozone nonattainment would, for the most part, satisfy the requirements of BART. The important point here is that EPA wanted and pushed for flexible, cost-savings approaches to address regional haze. EPA is still pushing for approval of the Cross States Air Pollution Rule (CSAPR) as a solution to regional haze problems on the east coast.

There appears to be a consistency issue within the EPA over the application of flexibility. Wyoming does not think EPA meant for an approach to promote costs savings and less burdensome solutions to be restricted to one area of the country or certain types of solutions. However, EPA's proposal to partially disapprove Wyoming's regional haze SIP and impose more costly and burdensome FIP requirements for seven BART units in the State of Wyoming appear to be inconsistent with EPA's purported ''substantial flexibility.'' EPA's failure to recognize Wyoming's discretion in these areas is arbitrary and capricious.

Response: Wyoming had the opportunity to submit better-than-BART alternatives in lieu of source-specific NO_X BART determinations. Wyoming did not do so. Because Wyoming did not take advantage of the flexibility afforded by better-than-BART alternatives, we must review Wyoming's BART determinations for compliance with the applicable requirements of the CAA, RHR, and BART Guidelines. Our proposal clearly laid out the bases for our proposed disapproval of the State's NO_X BART determinations, and we have relied on the standards contained in our regulations and the authority that Congress granted us to review and determine whether Wyoming's regional haze SIP complied with the minimum statutory and regulatory requirements. To the extent a cost analysis relies on values that are inaccurate, a state has not considered cost in a reasoned or reasonable fashion. To the extent a state has considered visibility improvement from potential emissions controls in a way that substantially understates the improvement or does so in a way that is not consistent with the CAA, the state has not considered visibility improvement in a reasoned or reasonable fashion. In these circumstances—as discussed in more detail in the proposed notice and this final notice—EPA is required to disapprove the relevant aspects of the SIP. In determining SIP adequacy, we must exercise our judgment and expertise regarding complex technical issues, and it is entirely appropriate that we do so. Courts have recognized this necessity and deferred to our exercise of discretion when reviewing SIPs. *See, e.g., Connecticut Fund for the Env't., Inc.* v. *EPA,* 696 F.2d 169 (2nd Cir. 1982); *Michigan Dep't. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000); *Mont. Sulphur & Chem. Co.* v. *EPA,* 2012 U.S. App. LEXIS 1056 (9th Cir. Jan. 19, 2012).

Comment: One commenter asserted that the U.S. Court of Appeals for the D.C. Circuit's decision to vacate CSAPR is relevant to the Wyoming FIP. *EME Homer City Generation, L.P.* v. *EPA.,* 696 F.3d 7 (D.C. Cir. 2012), *cert. granted* 570 U.S. (June 24, 2013) (No. 12–1182) (*CSPAR Decision*), and stated that EPA's proposed Wyoming FIP exceeds EPA's statutory authority. The commenter also states that in vacating CSAPR, the D.C. Circuit held that EPA's ''FIP-first'' approach exceeds EPA's authority because EPA issued a FIP at the same time it determined the emission reduction parameters that the states were supposed to implement. The commenter stated that EPA's theory was that EPA can define the end goals and simultaneously issue federal plans to implement them, upending that process and placing the Federal Government firmly in the driver's seat at both steps.

Other commenters stated that the D.C. Circuit's rejection of the CSAPR rule is irrelevant to EPA's regional haze rulemaking for Wyoming. They asserted that the regional haze program differs from the CAA's good-neighbor provision in fundamental ways that make the court's rejection of CSAPR irrelevant to EPA's action on Wyoming's regional haze plan. The commenters stated that the CAA's visibility provisions establish a technology-based standard for eligible major sources, including PacifiCorp's coal-fired power plants in Wyoming. *See* 42 U.S.C. 7491(b)(2)(A). To help achieve ''reasonable progress'' toward the national visibility goal, eligible sources must install BART for haze-causing pollutants. *Id.* BART is defined as: ''an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility.'' 40 CFR 51.301. The emission limitation must be established on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. Unlike the D.C. Circuit's interpretation of the good-neighbor provision, the BART definition establishes a floor for emissions reductions, but no ceiling. States must ensure that eligible sources install the best pollution control devices.

These commenters also argued that when a SIP fails to establish a program that meets CAA requirements, then EPA has an obligation to promulgate a FIP. Here, they argued, EPA carried out its statutory duty in proposing a partial FIP for Wyoming. EPA's role is not mere ''rubber-stamping'' of poor SIPs. EPA ''has a duty to evaluate the adequacy of the existing SIP as a whole when approving SIP revisions.'' *Ass'n of Irritated Residents* v. *EPA,* 632 F.3d 584, 591 (9th Cir. 2011). A FIP ''fill[s] all or a portion of a gap *or otherwise correct[s] all or a portion of an inadequacy in a State implementation plan.''* 42 U.S.C.

7602(y) (emphasis added). In proposing to reject many of Wyoming's inadequate BART determinations, and proposing a partial FIP, EPA is merely acting to fulfill its own regulatory obligations under the Act.

Response: With respect to the comment that we lacked authority to promulgate a FIP due to the D.C. Circuit's decision in *EME Homer City,* we disagree. In *EME Homer City,* the D.C. Circuit vacated CSAPR, which was promulgated by EPA to address interstate transport of SO_2 and NO_X under CAA section 110(a)(2)(D). The court found that CSAPR exceeded EPA's authority under section 110 because the rule had the potential to require upwind States to reduce emissions by more than their own significant contributions to downwind nonattainment and because EPA had not given states an opportunity to submit SIPs after EPA had quantified their obligations for emissions reductions.

In the regional haze context, by contrast, EPA defined states' obligations under the RHR and the BART Guidelines well in advance of its findings of failure to submit and subsequent SIP disapprovals. EPA promulgated the original RHR on July 1, 1999 (64 FR 35714). Following the D.C. Circuit's decision in *American Corn Growers,* EPA revised the RHR and issued the final BART Guidelines on July 6, 2005. (70 FR 39104). The revised RHR and the BART Guidelines were upheld by the D.C. Circuit in *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333 (D.C. Cir. 2006).[18] As explained in our proposal and elsewhere in this document, the BART Guidelines provide detailed instructions to states on how to determine which sources are subject to BART and how to analyze the five statutory factors in order to set emissions limits representing BART for each subject-to-BART source.[19] In 2006, responding to specific questions from various states and Regional Planning Organizations (RPOs), EPA issued further guidance to help states implement the RHR and BART Guidelines.[20]

As noted in prior responses, EPA issued a finding of failure to submit for regional haze SIPs on January 15, 2009 (74 FR 2392), triggering a FIP clock under CAA section 110(c). By this time, states already had more than three years since issuance of the final BART Guidelines to develop their regional haze SIPs. By the time the FIP clock actually ran out in January 2011, EPA had received regional haze SIPs from nearly every state. EPA has since proposed and approved, in part or in whole, the vast majority of these SIPs.[21] [22] This stands in contrast to the situation in *EME Homer City,* where the court noted that, ''every Transport Rule State that submitted a good neighbor SIP for the 2006 24-hour $PM_{2.5}$ NAAQS was disapproved.'' Thus, it is clear that states had ample opportunity to submit approvable regional haze SIPs before EPA was obligated to promulgate regional haze FIPs under CAA section 110(c).

One commenter also pointed to the D.C. Circuit's general statements concerning state and federal roles under the CAA and argues that EPA has exceeded its statutorily mandated role in proposing to disapprove portions of Wyoming's regional haze SIP and promulgate a FIP. While we agree that the general principles concerning state and federal roles under Title I of the CAA apply to our action here, we do not agree that our action is inconsistent with those principles. In this action, we are fulfilling our statutory duty to review Wyoming's regional haze SIP, including its BART determinations, for compliance with the applicable requirements of the CAA and the RHR, and to disapprove any portions of the plan that do not meet those requirements. Based on our review of the SIP, we proposed to determine that certain elements of Wyoming's regional haze SIP did meet the requirements of the CAA and the RHR, and we proposed to approve those elements. However, for the reasons explained in detail in our proposed notices and elsewhere in this document, we have concluded that five of Wyoming's BART determinations[23] and four elements of the regional haze SIP[24] did not comply with the requirements of the CAA and the RHR. Based on these findings, we are required to disapprove these portions of Wyoming's regional haze SIP. As discussed in detail in several below responses, the CAA provides EPA with the authority to review and reject an inadequate regional haze SIP. *Oklahoma* v. *EPA,* 723 F.3d 1201, 1207 (10th Cir. 2013).

Comment: One commenter stated that the limits on EPA's authority to reject a SIP were affirmed by the Fifth Circuit in *Texas* v. *EPA,* 690 F.3d 670 (5th Cir. 2012), vacating EPA's rejection of a Texas SIP revision implementing its minor new source review program (i.e., the Texas Flexible Permit Program). In the *Texas* decision, the court reaffirmed the principle that if a SIP or SIP revision meets the statutory criteria of the CAA, then EPA must approve it. The Wyoming regional haze SIP meets the statutory criteria of the CAA. Therefore, EPA's disapproval of the Wyoming regional haze SIP exceeds EPA's statutory authority.

Response: In *Texas,* the Fifth Circuit found that EPA had failed to tie its disapproval to any specific requirement in the CAA or EPA's implementing regulations.[25] In this action, our disapproval is based explicitly and squarely on the SIP's failure to comply with the CAA section 169A(b)(2)(A), as implemented through the RHR and the

[18] In response to another D.C. Circuit decision, *Center for Energy and Economic Development* v. *EPA,* 398 F.3d 653 (D.C. Cir. 2005), EPA revised the RHR's provisions governing alternatives to source-specific BART determinations on October 13, 2006. These revisions did not alter the requirements for source-specific BART determinations that apply to Wyoming's BART determinations at issue here.

[19] 40 CFR Part 51, Appendix Y. While the Guidelines are only mandatory for fossil fuel-fired electric generating plants with a total generating capacity in excess of 750 megawatts, States are encouraged to follow the BART Guidelines in making BART determinations for other types of sources. Id. section I.H. The Guidelines also set specific presumptive limits for SO_2 and NO_X for these large power plants, but allow states to apply more or less stringent limits based upon source-specific five-factor analyses. 70 FR 39131–39132.

[20] Memo from Joseph W. Paise Regarding Regional Haze Regulations and Guidelines for BART (July 19, 2006); Additional Regional Haze Questions (Guidance) (Sept. 27, 2006). In addition, EPA issued final ''Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program'' on June 1, 2007, but this Guidance is not directly relevant for individual BART determinations.

[21] See, e.g., 76 FR 36450 (Nevada); 77 FR 24794 (New York); 76 FR 13944 (California); 77 FR 11798 (Rhode Island); 76 FR 27973 (Delaware); 77 FR 12770 (Nebraska); 77 FR 18052 (Colorado); 76 FR 16168 (Oklahoma); 77 FR 11914 (Vermont); 77 FR 11928 (Wisconsin); 76 FR 52604 (Kansas); 76 FR 64186 (Arkansas); 77 FR 11839 (Maryland); 76 FR 58570 (North Dakota); 77 FR 3966 (Illinois); 76 FR 76646 (South Dakota). EPA proposed limited approval and limited disapproval of the Regional Haze SIPs of states covered by the Clean Air Interstate Rule (CAIR), due to the remand of CAIR by the D.C. Circuit. See, e.g. 77 FR 3691 (Jan. 25, 2012) (proposing limited approval and limited disapproval of Virginia's Regional Haze SIP).

[22] See, e.g., 76 FR 34608 (California); 76 FR 42557 (Delaware); 76 FR 80754 (Kansas); 77 FR 19 (New Jersey); 77 FR 5191 (District of Columbia); 77 FR 14604 (Arkansas); 77 FR 17334 (Nevada); 77 FR 24845 (South Dakota); 77 FR 40150 (Nebraska); 77 FR 51915 (New York).

[23] As presented elsewhere in this final notice and in the docket, the five NO_X BART determinations we are disapproving are for the following: PacifiCorp Dave Johnston Unit 3, PacifiCorp Wyodak Unit 1, and Basin Electric Laramie River Units 1, 2, and 3.

[24] As presented elsewhere in this final notice and in the docket, the four elements of the State SIP we are disapproving include: (1) Wyoming's RPGs; (2) The State's monitoring, recordkeeping, and reporting requirements in Chapter 6.4 of the SIP; (3) portions of the State's long term strategy (LTS) that rely on or reflect other aspects of the regional haze SIP that we are disapproving; and (4) the provisions necessary to meet the requirements for the coordination of the review of the reasonably attributable visibility impairment (RAVI) and the regional haze LTS.

[25] 690 F.3d at 679, 682, 686.

BART Guidelines. Just because a court found EPA's disapproval invalid in one case does not mean that finding applies in all cases. This situation involves a very different program under the CAA and a very different state submittal and review. The *Texas* case does not involve BART or the CAA's regional haze provisions at all. Rather, it involved EPA's disapproval of SIP revisions involving Texas's minor new source review program. There are a limited number of specific requirements in EPA rules for minor source review programs. In contrast, regional haze SIPs and BART determinations are subject to the detailed requirements set forth in CAA section 169A, the RHR, and the BART Guidelines.

Comment: One commenter stated that the CSAPR decision criticized the CSAPR's FIP-first approach because it forces states to ''take a stab in the dark'' on their compliance obligations only to be judged later whether they hit the mark. As the D.C. Circuit explained in the CSAPR decision, a ''SIP logically cannot be deemed to lack a required submission or deemed to be deficient for failure to meet . . . [an] obligation before EPA quantifies the . . . obligation.'' *EME Homer City Generation, L.P.* v. *EPA.,* 696 F.3d 7, 49 (D.C. Cir. 2012), *cert. granted* 570 U.S. (June 24, 2013) (No. 12–1182) (hereinafter ''*CSPAR Decision''*).

Other commenters reject this assertion, explaining that Wyoming was not forced to take a ''stab in the dark'' in developing its regional haze SIP. In *EME Homer City,* the D.C. Circuit accepted the state petitioners' argument that they had no obligation to submit SIPs until after EPA defined each state's contribution to interstate pollution and the necessary emissions reductions to address that contribution. *EME Homer City,* 2012 WL 3570721, at *18 (''[L]ogically, a SIP cannot be deemed to lack a required submission . . . until after EPA has defined the State's good neighbor obligation.''; ''There is no way for an upwind State to know its obligation . . . until EPA defines it.'').

Response: We do not agree that Wyoming was forced to take a ''stab in the dark'' in developing its regional haze SIP. The regional haze program and the interstate transport obligations under the CAA are quite different. The states' regional haze obligations have been clearly defined. EPA issued BART Guidelines establishing detailed parameters for state BART determinations in 2005. Commenter's charge that EPA may never issue a FIP in such circumstances is incorrect. We explain in detail above how the CAA's visibility provisions and EPA's implementing regulations differ from the good-neighbor provision at issue in *EME Homer City.* Wyoming was well aware of these requirements as it developed its regional haze SIP, through EPA comment letters and meetings between EPA and the State. Finally, unlike the petitioners in *EME Homer City,* none of the commenters here dispute that Wyoming's regional haze SIP and BART determinations were ''required submission[s].''

Comment: One commenter stated that the CSAPR decision also made clear that any FIP issued by EPA must be related to the ''end goal of the statute.'' The D.C. Circuit stated in the CSAPR decision: ''[T]he end goal of the statute is attainment in the downwind state. EPA's authority to force reductions on upwind states ends at the point where the affected downwind State achieves attainment.'' *CSAPR Decision* at p. 25.

The ''end goal'' of the regional haze statutory requirements is to gradually achieve ''natural visibility'' conditions by the year 2064 under an emission reduction approach known as reasonable progress as determined by the states. EPA's rush in the proposed Wyoming FIP to front-load as many emission reductions as possible in the first five years of this decades-long program is a clear indication that EPA has lost sight of the ''end goal'' of the regional haze program. Likewise, EPA's failure to account for, and properly address, other causes of visibility impairment in its FIP, such as natural causes (forest fires), out of state sources, oil and gas sources, etc., demonstrates that EPA has lost focus on the ''end goal'' of the regional haze program. EPA's proposed Wyoming FIP violates this ''end goal'' principle espoused by the CSAPR decision.

Response: EPA is required to evaluate BART factors included in state SIPs (e.g., ultimately rejecting methodological flaws and data flaws in estimating costs of compliance and visibility, as we have done in this final action), where the flaws in the analysis prevented the State of Wyoming from conducting meaningful consideration of the BART factors, as required by the BART Guidelines, and moored to the CAA's BART and SIP provisions. *North Dakota* v. *EPA,* 730 F.3d 750, 761 (8th Cir. 2013).

Furthermore, we do not agree that one provision of the CAA should be read and applied in isolation. The commenter's position would ignore the rest of the CAA's statutory requirements and violate the ''fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'' A court must therefore interpret the statute ''as a symmetrical and coherent regulatory scheme,'' and ''fit, if possible, all parts into an harmonious whole.'' *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Depart of Treasury,* 489 U.S. 803, 809 (1989); *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 569 (1995); and *FTC* v. *Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959)). The commenter's claim that one provision in the CAA overrides all other statutory provisions is unfounded and not supported by the CAA. In particular, the statutory requirements for BART are separate and distinct from the statutory requirements for reasonable progress.

Moreover, as explained elsewhere in this document, EPA's action fully accounts for other causes of visibility impairment. With respect to wildfires, we explain in detail elsewhere in this document the role that fires play in determining natural background conditions. With respect to oil and gas sources, we are approving the State's determination to not impose controls on this source category during this planning period, in part because the State already applies minor source BACT to many of them through the State's SIP-approved minor NSR program, and in part because controls on these sources are not so cost-effective that we are prepared to say the State was unreasonable. With respect to accounting for out-of-state sources, we cited sources outside the Western Regional Air Partnership (WRAP) domain as one factor that made it reasonable for our RPGs to fall short of the uniform rate of progress (URP) and unreasonable to achieve the URP. Finally, we note that we are approving some of Wyoming's BART determinations and all of Wyoming's reasonable progress determinations. Additionally, BART is required in the first planning period, which ends in 2018, and is required to be installed as expeditiously as practicable, but in no event later than five years after the effective date of this final notice. In light of the fact that many of Wyoming's Class I areas are not even expected to meet the URP this planning period, the notion that EPA has required ''front-loading'' of controls is utterly without merit.

Comment: Some commenters stated that the CSAPR decision considered, and then rejected, a ''reasonableness'' standard put forth by EPA as the only limit on its authority to impose emission reductions under the CSAPR. *CSAPR Decision* at p. 37, ftnt. 23. EPA likewise purports to impose a

reasonableness standard as adequate justification for rejecting the Wyoming regional haze SIP and imposing a FIP. The CSAPR decision makes clear that such a reasonableness standard, not included in the CAA itself, does not have a place in justifying EPA's actions in issuing a FIP. For this added reason, the CSAPR decision makes clear the FIP exceeds EPA's statutory authority.

Response: EPA disagrees with this comment. First, the commenters misunderstand the cited footnote in the CSAPR decision. In the D.C. Circuit's view, EPA ignored statutory limits on its authority and instead claimed that reasonableness was the only bound on EPA's authority. Here, EPA makes no such claim. EPA, of course, has the authority and the duty to review Wyoming's SIP for compliance with the CAA and the RHR.

In reviewing the Wyoming regional haze SIP, EPA has determined that a ''reasonableness'' standard is in fact harmonious with the CAA and the RHR, and the courts have agreed. *Oklahoma* v. *EPA,* 723 F.3d 1201, 1207 (10th Cir. 2013) (''The EPA therefore had a reasonable basis for rejecting the 2008 Cost Estimates [that were based on the overnight costing method] as not complying with the guidelines.''); *see also North Dakota* v. *EPA,* 730 F.3d 750, 761 (8th Cir. 2013) (explaining EPA is not required to ''approve a BART determination that is based upon an analysis that is neither reasoned nor moored to the CAA's provisions'').

The CAA requires states to submit SIPs that contain such measures as may be necessary to make reasonable progress toward achieving natural visibility conditions, including BART. The CAA accordingly requires the states to submit a regional haze SIP that includes BART as one necessary measure for achieving natural visibility conditions. *See Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 500 (2004) (in a related context, holding that EPA validly issued stop work orders because the state's BACT determination ''simply did not qualify as *reasonable* in light of the statutory guides.'' (emphasis added)) (hereinafter ''*ADEC*''). Thus we are not establishing a new reasonableness standard, as the commenter asserts.

Comment: In the CSPAR decision, the D.C. Circuit found it ''inconceivable'' that Congress would bury in the CAA ''an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems 'cost effective'.'' *CSAPR Decision* at p. 40. In so finding, the court refused to transform a ''narrow'' provision into a ''broad and unusual'' authority that would overtake other core provisions of the Act.'' *Id.* Similarly, it is inconceivable in the regional haze context that Congress would bury an open-ended authorization allowing EPA to ignore its own BART Guidelines, overrun carefully crafted state regional haze SIPs and BART determinations, and require the installation of expensive emission controls which result in minimal regional haze improvements. This principle espoused in the CSAPR decision is particularly applicable in the regional haze context where, just like in the CSAPR, EPA's BART determinations in the Wyoming FIP are ''not a clear numerical target—far from it—until EPA defines the target.'' *CSAPR Decision* at p. 48. And in spite of EPA initially helping to define ''the target'' by issuing its BART Guidelines (which EPA subsequently ignored), EPA did not begin to redefine the target until it began to issue various determinations around the country in reaction to various state regional haze SIPs. Even then, EPA's ''target'' is not clear and certainly is impossible to determine, on a state or source-by-source basis, until EPA sets the target in a state-specific FIP.

Like the upwind states in the CSAPR decision, it was ''impossible'' for Wyoming to determine its regional haze obligation ''until EPA defined it.'' *Id.* This process effectively allows EPA to impose any standard it wants with little ability for the states (or sources) to achieve the redefined target through a state-led process because of the tight deadlines imposed by EPA as a result of negotiated consent decree deadlines.

Response: We do not agree that we have ignored the CAA and BART Guidelines. As explained in our proposed notice and elsewhere in this document, our decisions are firmly grounded on the CAA provisions and BART Guidelines, and Wyoming was well aware of these requirements as it developed its SIP. In addition, the comparison of BART determinations and the CSAPR decision is not appropriate. In contrast to CSPAR, the CAA and RHR do not set specific numerical targets for BART determinations. Instead, they require states to reasonably consider the five statutory factors, which, as we have detailed in our proposal and in our response to comments, Wyoming did not do. Furthermore, EPA provided extensive comments to the State on the proposed regional haze SIP and met with the State on numerous occasions, so the State was aware of EPA's concerns regarding approvability before the SIP was submitted to EPA. As explained below in greater detail, the Consent Decree that covers this action has not hindered Wyoming's ability to develop and submit an approvable SIP. Wyoming can submit new SIP revisions, and request that EPA review and approve them, to replace the FIP elements at any time.

To the extent that the comment argues that the RHR itself is invalid for similar reasons to those for which the D.C. Circuit vacated CSAPR, the time to make those arguments has passed.

Finally, in establishing the BART requirements, Congress was addressing a category of large sources that pre-dated the modern NSR affected sources, which were determined to significantly contribute to regional haze and set an expectation that included consideration of cost, feasibility, and effect on regional haze (as well as the other five factors) for those sources, many of which did not have modern pollution controls because of their age and because they hadn't been addressed through ozone SIPs the way so many eastern sources had. This is one of the reasons why the western regional haze SIPs are seeing emission controls.

Comment: One of the commenters stated that one of the key conclusions of the CSAPR decision was that EPA exceeded the scope of its authority by requiring emission reductions beyond the statutory or regulatory requirements. In the CSAPR decision, the court looked at the fact that once EPA had determined that an upwind emission source contributed ''significantly'' to nonattainment or maintenance of the standard in a downwind state; it was ''in'' for purposes of requiring emission reductions. The emission reduction requirements were then based on cost-effectiveness thresholds that were applied uniformly throughout the CSAPR region. In other words, all emissions that could be reduced, for example, for a cost between $1 and $500 per ton were effectively required. The court held that this approach resulted in a situation where some sources had to bear a disproportionate amount of costs, based on their relative contribution to the nonattainment or maintenance problem.

Similarly in the regional haze context, EPA established an ''in or out'' criteria of a 0.5 deciview impact. Sources with modeling results that suggested the impact was greater than 0.5 were ''in'' and required further analysis. If, under EPA's FIP approach, the facilities could cost-effectively (as determined by EPA, not the states) control emissions, they were required to do so. Oftentimes, EPA has required the controls notwithstanding the negligible contribution the emission reductions

will have towards meeting the requirement of the RHR. EPA's conclusions requiring individual sources to reduce emissions under its subjective cost-effectiveness criteria have no relationship to visibility impacts or improvements, and EPA failing to conduct that modeling, but supporting a determination of reasonableness of controls ''based on the high cost effectiveness at each of the units.'' 77 FR at 33034, 33038 and 33055.

EPA's conclusions regarding emission reductions that are based on the cost-effectiveness of controls without an appropriate linkage to visibility improvement and meeting the goals and objectives of the RHR exceed EPA's statutory authority as suggested by the CSAPR decision.

Response: We agree with some of this comment and disagree with other portions. As an initial matter, as we explained in our proposed notice, we note that:

> Wyoming used a contribution threshold of 0.5 deciviews for determining which sources are subject-to-BART. By using a contribution threshold of 0.5 deciviews, Wyoming exempted seven of the fourteen BART-eligible sources in the State from further review under the BART requirements. Based on the modeling results, the State determined that P4 Production, FMC Granger, and OCI Wyoming had an impact of .07 deciview, 0.39 deciview, and 0.07 deciview, respectively, at Bridger Wilderness. Black Hills Neil Simpson 1, Sinclair Casper Refinery, and Sinclair—Sinclair Refinery have an impact of 0.27 deciview, 0.06 deciview, and 0.12 deciview, respectively, at Wind Cave. Dyno-Nobel had an impact of 0.22 deciview at Rocky Mountain National Park. These sources' modeled visibility impacts fell below the State's threshold of 0.5 deciview and were determined not to be subject-to-BART. 78 FR 34747

Since the State's approach is consistent with the BART Guidelines [26] and given the relatively limited impact on visibility from these seven sources, as explained earlier in this document and in our proposals, we are finalizing our proposal to approve Wyoming's threshold of 0.5 deciviews as reasonable for determining whether its BART-eligible sources are subject-to-BART. 78 FR 34734, 34747

We do not agree that our decision exceeds our statutory authority and the goals and objectives of the RHR. CAA section 110(a)(2)(J) requires each plan submitted by a state to ''meet the applicable requirements'' of Part C of Title I of the CAA, including those for ''visibility protection.'' In the case of a regional haze SIP submittal, the ''applicable requirements'' include the requirement that each source found subject-to-BART, ''procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology . . .'' [27] Section 169A(g)(2) further provides that:

> In determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[28]

Similarly, the RHR provides that:

> The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[29]

Wyoming's BART determinations for NO_X at five BART units fall short of these requirements in several respects.

First, Wyoming did not analyze the ''best system of continuous emission control technology available and associated emission reductions achievable.'' This is explained in detail in our proposed rulemaking, the docket for this action, and elsewhere in this document. Therefore, Wyoming has not demonstrated that its BART determinations were ''based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable.''

For example, as we explained in our proposed notices and elsewhere in this final action, Wyoming did not appropriately consider the ''degree of improvement in visibility which may reasonably be anticipated'' from installation of BART because it did not provide visibility improvement modeling from which the benefits of individual NO_X controls could be ascertained. Thus Wyoming's BART determinations for NO_X do not meet the requirements of CAA section 169A(g)(2) or 40 CFR 51.308(e)(1)(ii)(A).

Additionally, as explained in our proposed notices and elsewhere in the modeling section of this final action, it was not possible to ascertain the visibility improvement from the NO_X control options as the State modeled emission reductions for multiple pollutants together. For this reason, in the modeling conducted by EPA, we held SO_2 and PM emission rates constant (reflecting the ''committed controls'' for those pollutants identified by Wyoming), and varied only the NO_X emission rate. This allowed us to isolate the degree of visibility improvement attributable to the NO_X control option.

In addition, 40 CFR 51.308(e)(1)(ii)(B) provides that the determination of BART for fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts must be made pursuant to the guidelines in appendix Y of part 51 (Guidelines for BART Determinations under the Regional Haze Rule).

All of the Wyoming BART sources, except Wyodak, each have a generating capacity greater than 750 megawatts. Therefore, the BART determinations for these BART sources *must* be made pursuant to the BART Guidelines. However, Wyoming's BART determinations for these sources did not fully comply with the BART Guidelines. In particular, as explained more fully elsewhere in this document, contrary to the Guidelines' admonition that ''cost estimates should be based on the CCM, where possible,'' the control cost calculations supplied by the utilities and relied upon by Wyoming included costs not allowed by the CCM, such as owner's costs and Allowance for Funds Utilized During Construction (AFUDC). Thus, Wyoming's consideration of the ''cost of compliance'' for these units was not consistent with the Guidelines. Furthermore, as explained elsewhere in this document, Wyoming's consideration of visibility benefits was inconsistent with the Guidelines because the State did not provide visibility modeling from which the visibility improvement from individual controls could be ascertained. Finally, for all pollutants at all units covered by today's action, Wyoming's regional haze SIP does not meet the requirements of 40 CFR 51.308(e)(1)(iv) and (v) because it lacks the following elements:

- A requirement that each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision.

[26] 40 CFR part 51, appendix Y, section III.A.1.

[27] CAA section 169A(b)(2)(A), 42 U.S.C. 7491(b)(2)(A).

[28] 42 U.S.C. 7491(g)(2).

[29] 40 CFR 51.308(e)(1)(ii)(A).

• A requirement that each source subject to BART maintain the control equipment required by this subpart and establish procedures to ensure such equipment is properly operated and maintained.

These two requirements are mandatory elements of the RHR and are necessary to ensure that BART is procured, installed, and operated as expeditiously as practicable and maintained thereafter, as required under CAA section 169A(b)(2)(A).

Moreover, the CAA and regional haze rule require that SIPs contain provisions that make emissions limits, including BART limits, practically enforceable. CAA section 110(a)(2)(A)–(B) require that emissions limits such as BART be ''practically enforceable'' and SIPs provide for establishment, methods and procedures necessary to monitor, compile, and analyze data. CAA section 302(k) requires emissions limits to be met on a continuous basis. Additionally, CAA section 169A(b)(2) requires that regional haze SIPs include ''such emission limits, schedules of compliance and other reasonable measures'' necessary to meet the goals of the regional haze program.'' As discussed in our proposed notices and elsewhere in this final notice, Wyoming's regional haze SIP lacks requirements for monitoring, recordkeeping, and reporting sufficient to ensure that the BART limits are enforceable and are met on a continuous basis.

Therefore, Wyoming's BART determinations for these five units covered by the FIP do not meet the BART requirements of the CAA, the RHR and the BART Guidelines. Additionally, Wyoming's SIP requirements do not ensure the BART limits are enforceable for all BART sources for which there is a SIP or FIP emissions limit, and therefore do not meet the requirements of the CAA and RHR. Accordingly, we are compelled to partially approve and partially disapprove Wyoming's regional haze SIP.

Comment: EPA cannot invoke its Section 110 SIP approval authority as grounds for rejecting state BART determinations with which it disagrees. The CAA does not require any specific degree of visibility improvement in the determination and only requires BART for the purpose of eliminating or reducing impairment to visibility. See CAA Section 169A, 42 U.S.C. 7491.

Consistent with the long-recognized principle that EPA may not ''condition approval of the plan of any State, on the State's adoption of a specific control measure,'' *Virginia,* 108 F.3d at 1408, EPA has no statutory authority to disapprove a SIP that contains a BART determination for an individual facility that complies with the statutory BART factors. Any other result would allow EPA to employ its generalized SIP approval authority to ''run roughshod over the procedural prerogatives that the Act has reserved to the States.'' *Bethlehem Steel Corp.,* 742 F.2d at 1036.

The fact that states must propose SIP revisions ''as may be necessary'' to achieve reasonable progress does not mean EPA has authority to countermand the textual commitment of specific BART decisions to the states. The D.C. Circuit interpreted similar language in Section 110(k)(5) to constrain EPA's authority over SIP approval and disapproval. See *Virginia,* 108 F.3d at 1409. The SIP call provisions of Section 110(k)(5) state that when a SIP is inadequate ''the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.'' But the *Virginia* court rejected the agency's expansive view of this phrase as authority to impose specific control measures for specific emission sources.

Response: States are required by the CAA to address the BART requirements in their SIP. Our disapproval of the NO_X BART determinations in the Wyoming regional haze SIP is authorized under the CAA because the State's NO_X BART determinations for the five units do not satisfy the statutory criteria. The State's analysis of the cost effectiveness of controls and visibility analyses were flawed due to reasons discussed elsewhere in the proposed and final notices. While states have authority to exercise different choices in determining BART, the determinations must be reasonably supported. Wyoming's errors in taking into consideration the costs of compliance were significant enough that we cannot conclude the State determined BART according to CAA standards. The cases cited by the commenters stress important limits on EPA authority in reviewing SIP submissions, but our disapproval of these NO_X BART determinations for the five units has an appropriate basis in our CAA authority. We did not require Wyoming to adopt specific control measures for specific emission sources. Instead, we disapproved some of Wyoming's BART determinations for reasons described in detail in our proposal and elsewhere in our response to comments. To promulgate our FIP, EPA then had both the authority and the duty to determine specific control measures for specific sources.

Finally, contrary to the commenter's assertion, the *Bethlehem Steel* case is inapplicable here. We are promulgating BART emission limitations and other FIP elements described elsewhere in this document under the authority of CAA section 110(c), not through our action on Wyoming's SIP. We have authority to promulgate our FIP under 110(c) on two separate grounds: first, based on our January 2009 finding of failure to submit the regional haze plan elements required by 40 CFR 51.309(g), the reasonable progress requirements for areas other than the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report; and second, based on our partial disapproval of the regional haze SIP.

Comment: We received comments that EPA does not have the authority under the CAA to issue a regional haze FIP in this instance. Commenters contend that EPA's role under Section 110 in reviewing states' regional haze SIPs is narrow and that the CAA confines EPA to the ministerial function of reviewing SIPs for consistency with the CAA's requirements. Commenters assert that Wyoming submitted a regional haze SIP that met the requirements of Section 51.309 and included all the required elements and that EPA admits that Wyoming has considered all five BART factors. Therefore, commenters go on to say that EPA's sole function was to review whether Wyoming followed the regional haze requirements, including Appendix Y, in preparing the Wyoming regional haze SIP, and Congress did not authorize EPA to ''second guess'' Wyoming's BART decision making, or to substitute its own judgment, simply because EPA would prefer different BART and reasonable progress NO_X controls. Commenters go on to point out that courts have consistently held that states are primarily responsible for SIP development; EPA's role is ministerial. Commenters cite that the Supreme Court has recognized the states' primary role in developing SIPs, holding ''so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.'' *Train* v. *NRDC,* 421 U.S. 60, 79 (1975). Commenters argue that EPA is going beyond its ministerial function of reviewing Wyoming's regional haze SIP for consistency with the CAA's requirements; it is attempting to design Wyoming's SIP by establishing new NO_X emission limits, contrary to its promulgated BART regulations. Commenters go on to say that EPA

should follow the structure of the CAA and give deference to the State's judgment in determining BART in Wyoming's regional haze SIP.

Response: States are required by the CAA to address the BART requirements in their SIP. Our disapproval of the NO_X BART determinations in the Wyoming regional haze SIP is authorized under the CAA because the State's NO_X BART determinations for the five units do not satisfy the statutory criteria. The State's analyses of the cost effectiveness of controls and visibility analyses were flawed due to reasons discussed in the introduction and BART sections of this document. While states have the authority to exercise different choices in determining BART, the determinations must be reasonably supported. Wyoming's errors in taking into consideration the costs of compliance and visibility analyses were significant enough that we cannot conclude the State determined BART according to CAA standards. The cases cited by the commenters stress important limits on EPA authority in reviewing SIP submissions, but our disapproval of these NO_X BART determinations for the five units has an appropriate basis in our CAA authority.

Comment: Under the CAA, both the federal government and the states have responsibilities for maintaining and improving air quality. The federal government has the authority to set specific emissions targets, but the states have the authority to develop and impose their own regulatory structure to meet those. As long as the State meets its specific criteria, which Wyoming can and will show that it has done, the fact that EPA does not share the State's opinion regarding the best course of action is immaterial.

This reading of the CAA is the opinion of the Congress that passed the regional haze program in 1977. Committee and floor debate in Congress at the time makes clear that Congress fully intended for the states to possess a high degree of primacy in regional haze decisions. The primary sponsor of the CAA and 1977 amendments in the Senate was the late Senator Edmund Muskie, a Democrat from Maine. In his opening address to the Senate on the Conference Report to the 1977 amendments, Senator Muskie said, ''under this legislation, the administrator of the EPA will be more reliant on local and state capabilities to create the institutional and infrastructural changes necessary to achieve clean air. And perhaps this is as it should be. We have learned that there is little political support for inartfully conceived national measures. We have learned that where change can be made, it must be made with the full understanding and support of the people who are affected by that change.''

While the courts in some instances may not give adequate weight to the intent of Congress in drafting legislation, Congress's intent in passing the nation's law is something that Congress itself takes very seriously. Some courts have honored Congressional intent and upheld the CAA as a cooperative statute. In *Appalachia Power Company* v. *EPA* [sic], the courts determined that the CAA includes a cooperative standard they call a federalism bar. In *Train* and *Luminant Generation Co., LLC* v. *EPA,* 675 F.3d 917 (5th Cir. 2012) (hereinafter ''*Luminant*''), the courts held that the EPA had no authority to overturn the decisions of the states so long as the basic requirements of Section 110 are met.

EPA does not have the authority under the CAA to issue a regional haze FIP in this instance. EPA contends its review of the Wyoming SIP is ''pursuant to section 110 of the CAA.'' 78 FR 34738. Section 110(a)(2) provides the general requirements that a SIP must contain. Importantly, EPA's role under Section 110 in reviewing states' regional haze SIPs is narrow: ''With regard to implementation, the (CAA) confines the EPA to the ministerial function of reviewing SIPs for consistency with the (CAA)'s requirements.'' *Luminant Generation Co., LLC* v. *EPA,* 675 F.3d 917, 921 (5th Cir. 2012) (citing section 110(k)(3)). As the court in *Luminant* explained, if the state's submissions ''satisfy those basic requirements (found in section 110), the EPA must approve them,'' and ''(t)hat is the full extent of the EPA's authority in the SIP-approval process because that is all the authority that the CAA confers.'' *Id.* at 932. Here, Wyoming submitted a regional haze SIP that met the requirements of Section 309 and included all the required elements. The Wyoming SIP submittals are well developed and comprehensive. EPA admits that Wyoming considered all five BART factors. 78 FR 34748. Therefore, EPA's role was to review whether Wyoming followed the regional haze requirements, including Appendix Y, and provided factual support for the Wyoming regional haze SIP. Congress did not authorize EPA to ''second guess'' Wyoming's BART decision making, or to substitute its own judgment, simply because EPA would prefer different BART and reasonable progress NO_X controls.

More recently, the D.C. Court vacated the CSAPR. The court's 2012 opinion in the CSAPR case is illustrative for our purposes because the EPA used very similar arguments to justify their authority in CSAPR as they're using today for regional haze. In vacating the CSAPR rule, the D.C. Circuit Court writes ''under the CAA, the federal government sets air quality standards, but states retain the primary responsibility for choosing how to attain those standards within their borders. The Act thus leaves it to the individual states to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders.'' The court goes on to write that ''. . .the statutory federalism bar prohibits the EPA from using the SIP process to force states to adopt specific control measures.''

Response: We responded to similar comments above.[30] With respect to EPA's supposed admission that Wyoming considered the five BART factors, the precise language in the proposal notice is: ''We find that Wyoming considered all five steps above in its BART determinations, but we propose to find that its consideration of the costs of compliance and visibility improvement for the EGUs was inadequate and did not properly follow the requirements in the BART Guidelines and statutory requirements, as explained below.'' 78 FR 34748. With respect to the legislative history quoted, the comment does not provide any connection between the general remarks of Senator Muskie regarding the 1977 Amendments and EPA's interpretation of the visibility provisions in the Act.

Comment: We received numerous general comments that EPA has overstepped its authority and that states have the responsibility of determining what controls are necessary for regional haze.

Response: As explained earlier, the states have the responsibility to draft the regional haze SIP and EPA has the responsibility of ensuring state plans, including regional haze SIPs, conform to the CAA. As the drafter of the regional haze SIP, the State generally has the authority to decide how each of the BART factors are taken into account and weighed. EPA is not disapproving Wyoming's BART determinations because we disagree with how Wyoming weighed the relevant factors, such as the cost of controls or the degree of visibility improvement resulting from

[30] As the commenter mentions, we agree that we did approve Wyoming's regional haze SIP submitted under Section 309 of the RHR (40 CFR 51.309) (77 FR 73926 (Dec. 12, 2012)), as in that action we determined the State met the requirements of 40 CFR 51.309 and related provisions.

the use of controls. EPA is disapproving certain Wyoming BART determinations because the State did not consider these factors in its BART determinations in accordance with the RHR and the Act.

Comment: EPA's regional haze FIP failed to afford the required deference to the technical, policy and other discretion granted to Wyoming under the CAA and regional haze program. Congress added section 169A to the CAA in order to address the ''impairment of visibility'' in Class I areas that ''results from man-made air pollution.'' This provision of the CAA, in turn, describes separate roles for EPA, the states, and major sources such as PacifiCorp's BART Units.

EPA's roles are to create a report, see CAA section 169A(a)(2)–(3), create regional haze regulations, see CAA section 169A(a)(4), provide guidelines for the states, see CAA section 169A(b)(1), and determine whether regional haze SIPs submitted by the states follow the regulations and guidelines, and contain the required elements. CAA section 110. The states' roles, which are central to the regional haze program, are intended to be accomplished using substantial discretion which, in turn, requires significant deference from EPA. States are required to submit a regional haze SIP that contains ''emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.'' CAA section 169A(b)(2). States also must ''determine[*thnsp;]'' BART for ''each major stationary source.'' CAA 169A(b)(2)(A). BART sources, such as PacifiCorp's BART units, are required to ''procure, install, and operate (BART) as expeditiously as practicable.'' CAA section 169A(b)(2)(A).

Thus, the CAA mandates that states have the primary role in developing regional haze SIPs to protect visibility in Class I areas. Likewise, the RHR makes clear that states have the responsibility to create and implement regional haze SIPs. In contrast, EPA's role is to develop ''guidelines'' for the states to use in implementing regional haze SIPs and to determine whether states followed those guidelines. CAA section 169A(b)(1). In short, the CAA anticipates that states, using their discretion, develop regional haze SIPs using EPA guidelines. This is exactly what Wyoming did in issuing BART permits and developing the Wyoming regional haze SIP.

In issuing regional haze guidelines, EPA recognized the broad discretion granted to the states by the CAA. Specifically, EPA adopted guidance to address BART determinations for certain large electrical generating facilities, referred to as ''Appendix Y.'' EPA created further guidance in the **Federal Register** responding to comments concerning the then-proposed Appendix Y, referred to as the ''Preamble.'' EPA recognized in the Preamble that ''how states make BART determinations or how they determine which sources are subject to BART'' are among the issues ''where the Act and legislative history indicate that Congress evinced a special concern with insuring that states would be the decision makers.'' 70 FR 39104, 39137 (July 6, 2005).

Likewise, in analyzing the applicability of certain executive orders, EPA stated that ''ultimately states will determine the sources subject to BART and the appropriate level of control for such sources'' and that ''states will accordingly exercise substantial intervening discretion in implementing the final rule.'' Id. at 39155. The U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role regarding regional haze programs is limited and that a state's role is paramount. Indeed, the Court found that the CAA ''calls for states to play the lead role in designing and implementing regional haze programs.'' *American Corn Growers Ass'n* v. *E.P.A.,* 291 F.3d 1, 2 (D.C. Cir. 2002). The court also reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory BART factors and was ''inconsistent with the Act's provisions giving the states broad authority over BART determinations.'' Id. at 8; (see also *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination ''requires states to determine the particular technology that an individual source 'subject to BART' must install.'')). The court in *American Corn Growers* emphasized that Congress specifically entrusted states with making BART five-factor analysis decisions: ''[t]o treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source.'' *American Corn Growers,* 291 F.3d at 6.

The court in *American Corn Growers* also outlined the relevant legislative history that recounts a specific agreement reached in Congress which granted this authority to the states: ''The 'agreement' to which the Conference Report refers was an agreement to reject the House bill's provisions giving EPA the power to determine whether a source contributes to visibility impairment and, if so, what BART controls should be applied to that source. Pursuant to the agreement, language was inserted to make it clear that the states—not EPA—would make these BART determinations. The Conference Report thus confirms that Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources. The RHR attempts to deprive the states of some of this statutory authority, in contravention of the Act.'' Id. at 8. EPA's FIP action makes the same mistake and, if finalized, will be similarly reversible.

In sum, based on the language in the CAA, the RHR, EPA's own guidelines, and case law, the states have significant discretion when creating regional haze SIPs.

Response: We responded to similar comments above and elsewhere in this document.

Comment: EPA failed to properly account for that discretion in analyzing the Wyoming regional haze SIP. EPA should have acknowledged that the Wyoming regional haze SIP followed the law and was supported by the facts. Examples of EPA ignoring Wyoming's discretion include: Visibility improvement; cost effectiveness analysis; modeling; application of the five BART factors; and reasonable progress analyses.

Response: We responded to similar comments above and elsewhere in this document.

Comment: EPA's proposed action ignores the congressional commitment to have local decisions under the CAA—particularly those relating to BART—made by the states. States have the primary responsibility for preventing air pollution under the CAA. CAA section 101(a)(3), 42 U.S.C. 7401(a)(3). Pursuant to this principle, states, not EPA, have always had primary control over decisions to impose specific emission limits (and therefore specific pollution control technologies) for individual facilities. By congressional design, under the CAA EPA ''is relegated . . . to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary [to meet] national standards.'' *Train v. NRDC,* 421 U.S. 60, 79 (1975) (hereinafter ''*Train*''). This basic division of responsibilities between EPA and the States remained unchanged when Congress amended the Act in 1977 and again in 1990. *See Virginia* v. *EPA,* 108 F.3d 1397, 1408–10 (D.C. Cir. 1997).

Congress took this principle a step further under the regional haze program, specifically directing that BART is to be

''determined by the State.'' CAA section 169A(b)(2)(A), 42 U.S.C. section 7491(b)(2)(A). Congress adopted the BART provisions to address visibility, rather than health concerns. *See* H.R. Rep. 95–294, at 529 (1977) (''It should be made clear at the outset that this provision [concerning BART] is totally unrelated to any question involving public health.'') (separate views of Messrs. Devine, Krueger, Broyhill, Gammage, Clarence J. Brown, Collins, Moore and Stockman). Congress therefore sensibly left decisions relating to the imposition of costly visibility control technologies on certain existing sources entirely to the states, where local factors could be properly considered and implemented:

> The agreement clarifies that the state, rather than the Administrator, identifies the source that impairs visibility in the Federal class I areas. ''. . . In establishing emission limitations for any source which impairs visibility, the State shall determine what constitutes 'best available retrofit technology' . . .'' H.R. Conf. Rep. 95–564, at 155 (1977). While the original House bill would have given EPA the power to determine what BART controls should be applied to individual sources, Congress eventually inserted the current statutory language to make it clear that the States, rather than EPA, would make BART determinations. *See id.;* 5 Leg. History of CAA Amendments 1997 P.L. 95–95, H8663 (1997) (''The provision [in the original bill] was modified to give States a greater role in identifying sources which are contributing (or may in the future contribute) to visibility problems and in establishing control requirements for those sources.''). Senator Muskie confirmed during the floor debate that ''the State, not the Administrator, identifies a source that may impair visibility'' and that ''it is the State which determines what constitutes 'Best Available Retrofit Technology.' '' 123 Cong. Rec. 26,854 (1977).

The federal courts have enforced this legislative intent. In *American Corn Growers,* the D.C. Circuit quoted at length from the legislative history of section 169A to conclude that it was ''clear that the States—not EPA—would make these BART determinations.'' 291 F.3d at 8; see also id. at 8 (''The Conference Report . . . confirms that Congress intended the States to decide which sources impair visibility and what BART controls should apply to those sources.''). *American Corn Growers* reaffirms that the states have ''broad authority'' to make their own BART determinations. *Id.* It also reaffirms that EPA cannot ''deprive the states of some of this statutory authority,'' nor can EPA ''constrain[ ] authority Congress conferred on the states'' with respect to BART determinations. *Id.* at 8–9. It was for this reason that the court struck EPA's first attempt at the Regional Haze Rule: it purported to tell the states how to make BART determinations. *Id.* at 6–7. The same court later reiterated that BART ''requires States to determine the particular technology that an individual source 'subject to BART' must install.'' *Utility Air Regulatory Grp.* v. *EPA,* 471 F.3d 1333, 1336 (D.C. Cir. 2006).

Other federal courts have recognized the cooperative federalism policies on which the CAA in general—and the regional haze provisions in particular—are based. *See, e.g., Texas v. EPA,* 690 F.3d 670, 684 (5th Cir. 2012); *Ellis* v. *Gallatin Steel Co.,* 390 F.3d 461, 467 (6th Cir. 2004); *Sierra Club* v. *EPA,* 315 F.3d 1295, 1300 (11th Cir. 2002); *Am. Lung Ass'n of N.J.* v. *Kean,* 871 F.2d 319, 322 (3d Cir. 1989). Under cooperative federalism, states retain the discretion and flexibility to make their own choices based on local conditions, histories, and policies. *See, e.g., Budget Prepay, Inc.* v. *AT&T Corp.,* 605 F.3d 273, 281 (5th Cir. 2010) (''cooperative federalism' . . . necessarily implies that states may reach differing conclusions on specific issues relating to the implementation of the [statute]''); *Global NAPs, Inc.* v. *Mass. Dep't of Telecom. & Energy,* 427 F.3d 34, 46 (1st Cir. 2005) (cooperative federalism has ''the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states'' and to implement statutory provisions ''fairly and with due regard to . . . local conditions . . . and . . . historical circumstances''); *Taylor* v. *Vt. Dep't of Educ.,* 313 F.3d 768, 777 (2d Cir. 2002) (''[c]ooperative federalism . . . allows some substantive differentiation among the states in the determination of which . . . theories, practices, and approaches will be utilized'') (citation omitted).

In sum, Congress directed that BART determinations are to be made by the states, allowing the states to make their own BART choices based on local conditions and other considerations. Because EPA may not exercise authority ''in a manner that is inconsistent with the administrative structure that Congress enacted into law,'' *ETSI Pipeline Project* v. *Missouri,* 484 U.S. 495, 517 (1998), EPA may not disapprove a state BART determination that complies with the CAA, whether or not EPA agrees with the state's decision. Here, EPA has not demonstrated that Wyoming's BART determination violates the CAA, and for that reason EPA must approve the BART determination in the SIP even if it ''disagrees'' with it. Instead, just as in its rulemaking at issue in *Texas,* EPA's Proposed Rule ''transgresses the CAA's delineated boundaries of [the] cooperative relationship'' between EPA and the states. 690 F.3d at 686.

Response: EPA disagrees with this comment. First, the legislative history of the 1977 Amendments cited by the commenter is incomplete. The complete legislative history, when fairly read, contradicts the commenter and confirms EPA's supervisory role in reviewing state regional haze SIP submittals, including the state's initial BART determinations.

The 1977 Amendments resulted from a conference agreement that reconciled the House bill, H.R. 6161, and the Senate bill, S. 252. The conference committee agreed to adopt the visibility protection provisions of section 116 of the House bill, with certain modifications. With respect to the BART provision in what is now section 169A(b)(2)(A) of the Act, the conference agreement inserted the phrase ''as determined by the State (or the Administrator in the case of a plan promulgated under [section 110(c) of the Act])'' in the two places it now appears in that section.[31] The conference agreement inserted similar language into the definition of BART in section 169A(g)(2). The 1977 Amendments also added section 110(a)(2)(J) to the Act, which makes (among other things) a regional haze SIP that meets the requirements of part C relating to visibility protection a *required* part of a state's SIP.

Thus, H.R. 6161 required states to submit regional haze SIPs containing BART determinations, but did not explicitly specify that the BART determinations should, in the first instance, be made by the state. The conference agreement language clarified that states should make BART determinations as part of their SIP submittals, as explained in the conference report:

> The agreement clarifies that the State, rather than the Administrator, identifies the source that impairs visibility in the Federal class I areas identified and thereby fall within the requirements of this section. . . . In establishing emission limitations for any source which impairs visibility, the State shall determine what constitutes ''best available retrofit technology'' (as defined in this section) in establishing emission limitations on a source-by-source basis *to be included in the State implementation plan so as to carry out the requirements of this section.*

[31] The conference agreement also revised the language ''except as otherwise provided pursuant to subsection (c), a requirement that each major stationary source (as defined in section 302(o)) which is in existence on the date of enactment of this section, but which has not been in operation for more than 15 years as of such date'' in H.R. 6161 to its present form. This revision does not affect any issue raised by the commenter.

H.R. Conf. Rep. 95–564, at 155 (1977) (emphasis added). In other words, BART determinations are a *required* element (''the State shall determine'') of a state's regional haze SIP submittal (''to be included in the State implementation plan''). However, the conference report *does not* say that the state's determination is final. For example, it does not say: ''The State shall determine, and EPA shall abide by . . .'' Thus, all the conference report says is that states must provide BART determinations as part of the state's required regional haze submittal. As the Tenth Circuit Court of Appeals stated, ''All the conference agreement referenced by the D.C. Circuit did was shift the initial responsibility for making BART determinations from the EPA to the state. But that does not differ from other parts of the CAA—states have the ability to create SIPs, but they are subject to EPA review.'' *Oklahoma* v. *EPA,* 723 F.3d 1201, 1209 (10th Cir. 2013).

Another portion of the legislative history, only partially quoted by the commenter, confirms EPA's supervisory role. Congressman Rogers inserted into the Congressional Record a Clean Air Conference Report (1977): Statement of Intent; Clarification of Select Principles. 123 Cong. Rec. 27070 (daily ed. Aug. 4, 1977) (statement of Cong. Rogers). The Statement of Intent clarified ''some important points on the intention and effect of the conferees action [that] may have been overlooked or may be unclear in the text of the conference bill or the accompanying statement of managers.'' *Id.* Under section ''D. Visibility protection,'' the first full paragraph states:

> The conferees essentially agreed to the House provision for visibility protection. The provision was modified to give States a greater role in identifying sources which are contributing (or may in the future contribute) to visibility problems and in establishing control requirements for those sources. However, the conferees rejected a motion to delete the national goal. *The conferees also rejected a motion to delete EPA's supervisory role under section 110 to assure that the required progress toward that goal will be achieved by the revised State plan. If a State visibility protection plan is not adequate to assure such progress, then the Administrator must disapprove that portion of the SIP and promulgate a visibility protection plan under section 110(c).* Thus, visibility protection in most mandatory federal Class I areas remains a national commitment, which is nationally enforceable.

Id. (emphasis added). Thus, the Statement of Intent, instead of supporting the commenter's arguments, confirms EPA's supervisory role over states' regional haze SIPs, as the conferees deliberately rejected a proposal to remove that supervisory role.[32] The Statement of Intent also only describes states as having a ''greater role'' in determining BART; it does not describe that role as exclusive.

With respect to Senator Muskie's statements, the comment omits a portion of the legislative history regarding application of the BART Guidelines. *Oklahoma* v. *EPA,* 723 F.3d 1201, 1209–10 (10th Cir. 2013). The Tenth Circuit considered those statements in context and confirmed EPA's authority to ensure that state BART determinations for fossil-fuel fired power plants having a total generating capacity greater than 750 MW complied with the BART Guidelines. *Id.* With respect to the separate views of several Representatives regarding visibility protection as unrelated to public health, those views are of a small minority that opposed any provisions for visibility protection whatsoever. H.R. Rep. 95–294, at 530 (1977). Their views did not carry the day and, in any case, are irrelevant to the question of EPA's supervisory role.

With respect to the remainder of the comment regarding various court opinions, we have responded to similar comments elsewhere. EPA's action here violates neither the holdings in *American Corn Growers* and *UARG* regarding the RHR, nor the generic remarks regarding cooperative federalism in the other cited cases.

Comment: Although EPA cites ''errors'' made by Wyoming in its BART determination for Laramie River Station, EPA has not—and cannot—demonstrate that any of these alleged ''errors'' represents a violation of the CAA. These are technical disagreements over judgments committed by Congress to the states—not grounds for EPA to step in and dictate a technology choice. Section 169A does not confer any authority upon EPA to make a BART determination when the state has made one. Once the state makes a BART determination, EPA's authority to review it in the SIP review process is very limited. Section 110 mandates that ''[EPA] *shall approve* such [SIP] submittal as a whole if it meets all of the applicable requirements of this chapter.'' 42 U.S.C. 7410(k)(3). *See also Forest Guardians* v. *Babbitt,* 174 F.3d 1178, 1187 (10th Cir. 1999) (''The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command.'').

As the Fifth Circuit recently expressed, ''the Act confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements,'' and ''[t]h[e] statutory imperative [of section 110(k)(3)] leaves the agency no discretion to do anything other than ensure that a state's submission meets the CAA's requirements and, if it does, approve it.'' *Luminant,* 675 F.3d at 921, 926. *See also id.* at 932 (''If [the State's] regulations satisfy th[e] basic requirements [of the CAA], the EPA must approve them, as section 7410(k)(3) requires. That is the full extent of the EPA's authority in the SIP-approval process because that is all the authority that the CAA confers.'') *Texas,* 690 F.3d at 676 (''[I]f a SIP or a revised SIP meets the statutory criteria of the CAA, then the EPA must approve it.''); *Bethlehem Steel Corp.* v. *Gorsuch,* 742 F.2d 1028, 1036 (7th Cir. 1984) (EPA's SIP disapproval power is ''constrained by the substantive criteria in 42 U.S.C. 7410(a)(2)(A)–(K)''); *Fla. Power & Light Co.* v. *Costle,*650 F.2d 579, 581 (5th Cir. 1981) (''If a SIP or a revised SIP meets the statutory criteria. . . the EPA must approve it.'') (citations omitted).

Since Wyoming's BART decision for Laramie River Station, along with its associated SIP revision, meets the requirements set forth in the CAA, EPA has no discretion and must approve it in its entirety. As the Supreme Court explained in the NAAQS context: The Act gives the Agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan which satisfies the standards of section 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan which satisfies those standards. Section 110(c). Thus, so long as the ultimate effect of a state's choice of emission limitations is compliance with the national standards for ambient air, the state is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. *Train,* 421 U.S. at 79; *see also Virginia,* 108 F.3d at 1408–10 (confirming that the 1977 Amendments to section 110 did not alter the division of responsibilities recognized in *Train*). *Accord Union Elec. Co.* v. *EPA,* 427 U.S. 246, 267 (1976) (''[T]he State has virtually absolute power in allocating emission

[32] In context, the statement regarding ''required progress'' must be understood to include BART. First, the preceding portion of the statement discusses States' roles in determining controls generally under 169A(b)(2), ''including'' the BART requirements in 169A(b)(2)(A). The portion about EPA's supervisory role in assuring ''required progress'' should be understood to apply to all of 169A(b)(2), including subsection 169A(b)(2)(A).

limitations so long as national standards are met.'').

The fact that states must propose SIP revisions ''as may be necessary'' to achieve reasonable progress does not mean that EPA has authority to countermand the textual commitment to leave BART decisions to the states. The D.C. Circuit interpreted similar language in Section 110(k)(5) to constrain EPA's authority over SIP approval and disapproval. *See Virginia,* 108 F.3d at 1409. The SIP call provisions of Section 110(k)(5) similarly state that when a SIP is inadequate ''[EPA] shall require the State to revise the plan as necessary to correct such inadequacies.'' But the *Virginia* court rejected the agency's expansive view of this phrase as authority to impose specific control measures for specific emission sources: EPA apparently thinks the ''as necessary'' language in section 110(k)(5) altered the division of responsibilities between the states and the agency. We suppose the idea is that because section 110(k)(5) empowers EPA to ''require the State to revise the plan as necessary to correct'' inadequacies, it empowers EPA to require the state to include particular control measures in the revised plan.

There is nothing to this. *Id.* at 1409. Instead, the court concluded that this phrase ''keep[s] EPA within bounds.'' *Id.* at 1410. Imposition of a FIP is intended to be a drastic penalty, imposed only where a state fails to provide the air pollution reductions required by the CAA, as ''it rescinds state authority to make the many sensitive and policy choices that a pollution control regime demands.''' *Id.* at 1406–07 (citation omitted). The court also expressed, in rejecting EPA's interpretation of Section 110(k)(5), that ''[w]e would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes.'' *Id.* at 1410.

EPA must therefore approve the Wyoming SIP as it relates to BART at Laramie River Station, as compliance with the law is all that is required. *See Luminant,* 675 F.3d at 926 (EPA's reliance on factors other than compliance with the CAA in disapproving a SIP violated the Administrative Procedures Act (APA), as it was ''in excess of statutory authority,'' and was arbitrary and capricious, as it considered ''a 'factor[ ] which Congress has not intended [the EPA] to consider' '') (quoting 5 U.S.C. 706(2)(C) and *State Farm,* 463 U.S. at 43) (alteration in original).

Response: EPA is not substituting its judgment on required technology for the State's in this decision. Rather, we have determined that Wyoming's analysis and determinations were not performed consistent with the CAA and implementing regulations. EPA considered the State's SIP as well as the most recent information submitted by Basin Electric and others for the Laramie River BART units. As explained in detail in our response to similar comments in the BART section of this document, we found Basin Electric's estimates of SCR capital cost deficient in a number of respects, specifically: (1) Inadequate explanation for the high labor rates that were assumed when compared to published labor rates; (2) High overtime and per diem costs without sufficient explanation; (3) Apparent duplication of costs associated with General Facilities; (4) Inclusion of AFUDC; (5) Apparent duplication of contingencies and other cost adders; and (6) Addition of unnecessary SO_3 mitigation system. All of these contributed to excessively high capital cost. Sargent & Lundy also assumed excessively high cost for replacement catalyst, which contributes to high operating cost. As we explain elsewhere, these deficiencies are inconsistent with the CAA and RHR.

We responded to similar comments regarding the remaining comments above and elsewhere in this document.

Comment: To the extent that the Supreme Court in *ADEC* suggested it was adopting a ''reasonableness'' standard, and did not expressly state that what it was doing was adopting an ''arbitrary and capricious'' standard, the Supreme Court and other federal courts have confirmed that these two standards are nearly interchangeable. Moreover, to the extent that there is any perceivable difference between the two standards, these cases confirm that ''reasonable'' means something more like ''not arbitrary and capricious'' than ''not what EPA would prefer.'' *See, e.g., Marsh* v. *Ore. Nat. Res. Council,* 490 U.S. 360, 377 n.23 (1989) (''as some of the[ ] courts have recognized, the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence'') (citing cases); *Ridenour* v. *Kaiser-Hill Co.,* 397 F.3d 925, 939 (10th Cir. 2005) (''When a party challenges agency action as arbitrary and capricious the reasonableness of the agency's action is judged in accordance with its stated reasons.'') (citation omitted); *Amisub (PSL), Inc.* v. *Colo. Dep't of Social Servs.,* 879 F.2d 789, 800 (10th Cir. 1989) (the court's role in applying the arbitrary and capricious review standard is ''to determine if there was a reasonable factual basis to support'' the agency's findings); *United States* v. *Minnkota Power Co-Op Inc.,* 831 F. Supp.2d 1109, 1119 (D.N.D. 2001) (expressing that the ''reasonableness'' standard employed by the *ADEC* Court is the same as the ''arbitrary and capricious'' standard).

Under the APA's arbitrary and capricious review standard, administrative action is presumed valid, and review of that action is '' 'narrow in scope.' '' *Copar Pumice Co.* v. *Tidwell,* 603 F.3d 780, 793 (10th Cir. 2010) (citation omitted). ''Agency action is arbitrary and capricious only if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,' or if the agency action 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' '' *Id.* (quoting *State Farm,* 463 U.S. at 43). A court will not ''substitute [its] judgment for that of the agency,'' but will only consider whether the agency provided a ''reasoned basis'' for its action. *Id.* at 793–94 (quoting *State Farm,* 463 U.S. at 43). The courts also have developed a series of related standards designed to ensure that courts afford appropriate deference to an agency's technical and policy choices, and refrain from substituting the courts' judgment for that of the agency. For the same reasons that arbitrary and capricious review should apply to EPA's review of a state BART determination, these related standards also should apply: (1) The State's BART decision is presumed valid, and EPA bears the burden of proving otherwise, *see Hillsdale Envt'l Loss Prevention, Inc.* v. *U.S. Army Corps of Eng'rs,* 702 F.3d 1156, 1165 (10th Cir. 2012); (2) the State's decision may be set aside '' 'only for substantial procedural or substantive reasons,' '' *id.* (citation omitted); and (3) where experts might disagree about a technical issue, EPA must defer to the ''reasonable opinions'' of the States' experts, *see Colo. Wild* v. *U.S. Forest Serv.,* 435 F.3d 1204, 1214 (10th Cir. 2011). *See also Minnkota Power,* 831 F. Supp.2d at 1119–20 (the same principles that apply to court review of agency action under the APA apply to EPA challenges to state BACT determinations).

EPA's proposal does not formulate or apply these standards, and thus does not establish grounds to overrule the State's BART determination for Basin Electric's Laramie River Station. EPA has not found that Wyoming ''entirely failed to consider an important aspect of the problem,'' considered factors Congress did not intend it to consider, or reached a decision ''so implausible''

as to be arbitrary. Nor has EPA found that Wyoming's explanation for its decision runs counter to the evidence that was before it. Instead, EPA complains of minor alleged deviations from broadly worded and highly flexible guidelines deliberately designed to be consulted but not rigidly adhered to in any event. EPA therefore must approve the State's BART decision for Laramie River, as any other result represents EPA's substitution of its judgment over Wyoming's, which EPA has no statutory authority to do.

Response: EPA disagrees with this comment, which is based on a fundamental misunderstanding of EPA's role. In acting on a state's SIP submittal, EPA does not sit in the position of a reviewing federal court. Instead, EPA is the agency entrusted by Congress with administering the CAA. Thus Congress has ''vested EPA with explicit and sweeping authority to enforce CAA requirements'' and requires that ''EPA step in to ensure that the statutory requirements are honored.'' *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 490 (2004). Reviewing courts, on the other hand, ''are not experts in the field'' and thus defer to decisions by ''the agency charged with the administration of the statute.'' *Chevron, Inc.* v. *Natural Res. Def. Council,* 467 U.S. 837, 866 (1984).

In the context of acting on a regional haze SIP, EPA must assure that it meets the requirements of the Act and the RHR, including requirements regarding BART. EPA—unlike a reviewing court—is not required to defer to the state's technical judgments. Instead, EPA is not only authorized, but required to exercise independent technical judgment in evaluating the adequacy of a state's regional haze SIP, including its BART determinations, just as EPA must exercise such judgment in evaluating other SIPs. In evaluating other SIPs, EPA's role is always to make a judgment about SIP adequacy, not just to meet and maintain the NAAQS, but also to meet other requirements that do not have a numeric value. In this case, Congress did not establish NAAQS by which to measure visibility improvement; instead, it established a reasonable progress standard and required that EPA assure that such progress be achieved. Here, contrary to the commenter's assertion, we are exercising judgment within the parameters laid out in the CAA and our regulations. Our interpretation of our regulations and of the CAA, and our technical judgments, are entitled to deference. *See, e.g., Michigan Dep't. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000); *Connecticut Fund for the Env't., Inc.* v. *EPA,* 696 F.2d 169 (2nd Cir. 1982); *Voyageurs Nat'l Park Ass'n* v. *Norton,* 381 F.3d 759 (8th Cir. 2004); *Mont. Sulphur & Chem. Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012).

The comment does not cite to anything in the *ADEC* opinion (or, for that matter, in the CAA itself) that suggests EPA must, in reviewing a SIP submittal, adopt the APA standards of review. Instead, in *ADEC* the Supreme Court upheld EPA's position that the State permitting agency's BACT determination ''did not qualify as reasonable in light of the statutory guides.'' *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 484 (2004). The mere coincidence that some courts have described the APA standards of review as essentially a ''reasonableness'' standard does not compel EPA to adopt the APA standards of review; nor did the *ADEC* opinion suggest EPA must do so. As explained above, a fundamental difference between EPA and a reviewing court is that courts lack technical expertise and so generally defer to agency technical judgments; on the other hand, EPA is the expert agency entrusted by Congress with administering the CAA and exercising its best technical judgment in doing so. Another fundamental difference is that a reviewing court is limited to the record compiled by the administrative agency, but EPA in its review of a SIP submittal is not limited just to the record compiled by the state agency, and may supplement the record with (among other things) EPA's own expert reports and analyses. In fact, if the cases cited by the commenter discussing the APA standard of review stand for anything, it is the proposition that if and when EPA's action on this SIP submittal is subject to judicial review, the court will base its decision on the record compiled by EPA and give appropriate deference to EPA's technical judgments and interpretations of the Act and the RHR. Accordingly, the Eighth and Tenth Circuit Court of Appeals have applied the APA standard of review to EPA's actions on other regional haze SIP submittals. *See Oklahoma* v. *EPA,* 723 F.3d 1201 (10th Cir. 2013), *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013).

The discussion of the standard of review in the district court's order and opinion in *United States* v. *Minnkota Power Co-op., Inc.,* 831 F. Supp. 2d 1109 (D.N.D. 2011), cited by commenter, is not to the contrary. The district court's opinion first quotes the *ADEC* opinion for the proposition that the question presented is whether ''*the state agency's* BACT determination was reasonable, in light of the statutory guides and the state administrative record.'' *Id.* at 1119 (emphasis added). The district court's opinion then again quotes the *ADEC* opinion: ''We apply the familiar default standard of the Administrative Procedure Act . . . and ask whether *the Agency's* action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' '' *Id.* (emphasis added). In the context of the *ADEC* opinion, the Agency referred to by the Supreme Court in the second quote is EPA, not the State agency. The district court's opinion then continues by quoting a separate Supreme Court opinion discussing the similarities of the arbitrary and capricious standard and the reasonableness standard. This fails to establish any sort of connection between the APA standard and EPA's review of a state determination. In addition, *Minnkota Power* took place in the context of an enforcement action, not action on a SIP submittal. The EPA had entered into a consent decree that (among other things) ''establishe[d] the standard of review governing the EPA's challenge to the North Dakota NO_X BACT Determination.'' *Id.* at 1112. The consent decree provided that ''[t]he disputing Party shall bear the burden of proof throughout the dispute resolution process.'' Thus, *Minnkota Power* has nothing to say about use of the APA standard in EPA's review of a state's BART determination.

Comment: In applying the arbitrary and capricious standard, EPA should accord the same deference to a state's BART determination that courts accord to an agency decision under the National Environmental Policy Act (NEPA), which, like section 169A, ''does not mandate particular results, but simply prescribes the necessary process.'' *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). *See also* 42 U.S.C. 4332(2)(C) (any agency contemplating a ''major Federal action [that] significantly affect[s] the quality of the human environment'' must prepare an environmental impact statement [EIS] analyzing the action's environmental effects). Under NEPA, ''[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'' *Baltimore Gas & Elec. Co.* v. *NRDC,* 462 U.S. 87, 97–98 (1983).

The purpose of this deferential review standard under NEPA is to prevent a court from ''substitut[ing] its judgment for that of the agency.'' *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n.21 (1976). As the Supreme Court explained in *Kleppe,*

''[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.''' *Id.* (citing *NRDC* v. *Morton,* 458 F.2d 827, 838 (D.C. Cir. 1972)).

Under this review standard, ''even if [the reviewing court] would have made a different choice had the matter been before [the court] de novo,'' the court ''cannot displace the agencies' choice'' between conflicting views, evidence, data, and scientific opinions. *Custer Cnty. Action Ass'n* v. *Garvey,* 256 F.3d 1024, 1036 (10th Cir. 2001). Thus, even in the face of technical objections, a court will uphold the agency's action so long as it is supported by substantial evidence in the administrative record, is adequate to foster informed public participation and decision making, and is not otherwise arbitrary or capricious. *Id.*

Moreover, as the courts have repeatedly recognized, ''[d]eficiencies in an EIS that are mere 'flyspecks' and do not defeat NEPA's goals of informed decision making and informed public comment will not lead to reversal.''' *WildEarth Guardians* v. *NPS,* 703 F.3d 1178, 1183 (10th Cir. 2013) (quoting *New Mexico* v. *BLM,* 565 F.3d 683, 704 (10th Cir. 2009)). *See also Custer Cnty,* 256 F.3d at 1035 (''Our objective is not to 'fly speck' the [EIS], but rather, to make a 'pragmatic judgment whether the [EIS]'s form, content and preparation foster both informed decision-making and informed public participation.''') (citation omitted).

The same principles apply here, where Congress has expressly delegated the BART decision to the states, did not mandate the states to reach a specific outcome, and established only a decision making process for the states to follow—not a required outcome. If the state considered all five statutory factors to arrive at a result that improves visibility, and its decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, EPA must affirm the BART selection—even if EPA would or could have made a different selection.

Response: EPA disagrees with this comment. The comment does not identify anything in the NEPA court decisions that demonstrates that those decisions are applicable to EPA's review of a SIP submittal. In fact, Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)) exempts actions under the CAA from the requirements of NEPA. Specifically, this section states that ''[n]o action taken under the CAA [42 U.S.C. 7401 et seq.] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.].'' While the standard of review for EPA's SIP and FIP decisions may be similar to that under NEPA,[33] the NEPA decisions simply are not applicable in the CAA context.

Furthermore, NEPA relies solely on ''procedural mechanisms—as opposed to substantive, result-based standards.'' *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 353 (1989). Unlike NEPA, the CAA's regional haze program has specific substantive requirements, and EPA must ensure that SIP submittals meet the requirements of the Act, including the substantive provisions of the regional haze program. *See* CAA Section 110(a)(2)(J) (SIP submittals must meet applicable requirements of Part C of title I, including visibility protection). As the Eighth Circuit Court of Appeals stated: ''EPA is left with *more than* the ministerial task of routinely approving SIP submissions.'' *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013) (emphasis added).

Comment: One commenter asserted that the U.S. Supreme Court and the lower federal courts have long recognized and applied the principle of ''harmless error'' where an agency may have committed an error, but that error did not affect the outcome of its decision. *See, e.g., Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife,* 551 U.S. 644, 659 (2007); *Hillsdale,* 702 F.3d at 1165. *See generally* 5 U.S.C. 706 (''[D]ue account shall be taken of the rule of prejudicial error.'').

The commenter argued that the courts also have long recognized the related principle that agencies may ''overlook circumstances that in context may fairly be considered *de minimis,''* as part of the broad notion that ''the law does not concern itself with trifling matters.'' *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (D.C. Cir. 1979). Thus, for instance, the D.C. Circuit rejected a challenge to a Federal Aviation Administration rule where the agency had used ''inappropriate guidelines for measuring the effects of noise'' in its determination that a proposed airport site would not result in any ''use'' of a nearby wildlife refuge. *Allison* v. *Dep't of Transp.,* 908 F.2d 1024, 1026 (D.C. Cir. 1990). The court cited the APA provision requiring consideration of ''prejudicial error,'' and expressed that ''[a] court should not upset a decision because of errors that are not material.'' *Id.* at 1029 (citations omitted). *See also Grunman Data Sys. Corp.* v. *Widnall,* 15 F.3d 1044, 1048 (Fed. Cir. 1994) (rejecting bid protest although agency may have violated accounting principles in its analysis of the best value bid, as any accounting errors were ''*de minimis,''* and stating that ''overturning awards on *de minimis* errors wastes resources and time, and is needlessly disruptive of procurement activities and governmental programs and operations'') (citation omitted).

Finally, the commenter argued, the courts have repeatedly held that agency action should not be reversed due to mere calculation errors that do not render a rule arbitrary and capricious. *See, e.g., Michigan* v. *EPA,* 213 F.3d 663, 691 (D.C. Cir. 2000) (rejecting challenge to EPA decision despite error in calculation); *Chem. Mfrs. Ass'n* v. *EPA,* 870 F.2d 177, 241, *clarified on reh'g,* 885 F.2d 253 (5th Cir. 1989) (same); *CPC Int'l, Inc.* v. *Train,* 540 F.2d 1329, 1343–44 (8th Cir. 1976) (same). The commenter stated that these same principles should apply to EPA's review of the State's BART determinations, such that EPA has no authority to disapprove the State's decisions if a deviation from the BART Guidelines and CCM was merely *de minimis* and at most harmless error that did not affect the State's selection of BART. Indeed, EPA's approach itself suggests that the BART Guidelines and CCM were intended to be flexible, and that EPA's review of compliance with their provisions is subject to a materiality standard. For instance, in the Proposed Rule, EPA proposes to disapprove certain BART determinations based on purported deviations from the BART Guidelines and CCM in assessing cost and visibility, yet it also proposes to approve other BART determinations ''because [it has] determined that the State's conclusions were reasonable despite the cost and visibility errors'' identified by EPA. 78 FR 34750. And, while the Tenth Circuit's decision in *Oklahoma* v. *EPA* is not yet final, as petitions for rehearing may yet be filed, that court similarly suggested that there

[33] By statute, EPA's promulgation of a FIP must be upheld unless the court determines EPA's action was ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'' CAA Section 307(d)(1)(B), (9)(A). There is no statutory standard of review governing EPA's disapproval of a SIP, however, the Supreme Court has held that where the Clean Air Act does not specific a standard for judicial review, ''we apply the familiar default standard of the Administrative Procedure Act . . . and ask whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' *ADEC* at 496–97.

was a materiality element to a state's compliance with the BART Guidelines, noting, in particular, that the State's cost estimates were ''more than ten times EPA's stated average costs per ton for th[e] technology, and nearly five times as much as the upper limit of EPA's expected cost range.'' —F.3d—, 2013 U.S. App. LEXIS 14634, at *25 (10th Cir. July 19, 2013). Notably, that case did not involve SCR technology, which the CCM affords a greater amount of flexibility in assessing, and the State had failed to note and explain its deviations from the CCM.

By applying these principles here, the commenter asserted, any deviation from the BART Guidelines and CCM was *de minimis,* and mere harmless error. Certainly, EPA has not shown that the State would have made a different BART selection had it assessed the cost and visibility factors in the manner EPA suggests—particularly as the selection of BART must be made by weighing all five factors, and as the differences between the State's and EPA's assessments of cost and visibility are not so substantial as to necessitate a different result. In other states, EPA has acknowledged that a state's BART determination may be disapproved on account of a claimed error only if the error would have changed the BART determination. In approving Colorado's regional haze SIP, EPA did not disapprove the BART determination for the Martin Drake power plant, despite EPA's disagreement regarding the control efficiency of SCR because the discrepancy would not have changed the outcome. 77 FR 76871, 76875–76 (Dec. 31, 2012) (''[We] find that it was not unreasonable for Colorado to use 0.07 lb/MMBtu to model the predicted visibility improvement from SCR. Moreover, while we do agree that assuming a control efficiency of 0.05 lb/MMBtu would have resulted in greater modeled visibility benefits, we do not agree that the difference in visibility benefits would have led Colorado to a different conclusion given the magnitude of the benefits associated with SCR.''). The commenter advocated that EPA should take a similar approach in Wyoming.

The commenter finished by stating that if there is a question as to whether the State might have made a different BART selection had it assessed cost and visibility in the manner suggested by EPA, EPA should return the issue to the State to reweigh the BART factors with that information. *See SKF USA Inc.* v. *United States,* 254 F.3d 1022, 1029 (Fed. Cir. 2001) (courts may remand matters to the agency upon request to correct ''clerical errors, transcription errors, or erroneous calculations'').

Response: The cases cited to by the commenter all concern standards by which courts evaluate agency action, not standards by which EPA, an administrative agency, evaluates SIP submissions for compliance with the requirements of the CAA. The cases are therefore inapposite. Nevertheless, in situations where a state's SIP reaches a reasonable result overall despite violations of certain statutory or regulatory requirements, EPA believes that approving the SIP is sometimes a better use of scarce administrative resources and more in line with principles of cooperative federalism than promulgating a FIP. This approach is arguably similar to the principle of ''harmless error'' that courts adhere to in the context of judicial review.

In this situation, however, the errors committed by Wyoming in its regional haze SIP were neither harmless nor *de minimis.* As we have explained previously, because Wyoming did not properly calculate the costs of the various control options or accurately estimate the visibility improvement associated with these controls, the State's ultimate selection of BART for several EGUs did not represent the best system of continuous emission reduction. As the Eighth and Tenth Circuits have recently held, EPA acts within its power under section 169A of the CAA when it rejects a BART determination on the basis that a state did not properly take into consideration the costs of compliance as a result of methodological or data flaws. *See Oklahoma* v. *EPA,* 723 F.3d 1201, 1212 (10th Cir. 2013); *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013). This same reasoning applies equally to the other statutory BART factors, such as visibility improvement.

We also disagree with the commenter that our action on the Colorado regional haze SIP implies that a similar outcome is warranted here. In that action, we stated that ''it was not unreasonable for Colorado to use 0.07 lb/MMBtu to model the predicted visibility improvement from SCR.'' 77 FR 76871, 76875 (Dec. 31, 2012). Thus, we did not disagree with Colorado's choice of control efficiency, as the commenter claims, and the situation bears no relationship to this one, where we have carefully explained our disagreement with multiple aspects of Wyoming's NO_X BART determinations.

Finally, we decline to ''return the issue to the State,'' as the commenter proposes. At this time, the Wyoming regional haze SIP is many years overdue, and the deadline for EPA to issue a FIP has long since passed. We note, however, that Wyoming is free to submit a SIP revision at any time that, if approved, could replace all or a portion of EPA's FIP.

Comment: EPA's proposal to disapprove Wyoming's BART determination for Laramie River not only overrides the State's technical judgment but also renders moot with a stroke of a pen the extensive judicial, administrative, and political processes developed by the State to implement its obligations under the CAA as a separate sovereign. Wyoming has enacted a robust and independent set of administrative and judicial procedures to review and potentially overturn BART decisions made by the State. These procedures are part of the State's SIP expressly approved by EPA, 40 CFR 52.2620, making them federally enforceable.

Wyoming's air quality regulations require a source subject to BART to apply for and obtain a BART permit. In this case, Laramie River Station's BART permit was issued pursuant to Wyoming Air Quality Standards and Regulations (WAQSR) Chapter 6, Sections 2 and 9. The rules requiring BART permits in Wyoming were adopted on October 9, 2006 as a new section to meet the requirements of EPA's RHR. Chapter 6 requires facilities seeking permits to comply with all the rules and regulations of Wyoming. Chapter 6, Section 9 of the Air Quality Division's rules and regulations govern BART permits. Section 9(e)(iv) requires that the opportunity for public comment on BART permits follow the procedures specified in Chapter 6, Section 2(m). That section, in turn, establishes a notice and comment procedure that specifically requires a copy of the public notice to be sent to EPA. Thus, EPA approved Wyoming's plan that specifically contemplates EPA's inclusion in State administrative review proceedings. *See* 40 CFR 52.2620; *see also US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1159 (10th Cir. 2012) (EPA's approval of a State's SIP gave the SIP the force and effect of federal law).

Here, EPA received the required notice at every step of the proceedings. EPA, however, chose to participate to only a limited extent. After submitting August 3, 2009 comments to the State's BART Application Analysis and proposed permit and October 26, 2009 comments to Wyoming's draft regional haze SIP, EPA excised itself from the process. Despite its prior comments on Basin Electric's BART permit and the regional haze SIP, EPA did not seek to intervene in Basin Electric's administrative appeal to the

Environmental Quality Council or comment on Basin Electric's settlement agreement with the Environmental Quality Council. EPA could have advised the Environmental Quality Council that it believed the proposed settlement violated the CAA or was otherwise arbitrary and capricious, but it did not. Instead, illustrating its disregard for State primacy, EPA now proposes to disapprove the NO_X BART emissions limits in the settlement agreement and final SIP, years after the administrative process concluded.

As the dissenters in *ADEC* described, EPA should not be permitted to avoid a ''more painstaking state process by a mere stroke of the pen under the agency's letterhead.'' 540 U.S. at 509 (Kennedy, J., dissenting) (discussing an analogous process for BACT determinations). The CAA's ''strict'' division of authority creates a ''statutory federalism bar [that] prohibits EPA from using the SIP process to force States to adopt specific control measures.'' *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7, 29 (D.C. Cir. 2012) (citing *Virginia,* 108 F.3d at 1410). But that is precisely what EPA seeks to do here. EPA's approach both confuses the CAA ''with a general administrative law statute like the [APA]'' and upsets ''the balance between State and Federal Governments.'' *See ADEC,* 540 U.S. at 507–17 (Kennedy, J., dissenting). Simply put, it is inappropriate for EPA to dodge the administrative and judicial review process established in the State of Wyoming through overturning of Wyoming's BART decision by administrative fiat. *See id.* at 510 (Kennedy, J., dissenting). It was only after Wyoming submitted its regional haze SIP to EPA that EPA announced it found the settlement ''unreasonable'' and something with which it ''disagreed.'' Based upon these assertions, and without demonstrating that the BART permit actually violates the CAA, EPA now proposes to void all the extensive administrative proceedings, processes, comment periods, and permit finality accorded under State law.

This improperly impinges upon state authority. Under the regional haze program, deference to state authority is far more compelling than issues related to public health under the BACT program, and so the Supreme Court's holding in *ADEC* that EPA may not require ''recourse to state processes'' is inapplicable to BART decisions. *ADEC,* 541 U.S. at 492. EPA should conduct itself in accordance with the spirit of its representation to the Supreme Court that it has never sought to override a state court judgment, and should not seek to override a state BART decision that has been litigated to administrative conclusion under state law, particularly where, as here, EPA never advised the State adjudicators or the parties to the State proceedings that it considered the permit to be invalid under the CAA. EPA could have participated in the State administrative appeal proceeding or, at a minimum, appeared in the proceeding to register an objection to the settlement agreement. Having elected not to do so, EPA should respect the result of the State's process. Alternatively, EPA is precluded from overruling the Laramie River BART permit decision that resulted from that process. *ADEC,* 540 U.S. at 491 n.14. EPA had notice and ample opportunity to contest the appropriateness and legality of the BART permit in Wyoming, but simply chose not to do so.

EPA is not free to let parties like Basin Electric spend thousands of dollars and years of effort resolving the terms of a BART permit, only to find the process wasted because EPA disagrees yet chose to ignore multiple notices of the State proceedings. Absent application of claim preclusion under these circumstances, EPA could effectively ''rescind[ ] state authority to make the many sensitive and policy choices that a pollution control regime demands.'' *Virginia,* 108 F.3d at 1406–07 (citation omitted). Here, EPA does not intrude upon state political processes; it ignores them, upsetting ''the balance between State and Federal Governments.'' *See ADEC,* 540 U.S. at 507–17 (Kennedy, J., dissenting).

EPA's interference with State's prerogatives also violates the Tenth Amendment to the United States Constitution. ''[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.'' *New York* v. *United States,* 505 U.S. 144, 157 (1992). *See also* U.S. Const. amend. X (''The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.''). Here, EPA's rejection of Wyoming's BART decision and imposition of its own not only overrides Congress' resolution to leave localized BART analyses in the hands of the states, but also infringes on Wyoming's (and its citizens') Tenth Amendment right to have those decisions made *and adjudicated* by the State. *See Arlington,* 133 S.Ct. at 1874 (although *Chevron* deference generally applies to an agency's interpretation of the scope of its authority, ''[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow''); *Hodel* v. *Va. Surface Min. & Reclamation Ass'n,* 452 U.S. 264, 289 (1981) (statute survived Tenth Amendment scrutiny because it ''establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs,'' instead of ''commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'').

Earlier comments provided similar arguments, by noting that Wyoming issued its BART Application Analysis and proposed permit on May 28, 2009, and accepted public comments on its analysis and proposed permit for a period of 60 days, followed by a public hearing on August 6, 2009. Numerous comments were received, including comments from EPA dated August 3, 2009. EPA did not comment that Wyoming's proposed BART determination violated the CAA. Nor did EPA identify any action taken by Wyoming in connection with the permit that was arbitrary or capricious. While EPA regularly encouraged Wyoming to consider both SNCR and SCR technologies, at no point did EPA advise Wyoming that BART controls of LNBs and OFA for the Laramie River Station would violate the CAA or otherwise be arbitrary and capricious. Basin Electric appealed its BART permit to the Environmental Quality Council, arguing that Wyoming's imposition of additional technology requirements in 2018 as part of its long term goals exceeded its authority for terms contained in a BART permit. In its appeal, Basin Electric accepted LNB and OFA as BART but objected to the additional permit condition related to long term strategies.

Basin Electric served its Petition for Review before the Environmental Quality Council on EPA, and EPA received this notice of appeal, as indicated by its acceptance of the certified mail forwarding the appeal. Thereafter, EPA chose not to comment or otherwise participate in Basin Electric's appeal and never informed the parties or the Environmental Quality Council that EPA considered Wyoming's BART decision to violate the CAA. In fact, no contention was made, by any person or entity, that the BART permit issued by Wyoming violated the CAA.

After litigation, Basin Electric's appeal was settled. Wyoming agreed to remove the provision related to future

control strategies in exchange for Basin Electric's agreement to reduce emission levels further than those proposed in the original permit and provide even further reductions by the end of 2017. This proposed settlement was presented to the Environmental Quality Council for approval. No persons or entities objected to the proposed settlement, including EPA.

Only after Wyoming's regional haze SIP was submitted to EPA did EPA announce that it found the settlement ''unreasonable'' and something with which it ''disagreed.'' Based upon these assertions, and without demonstrating that the BART permit actually violates the CAA, EPA now proposes to void all of the extensive administrative proceedings, processes, comment periods and permit finality accorded under state law.

This violates the explicit representations EPA made to the United States Supreme Court that decisions to over-ride state technology choices are rarely undertaken and therefore do not pose a threat to state adjudicative processes. In footnote 14 of the *ADEC* decision, the Court quoted EPA for the proposition that EPA has engaged in ''restrained and moderate'' use of its authority to overrule specific technology choices and has never ''asserted authority to override a state-court judgment.'' Based upon this understanding, the majority in *ADEC* dismissed concerns expressed by the dissent about state/federal relations, stating that ''[e]xperience . . . affords no grounding for the dissent's predictions that EPA oversight . . . will 'rewor[k] . . . the balance between State and Federal Governments' and threaten state courts' independence.'' *ADEC,* 540 U.S. at 493 n. 16. With its proposed action here, however, EPA is doing precisely what the dissent in *ADEC* predicted, ignoring the extended contested case process afforded under state law and the final administrative litigation resolution reached under state law.

While Basin Electric's appeal ended short of a court proceeding, the distinction between a litigated judgment in an administrative appeal and a judgment in a state court proceeding is not significant. In both cases, EPA's proposed action fails to respect the cooperative federalism that underlies the CAA in general. Under the RHR deference to state authority is far more compelling than issues related to public health under the BACT program, and so the Supreme Court's holding in *ADEC* that EPA may not require ''recourse to state processes'' is inapplicable to BART decisions. *ADEC,* 541 U.S. at 492. EPA should conduct itself in accordance with the spirit of its representation to the Supreme Court that it has never sought to override a state-court judgment, and should not attempt to override a state BART decision that has been litigated to an administrative conclusion under state law particularly where, as here, EPA never advised the state adjudicators or the parties to the state proceedings that it considered the permit to be invalid under the CAA. EPA could have participated in the State administrative appeal proceeding or at a minimum appeared therein to register an objection to the settlement agreement. Having elected not to do so, EPA should respect the result of the State's process.

Response: EPA disagrees with this comment. As an initial matter, as provided in detail elsewhere in this section and in the docket for this action, we provided feedback to the State in our comment letters on the proposed SIP and in meeting with State and company officials; therefore, the State and companies were aware of our expectations.

That WAQSR Chapter 6, Section 2 has been approved into the SIP does not somehow commit EPA to participate in Wyoming's BART permit process. The Act and the RHR do not require that BART be determined through a permit process that is subject to administrative appeal or through a permit process at all. The SIP-approved provision in Chapter 6, Section 2 for notice to EPA of permit actions meets the requirements of 40 CFR 51.161(d), regarding public procedures for review of *new or modified sources,* not BART sources. Furthermore, nothing in Chapter 6, Section 2 suggests that notice to EPA of a permit process somehow binds EPA to participate in that process.

The commenter provides no statutory, regulatory, or judicial authority to support the proposition that EPA must participate in state administrative or judicial procedures. With respect to state judicial procedures, the Supreme Court has stated: ''[i]t would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court.'' *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 493 (2004). Thus the Court ''decline[d] to read such an uncommon regime into the [CAA].'' *Id.* The commenter's notion that the *ADEC* opinion (which concerned a BACT determination under the PSD program) is inapplicable to BART determinations, merely because BART determination are part of a program to improve visibility rather than public health, finds no support in the *ADEC* opinion or anywhere in the CAA. We elsewhere respond to comments that argue that the language of the CAA itself requires a greater level of deference to states BART determinations.

With respect to the dissent in *ADEC,* that dissent of course does not represent the opinion of the Supreme Court. Nonetheless, EPA is not undoing the State's process through the ''mere stroke of a pen on the Agency's letterhead,'' but instead is acting on the State's regional haze submittal through notice-and-comment rulemaking that is potentially subject to judicial review. Furthermore, EPA is not confusing the CAA with the APA; our authority and duty to review the State's regional haze SIP for compliance with the CAA and the RHR stems from the CAA itself. As we discuss elsewhere, EPA's role in reviewing SIPs differs in many key aspects from that of a court reviewing agency action under the APA.

Under the CAA, states are required to submit SIPS that contain emissions limits necessary to protect visibility, and EPA is required to disapprove of any inadequate SIPs and promulgate FIPs in their place. 42 U.S.C. 7491(b)(2); Section 7410(c)(1)(A). The CAA does not require EPA to participate in state proceedings related to its SIP submission, nor does it preclude EPA from carrying out its statutory duty to disapprove an inadequate SIP if EPA does not participate in state proceedings. The notion that BART determinations are insulated from EPA review simply because the State has an administrative appeal process not only has no support in the Act, it is contrary to the purposes of the Act and EPA's express obligation to approve only SIP submittals that meet the requirements of the Act.

Moreover, any state BART decisions made under an unapproved SIP are not federally enforceable because any SIP ''shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements.'' 42 U.S.C. 7410(k)(3); *see also Gen. Motors Corp.* v. *United States,* 496 U.S. 530, 540 (1990) (holding EPA may bring enforcement action under an existing SIP while a SIP proposal is pending).

Finally, this action does not violate the Tenth Amendment. The Supreme Court has explained that ''where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.'' *New*

York v. *United States,* 505 U.S. 144, 167 (1992); *see also* U.S. Const. Art. I, Section 8, cl. 3 (commerce clause); *id.* Art. VI, cl. 2 (supremacy clause). The commenter does not argue that the CAA is outside of Congress' Commerce Clause authority. Through the SIP/FIP mechanism, the Act offered Wyoming the choice of regulating sources in the State in accordance with the regional haze provisions in the CAA and with rules promulgated by EPA under its CAA authority; thus the Act itself does not violate the Tenth Amendment. With respect to this particular action, our disapproval of Wyoming's regional haze SIP and our FIP compel no action on the part of the State and are not coercive vis-a-vis the State. As explained elsewhere in these responses, EPA has not required Wyoming to adopt specific control measures. Instead, our FIP contains requirements applicable only to some private companies. The Tenth Amendment is not implicated by our action.

Comment: Even if EPA can contravene the state process, it should still require compelling circumstances demonstrating a plain and unambiguous violation of the CAA before it countermands a state proceeding. Such a showing is necessary to preserve the balance between Federal and state governments under the CAA. EPA is undermining the significance and integrity of the State appeals process as well as the State's authority to determine BART. EPA is also making it possible for interested parties, including environmental groups, to ignore their procedural obligation to voice objections under State law because they can wait to raise them when EPA acts on a proposed SIP. EPA chose not to participate in the BART permit process and the resulting appeals, despite knowing that the very NO_X control equipment at issue in the regional haze FIP was being determined. Under the principles of comity, EPA should be barred from now addressing these issues at this late period. Under these circumstances, EPA should not be allowed to raise complaints with a BART permit for the first time in the federal proceeding. Failure to do so diminishes State law and puts parties like Basin Electric into a position where they must pursue State remedies to avoid finality under State law but find that such actions mean nothing in the end under the federal process.

Response: EPA disagrees with this comment. Nothing in the CAA sets some sort of ''compelling circumstance'' standard for disapproval of a SIP. Instead, we have the duty to ensure that regional haze SIP submittals meet the requirements of the Act and the RHR. *See* CAA Section 110(a)(2)(J) (SIP submittals must meet applicable requirements of Part C of title I, including visibility protection). We do not agree that we are prohibited from identifying deficiencies in the Wyoming SIP after the State rulemaking process is complete, and the commenter cites nothing in the Act to the contrary. Furthermore, many of the concerns raised in this action were communicated to the State in our comment letters and in numerous meetings with State officials. With respect to comments we have received from environmental organizations on our proposed action on Wyoming's SIP, the CAA does not require those organizations to participate in state processes.[34] EPA is taking actions specified under the CAA in partially approving and partially disapproving the Wyoming SIP. The CAA also specifies the responsibility of EPA to issue a FIP when states have not met their requirements under the CAA. EPA is promulgating this FIP to fill the regulatory gap created by the partial disapproval. Under the FIP, the State retains its authority to submit future regional haze SIPs consistent with CAA and RHR requirements; we do not discount the possibility of a future, approvable SIP submission that results in the modification or withdrawal of the FIP. This rulemaking does not change the distribution of power between the states and EPA.

Comment: BART applies to specific emission sources and requires consideration of facts applicable to specific source locations. Unlike a rule, or a SIP generally, a BART determination effectively adjudicates the specific rights and legal obligations of individual emissions sources. This typically entitles individual source owners to substantive procedural rights and remedies under state law when a BART determination is made. In Wyoming, for example, each individual source is required to apply for a BART Permit. Wyoming law affords the source being regulated with special opportunities to be heard, both as part of the public review of a permit application and, in the case of a permit, in an adjudicative hearing with opportunities to challenge factual determinations, call and question witnesses, and present evidence. When an applicant applies for a BART construction permit, the applicant is afforded the opportunity to present its own views and responses to comments to the state agency. If a permit is issued or denied, the applicant can appeal the permit decision to the Environmental Quality Council, which has statutory authority to amend, grant, modify, or deny the permit. Wyo. Stat. Section 35–11–802. This proceeding is conducted as a contested case, affording the applicant the right to cross-examine the Environmental Quality Council's technical experts regarding their BART assumptions and conclusions.

The applicant also can call its own experts and witnesses. Wyo. Dep't of Envtl. Quality Rules and Regulations, Wyo. Admin. Code ENV PP Ch. 2 Sections 1–14. With these procedures, BART permit applicants can challenge the cost estimates and assumptions underlying a BART permit decision, including making a showing, as Basin Electric does here by comment only, that EPA's consultants have ignored critical site-specific conditions.

EPA's effort to impose BART determinations by federal rulemaking impermissibly deprives source owners of these substantive procedural rights afforded under State law. This is one reason courts have taken a strong stance against EPA imposing specific control technologies through partial approval of a SIP. Leaving site-specific decisions in the hands of the states provides state-sponsored procedural rights for the individually regulated sources. *See Virginia,* 108 F.3d at 1406–10; *Michigan* v. *Thomas,* 805 F.2d 176, 186 (6th Cir. 1986); *Bethlehem Steel Corp.,* 742 F.2d at 1035–37 (all holding that EPA may not render a state SIP more stringent than intended by the state by partial SIP approval or imposition of control technologies). A BART determination requires consideration of complex, case-specific control technologies and makes fact-dependent determinations for individual named sources, which effectively makes the federal BART determination an administrative order directed specifically at Basin Electric rather than a rule generally applicable to the public. Under these circumstances, EPA cannot order specific emission limits and consequent expensive control technologies without affording Basin Electric a hearing at which it can cross examine EPA's consultants. Basin Electric must also be given an opportunity to challenge EPA's interpretation of the facts. When EPA moves from a quasi-legislative function to a quasi-judicial function, as it has by making fact-based determinations for specific, named sources, it must provide the required procedural protections for those affected by its actions. *See*

[34] In contrast, elsewhere in the Act Congress has made it explicit that participation in state processes is required in order to raise objections with EPA. See CAA section 504(b)(2).

Londoner v. *City & Cnty. of Denver,* 210 U.S. 373, 386 (1908) (requiring an agency to provide notice and an adjudicative hearing for individuals suffering specific injury from an agency rule); *compare Amoco Oil Co.* v. *EPA,* 501 F.2d 722, 734–35 (D.C. Cir. 1974) (agency action was quasi-legislative because it did not rely on ''findings of fact'' and evidence to make determinations for a single source).

One administrative law expert designated the distinction between rule making and adjudication as ''perhaps the most critical distinction in all of administrative law.'' Gary Lawson, *Federal Administrative Law* 10 (American Casebook Series, Thomson-West 4th ed. 2007). It is an important distinction because it separates agency decisions that function as policy from those that make situational determinations. ''A plain[ ] instance of administrative adjudication occurs where an administrative agency at one and the same time makes a rule and applies it to a concrete situation . . . The essential difference between legislation and adjudication is not that one looks to the future and the other to the past . . . What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.'' John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 16–21 (Harvard University Press 1927), *quoted in* Gary Lawson, *Federal Administrative Law* 10–11(American Casebook Series, Thomson-West 4th ed. 2007).

In the Proposed Rule, EPA makes specific factual findings about individual sources. EPA relies on its expert consultant Andover to draw specific factual conclusions about retrofit construction costs for Laramie River, yet it affords Basin Electric no opportunity to confront its expert over the Andover Report's error-filled findings. In order to provide due process, a specific party like Basin Electric who is singled out and subjected to EPA's fact-based determinations must be allowed ''the right to support his allegations by argument however brief[,] and, if need be, by proof, however informal.'' *Londoner,* 210 U.S. at 386. In the case of Laramie River, the requirement for a hearing is especially strong because ''[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' '' *Goldberg* v. *Kelly,* 397 U.S. 254, 262–63 (1970) (citing *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 168 (1951)).

EPA must afford these procedural rights to Basin Electric if EPA is going to assume control over site-specific BART determinations, rather than leave them to the states as Congress intended. Section 169A's directive that BART be determined by the states permits states to afford individual emissions sources the procedural and other rights that due process requires for site-specific regulation, and EPA must afford these same rights to source owners if it is going to federalize the BART program by rejecting all state determinations with which its technical consultants disagree.

Response: EPA disagrees with this comment. EPA's procedures did not deprive Basin Electric of due process. First, the comment confuses the issues by arguing that under State law Basin Electric has ''substantive procedural rights'' and that EPA's procedures somehow deprived Basin Electric of these. But due process under the Fifth Amendment does not require EPA to give exactly the same process that the State gave. The commenter provides no authority for the existence of something called a state ''substantive procedural right'' that the United States is bound by the Fifth Amendment to respect.[35] Instead, federal due process protects substantive fundamental rights and procedural rights if the claimant has a constitutionally protected life, liberty, or property interest. *See* U.S. Const., Amend. V (''nor be deprived of life, liberty, or property, without due process of law''). That the comment attempts to make a state procedure into a constitutionally protected interest by calling it a ''substantive procedural right'' is of no avail; the comment identifies no attribute of the state procedure that makes it into a constitutionally protected ''life, liberty, or property'' interest under either the text of the Fifth Amendment or the case law interpreting that Amendment. *See Cleveland Bd. Of Educ.* v. *Loudermill,* 470 U.S. 532, 541 (1985) (''[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.''). Nor does Basin Electric have a protected interest in the *outcome* of the State BART permit process. There is no ''legitimate claim of entitlement'' to that outcome, *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972), as the State's BART determination was always subject to review by EPA under the CAA. In the end, what the Fifth Amendment does potentially protect is Basin Electric's property interest itself, not the State procedure. As we now explain, EPA's procedures were sufficient to satisfy the requirements of due process with respect to Basin Electric's property interest.

CAA section 307(d) specifies the procedures that EPA is required to follow in promulgating a FIP. Section 307(d) does not require adjudicatory hearings, nor does it require EPA to allow for cross-examination of EPA's consultants.[36] Additionally, the Administrative Procedure Act only requires adjudicatory hearings if a particular statute specifies that a rule must be made ''on the record after an opportunity for an agency hearing.'' [37] No such requirement is contained in section 307(d).[38] The Supreme Court has explained that courts face an extremely high burden in order to impose additional procedures beyond those specifically required by statute because ''unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.'' [39] EPA followed the

[35] The cases cited by the commenter, *Virginia,* 108 F.3d at 1406–10; *Michigan* v. *Thomas,* 805 F.2d 176, 186 (6th Cir. 1986); *Bethlehem Steel Corp.,* 742 F.2d at 1035–37, lack any reference to a notion of ''state substantive procedural rights'' or ''state-sponsored procedural rights.'' The opinion in *Virginia* concerns the roles EPA and states play under the Act; the opinion does not discuss due process for owners of individual sources. The opinion in *Michigan,* noting that EPA's action had a rational basis, briefly dismisses a claim that the action violated the due process clause of the Fifth Amendment by discriminating against business and industry. *Michigan,* 805 F.2d at 185 n.1. Although the opinion does not make it explicit, the claim there thus seems to have been equal protection as incorporated into the Fifth Amendment, not procedural due process. *See Bolling* v. *Sharpe,* 347 U.S. 497 (1954). *Michigan* is not on point. Finally, the dicta in *Bethlehem Steel* speculates that, in the case of a FIP, ''EPA might have had to give interested persons an opportunity to submit oral as well as written comments,'' *Bethlehem Steel,* 742 F.2d at 1032, which EPA did in this case. The dicta, which in any case is not binding, does not say that EPA's experts must be available for cross-examination or that EPA is bound by state procedures or that the Fifth Amendment to the U.S. Constitution recognizes state ''substantive procedural rights.''

[36] *See* 42 U.S.C. 7607(d)(5).

[37] *See* 5 U.S.C. 553(c); *see also U.S.* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 757 (1972).

[38] *See* 42 U.S.C. 7607(d)(5); *see also Anaconda Co.* v. *Ruckelshaus,* 482 F.2d 1301, 1306 (10th Cir. 1973).

[39] *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.,* 435 U.S. 519, 548 (1978).

procedures required by Congress in the CAA and EPA believes that no additional proceedings are warranted.

Moreover, Congress specifically contemplated and rejected a cross-examination requirement for public hearings in section 307.[40] The House bill contained an opportunity to cross-examine those who made oral presentations at the public hearing. During Conference Committee, this was deleted and replaced with a requirement that the rulemaking record remain open for thirty days after public hearing to allow interested parties to submit rebuttal and supplemental information.[41]

The comment cites *Goldberg* v. *Kelly,* 397 U.S. 254, 262–63 (1970) and argues that Basin Electric, like the welfare recipient in *Goldberg,* has an especially strong claim to an evidentiary hearing prior to EPA's final rulemaking because Basin Electric may be ''condemned to suffer grievous loss.'' The comment fails to explain why the private interest of Basin Electric here is identical to the *Goldberg* welfare recipient's private interest in an evidentiary hearing before the termination of welfare benefits. The comment also does not examine the factors set out in *Mathew* v. *Eldridge,* 424 U.S. 319 (1976),[42] for determining what due process requires, and so does not provide any reason for EPA to think that the procedures here were inadequate. In particular, the comment provides no basis to think that EPA's procedures created a serious ''risk of an erroneous deprivation'' of Basin Electric's interest and that there would be any ''probable value'' to cross-examination. With respect to the alleged errors referred to in the comment, Basin Electric has made its arguments as to why they are errors and EPA has responded why they are not. If Basin Electric thinks EPA's responses are inadequate, then Basin Electric may seek judicial review of EPA's action under section 307(b) of the Act. The risk of erroneous deprivation appears small, and Basin Electric's comment gives no reason to think otherwise. Basin Electric's comment also does not identify any particular value to cross-examination in this context. As the comment admits, the matters here are ones of technical judgment; they are not (for example) eyewitness accounts that might benefit from cross-examination.

EPA also notes that the comment fails to discuss ''the Government's interest, including . . . the fiscal and administrative burdens'' that cross-examination would entail. *Eldridge* alternatively identified this third factor as ''the public interest.'' *Eldridge,* 424 U.S. at 347. In considering the burdens imposed by a full adjudicatory hearing on the Government and the public, the Tenth Circuit Court of Appeals stated (albeit before *Eldridge,* so not in the context of applying the *Eldridge* factors):

> Unending procedure could be produced by an adjudicatory hearing. This could bring about unending delay which would not only impede but completely stifle congressional policy. We do not, of course, condemn the trial court's concern for the rights of [the petitioner]. Those rights are important and the court should be sensitive to them, but those rights are not of such magnitude as to overcome congressional policy and the rights of the remainder of the community.

Anaconda Co. v. *Ruckelshaus,* 482 F.2d 1301, 1307 (10th Cir. 1973). The comment gives EPA no reason to think otherwise.

With respect to the comment's invocation of the *BiMetallic-Londoner* distinction between rulemaking and adjudication, it is not clear that *Londoner* applies here, where the interests of many parties are at stake. *See Anaconda,* 482 F.2d at 1306 (''The fact that Anaconda alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory, for there are many other interested parties and groups who are affected and are entitled to be heard. So the guidelines enunciated by Mr. Justice Holmes in *Bi-Metallic Investment Co.* v. *State Board of Equalization* are not applicable.'') (citation omitted). Even if the distinction does apply, due process does not *per se* require a full adjudicatory hearing. As the comment admits, what due process does require is that a person ''have the right to support his allegations by argument, however brief: and, if need be, by proof, however informal.'' *Londoner* v. *City & Cnty. of Denver,* 210 U.S. 373, 386 (1908). Thus the ''core of due process is the right to notice and a meaningful opportunity to be heard.''[43] With respect to whether a full evidentiary hearing is required, ''differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances.'' *Eldridge,* 424 U.S. at 348 (citations and quotations omitted).

EPA believes Basin Electric was afforded a meaningful opportunity to be heard and present evidence to EPA in support of its position. EPA notified the public of its proposed rule, held a public hearing, and accepted public comments for a period of 60 days.[44] In an effort to provide a greater opportunity for public comment on the proposed rule, EPA held two additional public hearings and extended the comment period to 75 days, which goes beyond the procedures required by the CAA.[45] Basin Electric submitted extensive comments prior to the first comment deadline, participated in two public hearings, and submitted additional comments during the extended public comment period.[46] Basin Electric took full advantage of its opportunity to be heard and was not denied due process.

Comment: Section 169A requires the State to take into consideration five different factors when making its BART determination. 43 U.S.C. 7491(g)(2). But these factors ''were meant to be considered together'' to arrive at a *single* judgment committed to the State: A BART emission limit. *American Corn Growers,* 291 F.3d at 6. Moreover, only Wyoming—not EPA—is entitled to determine the weight and significance to assign costs, feasibility, and visibility improvements. 70 FR 39123 (''The State makes a BART determination based on the estimates available for each criterion, and as the CAA does not

[40] *Kennecott Corp.* v. *EPA,* 684 F.2d 1007, 1020 (D.C. Cir. 1982).

[41] *See* H.R. Rep. No.95–564, 95th Cong. (1977).

[42] ''[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'' *Eldridge,* 424 U.S. at 335.

[43] *LaChance* v. *Erickson,* 522 U.S. 262, 266 (1988).

[44] Implementation Plans; Approvals, Disapprovals and Promulgations: Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze June 10, 2013 Docket EPA–R08–OAR–2012–0026–0093.

[45] Air Quality State Implementation Plans; Approvals, Disapprovals and Promulgations: Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Public Hearings Jul. 8, 2013 Docket EPA–R08–OAR–2012–0026–0098; *see* 42 U.S.C. 7607(d)(5).

[46] Basin Electric Power Cooperative Comments, Aug. 6, 2013 Docket EPA–R08–OAR–2012–0026–0058; Public Comment from Basin Electric Email Aug. 9, 2013 Docket EPA–R08–OAR–2012–0026–0148; Transcript from July 26, 2013 Hearings in Casper, Wyoming Aug. 8, 2013 Docket EPA–R08–OAR–2012–0026–0108 pp. 48–83; Transcript from June 24, 2013 Hearings in Cheyenne, Wyoming Aug. 15, 2013 Docket EPA–R08–OAR–2012–0026–0100 pp. 62–67; Additional Public Comment from Basin Electric Laramie River Station BART CALPUFF Modeling Analysis Aug. 26, 2013 Docket EPA–R08–OAR–2012–0026–0227.

specify how the State should take these factors into account, the States are free to determine the weight and significance to be assigned to each factor.''); *see also* 40 CFR Part 51, App. Y, Section IV.D.5.

By applying a different assessment of costs and visibility than those employed by Wyoming in its BART determination, and assuming that these assessments mandate a different BART outcome, EPA's proposed FIP rejects the State's determinations on cost, feasibility, and visibility improvement without considering whether, taken together, the five statutory factors would compel a different result than the one reached by Wyoming. The net result is a decision imposing a different BART choice than that selected by the State by splitting the statutory factors and giving them separate and independent determinative significance—the same legal error EPA made in *American Corn Growers.* The ''splitting of the statutory factors is consistent with neither the text nor the structure of the statute.'' 291 F.3d at 6.

Wyoming must therefore be afforded an opportunity to reconsider its BART determination before EPA imposes a FIP. This is necessary to preserve State primacy in the BART determination. States ''determine what is too costly (and what is not) for a particular source.'' *Am. Corn Growers,* 291 F.3d at 6–7. The actual BART determination flows not from any one of the statutory factors, but instead from consideration of all of them together. That is why it is erroneous for EPA to impose its own BART choice without explaining how it reached that choice upon consideration of all five statutory factors. If EPA acts to correct alleged errors in the State's cost assessment or visibility modeling, EPA must remand the statutory evaluation back to the State. Section 110(c) contemplates that States should be given an opportunity to correct any ''deficiencies,'' and this statutory opportunity should not be taken from the State as a result of self-imposed consent decree deadlines. Doing so destroys State primacy in the BART determination.

It also results in a BART determination from EPA that is not informed and explained by an independent assessment of the five statutory factors. EPA's failure to remand the BART determination back to the State therefore results in neither the State nor EPA making a BART assessment that considers all of the statutory factors together. While Basin Electric acknowledges that the Tenth Circuit Court of Appeals recently reached a different conclusion in *Oklahoma* v. *EPA,* 723 F.3d 1201 (10th Cir. 2013), that case is not yet final and that Court was not presented with, and did not consider, the fundamental problem associated with EPA's effort to make one of the five statutory factors outcome determinative. EPA cannot cause an outcome in which no agency has actually complied with the statute, which is what happens when EPA simultaneously disapproves the State's BART assessment on one or two statutory factors and then imposes a different BART assessment based upon cost and visibility factors combined with the State's prior consideration of the other factors, as EPA does here. This is not a procedural error, but rather an error that results in no agency—neither the State nor EPA—actually complying with the statute by considering all five statutory factors together before arriving at a BART emission limit.

Response: EPA does not agree with this comment. The RHR and the BART Guidelines allow the reviewing authority (State, Tribe, or EPA) the discretion to determine how to weigh and in what order to evaluate the statutory factors (cost of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology), as long as the reviewing authority justifies its selection of the ''best'' level of control and explains the CAA factors that led the reviewing authority to choose that option over other control levels.[47] In this action, having disapproved the State's BART determinations for NO_X at five units, ''all of the rights and duties that would otherwise fall to the State accrue instead to EPA.'' [48] This includes a significant degree of discretion in deciding how to weigh the five factors, so long as that weighing is accompanied by reasoned explanation for adopting the technology selected as BART, based on the five factors, and in accordance with the BART Guidelines. EPA has provided a detailed explanation of our BART evaluation process and five-factor analyses in our proposal, and elsewhere in this final notice. We have weighed the potential energy and non-air environmental quality impacts of the various control options along with the other statutory factors in our BART analyses. We have not, as the commenter surmises, approved the State's assessment of certain factors and disapproved the assessment of others, replacing just the factors we have disapproved. Instead, for those NO_X BART determinations we are disapproving, we have disapproved them in their entirety. Then EPA independently assessed and weighed the five factors. That we adopted the State's assessment of certain factors as our own does not change this. Thus the split in authority that the commenter suggests simply has not occurred.

We also disagree that our proposal is inconsistent with the *American Corn Growers* decision. In *American Corn Growers,* the petitioners challenged the original RHR because, among other things, the RHR treated one of the five statutory factors differently than the others by requiring states to consider the degree of visibility improvement from imposing BART on a group of sources rather than on a source-specific basis.[49] The court concluded that such a requirement could force states to apply BART controls at sources without evidence that the individual sources contributed to visibility impairment at a Class I area, which encroached on states' primary authority under the regional haze provisions to determine which individual sources are subject to BART and what BART controls are appropriate for each source.[50] Therefore, the court vacated the visibility improvement part of the original RHR as contrary to the statute.[51] Contrary to some commenters' suggestions, however, the *American Corn Growers* decision did not address EPA's authority to reject a state's BART determinations for failure to conform to the CAA, the RHR, or the BART Guidelines.

Finally, as explained elsewhere in this final rule, we have the authority to promulgate a FIP concurrently with a disapproval action.

Comment: EPA's FIP is subject to APA review. Accordingly, it cannot withstand judicial scrutiny if it is arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See* 5 U.S.C. 706(2)(A); *Olenhouse,* 42 F.3d at 1574. More generally, a court will set it aside ''if the agency relied on factors which Congress has not intended for it to consider, entirely failed to

[47] See BART Guidelines, 40 CFR Part 51, appendix Y, section IV.E.2.

[48] Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993).

[49] 291 F.3d at 5–9.

[50] Id. at 7–8.

[51] EPA revised the RHR to address the court's decision in *American Corn Growers* at the same time as we promulgated the BART Guidelines. 70 FR 39104 (July 6, 2005). The revised RHR and the Guidelines were upheld by the D.C. Circuit in *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333 (D.C. Cir. 2006).

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'' *State Farm,* 463 U.S. at 43.

A court reviewing agency action under the APA must ''ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.'' *Olenhouse,* 42 F.3d at 1574 (citing *State Farm,* 463 U.S. at 43) (footnote omitted). A reviewing court also must review the agency's explanation to ''determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.'' *Id.* (citing, *inter alia, Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971)). The court '''should not attempt itself to make up for . . . deficiencies''' in the agency's reasoning and ''may not supply a reasoned basis for the agency's action that the agency itself has not given.'' *Id.* at 1574–75 (quoting *State Farm,* 463 U.S. at 43) (emphasis removed).

As a result, '''an agency's action must be upheld, if at all, on the basis articulated by the agency itself,'' and ''the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record.'' *Id.* at 1575 (quoting *State Farm,* 463 U.S. at 50). In its decision, ''[t]he agency must make plain its course of inquiry, its analysis and its reasoning.'' *Id.* Moreover, its action must be ''supported by the facts in the record.'' *Id.* This means the action must be supported by ''substantial evidence,'' *i.e.,* '''enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact.''' *Id.* (citation omitted). In addition to providing a basis for invalidating the agency action, an agency's failure to fully explain and support its reasoning warrants a court's grant of less deference to the agency's decisions. *See, e.g., Achernar Broad. Co.* v. *FCC,* 62 F.3d 1441, 1447 (D.C. Cir. 1995) (''no deference is due when the agency has stopped shy of carefully considering the disputed facts''); *NLRB* v. *P*I*E Nationwide, Inc.,* 923 F.2d 506, 518 n.16 (7th Cir. 1991) (''deference given to an agency is not granted freely, it is purchased; the agency must exercise its touted expertise and ''explain the rationale and factual basis for its decision'') (citation omitted).

Although a court generally will defer to an agency's experts when the agency acts within its area of expertise, a court will not do so and will invalidate the agency's action where its expert's decisions were arbitrary and capricious. *See, e.g., Garvey,* 256 F.3d at 1036 (agencies can rely on their own experts only ''so long as their decisions are not arbitrary and capricious'') (citation omitted). *See also NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (''[W]e do not defer to the agency's conclusory or unsupported suppositions.'') (citation omitted); *Brower v. Evans,* 257 F.3d 1058, 1067 (9th Cir. 2001) (''The deference accorded to an agency's scientific or technical expertise is not unlimited. The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned.'') (citation omitted); *Nat. Resources Defense Council,* 725 F.2d at 768, 771 (the court owed EPA no deference where the agency ''complete[ly] fail[ed] to consider the criteria that should inform [its decision]''). Similarly, an agency can rely on a model ''only so long as it 'explains the assumptions and methodology used in preparing the model' and 'provides a complete analytical defense' should the model be challenged.'' *Appalachian Power Co.* v. *EPA,* 249 F.3d 1032, 1052 (D.C. Cir. 2001) (citation and brackets omitted). *See also Sierra Club* v. *Costle,* 657 F.2d 298, 333 (D.C. Cir. 1981) (although computer modeling undoubtedly ''is a useful and often essential tool,'' an ''agency must sufficiently explain the assumptions and methodology used in preparing the model'' and must ''provide a complete analytic defense of its model (and) respond to each objection with a reasoned presentation'') (internal quotation marks omitted), *rev'd on other grounds,* 463 U.S. 680 (1983); *id.* (there must be ''a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results''). Here, in promulgating its FIP, EPA was required to do the same thing Wyoming did: determine BART by ''tak[ing] into consideration'' the five statutory factors, including the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility that may reasonably be anticipated to result from the use of the technology. CAA Section 169A(g)(2), 42 U.S.C. 7491(g)(2). As the D.C. Circuit explained in *American Corn Growers,* ''the factors were meant to be considered together'' in determining BART, as ''[t]he language of section 169A(g)(2) can be read in no other way.'' 291 F.3d at 6.

Accordingly, in order to comply with the CAA and withstand APA review, EPA must fully explain how it assessed and weighed the five BART factors together, and it must support that explanation with record facts. EPA has failed to do so. Additionally, the same regulations EPA promulgates for state BART determinations must also apply to BART determinations made by EPA. *See* CAA Section 169A(b)(2)(A), 42 U.S.C. 7491(b)(2)(A). Indeed, it would be arbitrary and capricious for EPA to require a state to follow certain specific guidelines in making a BART determination, yet to not itself follow those same guidelines in making that same determination after taking it out of the state's hands. Moreover, EPA has suggested that the BART Guidelines and Cost Manual are mandatory provisions that must be followed in order to comply with the CAA.

Response: We disagree with this comment. As detailed elsewhere in this document and documented in the supporting record, EPA applied the BART statutory factors and BART Guidelines to each and every BART unit that is covered under this rulemaking; fully considered all significant comments submitted on the proposed notices and incorporated those comments as appropriate; provided basis for the decisions; applied models that are specified in the BART Guidelines (thus, the opportunity for commenters to challenge the specified models has long passed); developed and provided detailed explanations regarding EPA's model inputs and settings; and rationally applied the modeling results to the final determinations in applying the BART and reasonable progress factors. The comment does not identify any deficiency in any portion of this.

Comment: Wyoming developed a SIP that established reasonable progress toward meeting the national goal for regional haze as required under the CAA Section 169A(a)(1). EPA's establishment of a 2064 goal and glide path requires incremental visibility improvement for successive planning periods. EPA also clearly explains in these requirements that the glide path and 2064 target date are not binding. This provides considerable latitude to the individual states that are responsible to develop a regional haze SIP that makes reasonable progress in a way that works to achieve the visibility goals over time.

The State developed and submitted a plan that would make substantial progress in reducing haze at the affected Class I areas. The State followed the process in the EPA's Regional Haze

Guidelines, yet because it came to a different conclusion than EPA, the plan was rejected and replaced with EPA's FIP.

By rejecting the State's reasonable approach, EPA has ignored its own requirements and guidance. EPA's issuance of a FIP not only ignores the flexibility and authority granted the State, it also ignores EPA's guidance for establishing reasonable control requirements.

Response: EPA disagrees with this comment. While the RHR does not require states to achieve the URP, when a state's selected RPGs do not meet the URP, the state must demonstrate, based on the four reasonable progress factors, that meeting the URP is not reasonable and that the selected RPGs are reasonable. 40 CFR 51.308(d)(1)(ii). As discussed elsewhere, the State did not appropriately consider the four reasonable progress factors for Dave Johnston Units 1 and 2, and to the extent that the State relied on its BART determinations to show reasonable progress for those sources, we have disapproved some of those BART determinations. While the comment states that EPA ''ignored its own requirements and guidance,'' the comment does not cite any particular requirement that EPA purportedly violated.

Comment: The EPA proposal is deficient in large measure because the EPA has identified what it views as deficiencies in the Wyoming SIP and, rather than ordering reconsideration of all relevant factors with improved data, has created a FIP that suffers from analytical errors and arrogates the EPA's role in development and review of SIPs. If the EPA was convinced Wyoming's cost estimates were in error, it should have directed corrections, rather than substituting other flawed data and its own judgment. Indeed, it is apparent the EPA is not committed to maintaining the CAA's deference to states' authority to formulate workable haze plans. Otherwise, the EPA would have required Wyoming to correct perceived cost estimate errors and subsequently reevaluate BART factors. The EPA instead, substituted its own errors and performed its own evaluation in pursuit of its own goals.

Another commenter argued that EPA should not impose a FIP until it has issued a final rule disapproving the Wyoming regional haze SIP. 42 U.S.C. 7410(c)(1)(B). EPA should first conduct a rulemaking and take public comment on the Wyoming regional haze SIP submission, issue its determination on the regional haze SIP, and then seek input from the State. (*See* 42 U.S.C. 7410(c)(1)(B); *see also* 42 U.S.C. 7607(d)(B) (rulemaking provisions apply to ''the promulgation or revision of an implementation plan by the Administrator under section 7410(c)'') Otherwise, EPA removes the State from its assigned role as the one determining BART.

The facts here illustrate this problem. EPA initially agreed with Wyoming's BART determinations for Naughton Units 1 and 2, and Dave Johnston Unit 3. EPA then reversed itself, supposedly on the basis of new cost and visibility information. Without offering Wyoming any chance to review the new information and issue a new BART determination, EPA disapproved Wyoming's BART determination for these units, and instituted new BART determinations for these units through a regional haze FIP. EPA's failure to provide Wyoming an opportunity to review this new information, and address it through a revised BART determination, violates the applicable CAA statutes.

The CAA defines a FIP as a plan (or portion thereof) promulgated by the (EPA) Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a SIP. 42 U.S.C. 7602(y). Until EPA first assesses the Wyoming regional haze SIP, develops a proposed rule to approve or disapprove the Wyoming regional haze SIP, solicits and receives public comment on that proposed rule, considers the comments and information, and takes final action on whether (and to what extent) to approve the Wyoming SIP, EPA cannot know whether there is a ''gap'' in the Wyoming regional haze SIP that needs to be filled or whether (and to what extent) there is an ''inadequacy'' in the Wyoming regional haze SIP that needs to be corrected. *Id.* Moreover, EPA's failure to obtain public comments prior to proposing a regional haze FIP deprives Wyoming of an opportunity to correct any ''deficiencies'' identified by EPA. Here, where EPA claims to have obtained new cost and visibility information but did not allow Wyoming an opportunity to review and act on the new information, EPA's final determination regarding the Wyoming regional haze SIP ignores the State's authority under the CAA (including the regulatory programs implicated by CAA Section169A) to design and implement plans to control air pollution control within its borders. (*See* 42 U.S.C. 7401(a)(3).) Therefore, EPA illegally seeks to impose its regional haze FIP and should withdraw the same.

Earlier comments argued that EPA cannot impose a regional haze FIP until it has issued a final rule disapproving Wyoming's regional haze SIP. 42 U.S.C. 7410(c)(1)(B) mandates that disapproval of all or part of a SIP is a prerequisite to promulgation of a FIP. EPA must first conduct a rulemaking and take public comment on Wyoming's regional haze SIP submission, issue its determination on the regional haze SIP, and then proceed, or not, with promulgation of a regional haze FIP. (See 42 U.S.C. 7410(c)(1)(B); see also 42 U.S.C. 7607(d)(B) (rulemaking provisions apply to ''the promulgation or revision of an implementation plan by the Administrator under section 7410(c)'')

Response: We disagree with this comment. We have the authority to promulgate a FIP concurrently with a disapproval action. Nowhere in the CAA is there language that limits EPA's authority to simultaneously propose a FIP and propose disapproval of a state's SIP where there has been a prior finding of a failure to submit. This timing for FIP promulgation is authorized under CAA section 110(c)(1). As has been noted in past FIP promulgation actions, the language of CAA section 110(c)(1), by its terms, establishes a two-year period within which we must promulgate the FIP, and provides no further constraints on timing. *See, e.g.,* 76 FR 25178, at 25202. Wyoming failed to submit the 40 CFR 51.309(g) plan elements by December 17, 2007, as required under the CAA and our implementing regulations. Two years later, Wyoming still had not submitted these required plan elements. When we made the finding in 2009 that Wyoming had failed to submit these regional haze SIP elements (*see* 74 FR 2392), that created an obligation for us to promulgate a FIP by January 2011. We are exercising our discretion to promulgate the FIP concurrently with our disapproval action because of the applicable statutory deadlines requiring us at this time to promulgate regional haze BART determinations to the extent Wyoming's BART determinations are not approvable. In these concurrent SIP/FIP actions, if comments or other information cause us to reconsider portions of our proposed disapproval, and instead approve additional portions of Wyoming's SIP, we can readily adjust our FIP accordingly by not finalizing the FIP portions that are no longer needed, as, indeed we are doing in this case. Thus, the supposed procedural problem the comment identifies simply does not exist.

With respect to the argument that the CAA requires EPA, before promulgating a FIP, to give additional opportunities to Wyoming to address the deficiencies that EPA has identified, in fact the

opposite is true. Under section 110(c)(1) of the CAA, EPA must promulgate a FIP within 2 years of a finding of failure to submit a required SIP submittal. As explained above, the requirement for a FIP promulgation in today's action was triggered by a finding published on January 15, 2009 (74 FR 2392), that Wyoming (among other states) had failed to make a submittal to address the requirements of 40 CFR 51.309(g). Thus, EPA had an obligation to promulgate a FIP for the requirements of 40 CFR 51.309(g) by January 15, 2011, unless the State submitted and EPA approved a SIP addressing the deficiency. Although we are approving portions of Wyoming's SIP that meet the requirements of 51.309(g), we are disapproving other portions and, therefore, are still under an obligation to promulgate a FIP for those portions. In considering a similar argument to that made by the commenter, the Tenth Circuit Court of Appeals has stated:

> Once the EPA issued findings that Oklahoma failed to submit the required SIP under the Regional Haze Rule, the EPA had an obligation to promulgate a FIP. The statute itself makes clear that the mere *filing* of a SIP by Oklahoma does not relieve the EPA of its duty. And the petitioners do not point to any language that requires the EPA to delay its promulgation of a FIP until it rules on a proposed SIP. As the EPA points out, such a rule would essentially nullify any time limits the EPA placed on states. States could forestall the promulgation of a FIP by submitting one inadequate SIP after another.

Oklahoma v. *EPA,* 723 F.3d 1201, 1223 (10th Cir. 2013).

Finally, as explained elsewhere, under the FIP, the State retains its authority to submit future regional haze SIPs consistent with CAA and RHR requirements; which may result in the modification or withdrawal of the FIP.

Comment: The CAA and the RHR provide substantial discretion to states to determine how best to make reasonable progress toward achieving natural visibility conditions in designated areas. Reasonable progress—the touchstone of the regional haze program—is a flexible benchmark. *See* 42 U.S.C. 7491(g)(1). In recognition of this overarching flexibility and the need to account for local conditions, Congress directed EPA to allow states discretion in how they determine the BART for improving visibility. *Id.* Section 7491(b)(2)(A); *Am. Corn Grower Ass'n* v. *EPA,* 291 F.3d 1, 8 (D.C. Cir. 2002) (''Congress intended the states to decide which sources impair visibility and what BART controls should apply to those source.''); *see also* 40 CFR 51.308(e)(1)(ii)(A).

Against this backdrop of state discretion, the CAA requires SIPs to include: generally, ''such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal [of natural visibility conditions in national parks and wilderness areas],'' 42 U.S.C. 7491(b)(2); ''a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal,'' *id.* Section 7491(b)(2)(B); and more specifically, a plan for particular sources to ''procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology,'' *id.* Section 7491(b)(2)(A).

Response: The CAA gives states substantial but not unfettered discretion in determining BART and reasonable progress. We have already largely addressed the assertions in this comment in our responses to comments on our legal authority. Furthermore, as a hypothetical example, EPA would not defer to a state determination that the remaining useful life of a source is one year if relevant evidence indicates the remaining useful life is 20 years. Limits on state discretion are inherent in the CAA and our regulations; otherwise, states would be free to reach decisions that are arbitrary and capricious or inconsistent with the purpose behind the CAA and EPA's regulations. As we have stated, while we have approved much of Wyoming's SIP submittal, those elements which we have disapproved and for which we are finalizing a FIP thwart the goals stated by Congress in CAA section 169A and underlying the RHR. Those statutory and regulatory provisions cannot be simply dismissed under the mantle of state discretion.

Comment: On May 28, 2009, Wyoming published its BART application analyses for the PacifiCorp and Basin Electric facilities subject to BART. Wyoming solicited public comments on the analyses and to that end held public hearings. EPA commented on Wyoming's analyses on August 3, 2009. EPA was fully aware of Wyoming's BART proposals, but, at that time EPA gave no indication that Wyoming's BART proposals violated the CAA or were unreasonable.

Both PacifiCorp and Basin Electric ultimately challenged Wyoming's BART determinations before the Wyoming Environmental Quality Council. *See* Appeal & Pet. for Review of BART Permits, *In re BART Permit Nos. MD–6040 and MD–6042,* No. 10–2801 (Wyo. Envtl. Quality Council Feb. 26, 2010) (PacifiCorp Petition); Appeal & Pet. for Review, *In re Basin Electric Power Coop.,* No. 10–2802 (Wyo. Envtl. Quality Council March 8, 2010) (Basin Petition). The Environmental Quality Council is an independent administrative body charged with adjudicating issues arising under Wyoming environmental law, including BART determinations. *See* Wyo. Stat. Ann. Sections 35–11–111, 112.

Both Basin Electric and PacifiCorp served their petitions for review on EPA Region 8. EPA was again fully apprised of Wyoming's final BART decisions, as well as the appeals of those decisions. EPA elected not to participate in those proceedings, and, again, provided no indication that EPA viewed Wyoming's BART decisions as invalid.

After filing motions for summary judgment, PacifiCorp and Basin Electric both ultimately settled their litigation with the State. The Environmental Quality Council approved the settlements after providing an opportunity for public comment. EPA did not comment on the settlement agreements. Because no aggrieved person appealed the Council's decision approving the settlements, the permit decisions became final by operation of law. Wyoming therefore incorporated the BART permits into its SIP.

Years later, when EPA proposed action on Wyoming's SIP, EPA raised for the first time its disagreement with the BART decisions that PacifiCorp, Basin, and Wyoming had already litigated to conclusion. Because EPA had the opportunity to participate in the litigation and elected not to, EPA is now precluded from collaterally attacking those permit decisions. *See, e.g., ADEC,* 540 U.S. at 490 n.14. To conclude otherwise—that EPA can forgo participation in state adjudications only to later attack the conclusions of those state processes—is to give EPA the power to nullify state court judgments. *Id.* at 1015 (Kennedy, J., dissenting). Congress did not intend to so empower EPA to turn federalism on its head through the regional haze program.

Response: EPA disagrees with this comment. First, the comment does not identify any way in which EPA is precluded from exercising its authority and duty under the CAA to ensure that SIP submittals meet the requirements of the Act. The notion that a state BART determination is insulated from the requirements of the Act merely because the state has an administrative appeal process is contrary to the Act itself as well as the Supremacy Clause of the U.S. Constitution. Had Congress wanted to require EPA to participate in state rulemaking or permit processes, Congress would have explicitly stated this in the Act. With respect to the

ADEC dissent, it is just that, a dissent. Even if the dissent were somehow relevant, EPA is not nullifying a state court judgment. The Wyoming Environmental Quality Council is not within the State judicial branch. It is an executive agency. The members are appointed by the Governor and serve at the Governor's pleasure. See Wyo. Stat. Ann. Section 35–11–111(a) (''Council members shall be appointed by the governor with the advice and consent of the senate. The governor may remove any council member as provided in W.S. 9–1–202.''); Section 9–1–202(a) (''[A]ny person may be removed by the governor, at the governor's pleasure, if appointed by the governor to serve . . . as a member of a state board or commission.'').

Furthermore, EPA's comments to Wyoming on its proposed SIP and BART permits, which are in the docket for this action, emphasized that we would only come to a final conclusion regarding the adequacy of Wyoming's BART determinations when we acted on Wyoming's regional haze SIP revision, through public notice and comment rulemaking. While we may have been silent on some issues, silence from the EPA does not signify implicit approval. Any lack of participation by the EPA in the state administrative appeal proceeding or failure to register an objection to the settlement agreement is not an indication that a state's proposed BART determination will be approved following its submittal as part of a larger regional haze SIP, as discussed in greater detail elsewhere in this document. Wyoming is required to adopt a final BART determination as part of its regional haze SIP. As explained elsewhere in this document, once a state submits a SIP to the EPA, we are authorized to approve, partially approve, or disapprove the SIP, and we have the duty to assure that the SIP submittal complies with the requirements of the Act. The statutory scheme explicitly provides for this.

Alaska Depart of Environmental Conservation v. *Environmental Protection Agency,* 540 U.S. 461 (2004) concerned EPA's response to ADEC's issuance of a permit to a mine that provided, as BACT, unreasonably low NO_X controls. Accordingly, EPA issued three orders prohibiting ADEC from granting the permit unless it satisfactorily documented its reasoning behind its BACT determination. The Ninth Circuit held the three orders were a proper exercise of EPA's authority and discretion. The Supreme Court affirmed. EPA agrees with the commenter that EPA made representations to the Court stating the need to accord ''appropriate deference'' to states' determinations. EPA also agrees that we made the representation that we have never asserted our authority to override a state-court judgment, and therefore, the fear that EPA will threaten state courts' independence is unfounded.

While EPA did make these representations, these representations are not inconsistent with EPA's decision to disapprove Wyoming's BART determination for Laramie River Station. As explained above, we are not overriding a state-court judgment. Furthermore, the notion that a state administrative appeal process can insulate a BART determination from federal requirements itself ''turns federalism on its head.'' *See* U.S. Constitution, Art. VI, cl. 2 (supremacy clause).

In this instance, some of Wyoming's BART determinations were unreasonable in terms of cost effectiveness and other factors as detailed elsewhere in this document (detailed descriptions of the cost assumption are described in the comments specific to the units elsewhere in this document).[52] Finding Wyoming's BART determinations to be unreasonable is a ''restrained and moderate'' use of EPA's statutory authority. *See* 540 U.S. at n.14. Following EPA's issuance of orders to ADEC for failing to establish a reasonable BACT, the Court noted, ''Only when a state agency's BACT determination is 'not based on a reasoned analysis' . . . may EPA step in to ensure that the statutory requirements are honored.'' 540 U.S. 461, 490. In the case of Wyoming's BART determinations, EPA adhered to a similar role. Upon finding some of Wyoming's BART determinations unreasonable, EPA disapproved those determinations and proposed an alternative standard.

EPA continues to acknowledge the importance of significant deference to state authorities regarding their BART determinations since they are in the best position to make these determinations given their close familiarity with the unique characteristics of their particular area. This structure encourages cooperative federalism, a principle that underlies the CAA. However, this ''initial responsibility'' does not permit the state to make unreasonable BART determinations. *See* 540 U.S. at 464. EPA is not using its authority to disapprove part of a state's SIP as a way to override legitimate administrative litigation reached under state law. Rather, we are enforcing a requirement of the CAA concerning anthropogenic impairment of visibility by ensuring that reasonable BART controls are considered. State adjudicative processes are not threatened because states are free to use these processes to reach their own BART determination, provided that this determination is reasonable and consistent with the CAA.

Comment: Nowhere does the Act command national consistency in BART cost estimates and, to the contrary, by allowing states to make individualized BART determinations, Congress demonstrated that consistency was not intended to be a component of the regional haze program, save for the uniform objective of attaining natural visibility conditions. The commenter indicated that the RHR takes the same approach, allowing states wide discretion to conduct BART analyses, and that the BART Guidelines encourage states to take into account site-specific conditions that impact costs. In light of these authorities, the commenter believes that the EPA cannot disapprove the State's cost analyses simply because they do not fit within the EPA's preferred vision of national uniformity.

Another comment argued that EPA claimed that the State failed to follow the CCM, and the EPA supported this claim by quoting the CCM as saying that the EPA prefers consistency in control cost estimates (78 FR 34749). The CAA, the RHR, the BART Guidelines, and the fact that different sources have vastly different designs belie the EPA's preference for ''consistency.'' Nowhere does the Act command national consistency in BART cost estimates and, to the contrary, by allowing states to make individualized BART determinations, Congress demonstrated that consistency was not intended to be a component of the regional haze program, save for the uniform objective of attaining natural visibility conditions. The commenter indicated that the RHR takes the same approach, allowing states wide discretion to conduct BART analyses, and that the BART Guidelines encourage states to take into account site-specific conditions that impact costs. In light of these authorities, the commenter believes that the EPA cannot disapprove the State's cost analyses simply because they do not fit within the EPA's preferred vision of national uniformity.

Response: As we explain in our response to other comments in the legal issue section, we have authority to assess the reasonableness of a state's

[52] As explained elsewhere in this document, EPA has accepted some of the costs submitted in response to the proposed notice developed for Basin Electric, but not others.

analysis of costs; and a state's discretion must be reasonably exercised in compliance with the applicable requirements. While we agree that site-specific challenges must be identified and factored into the cost effectiveness analysis, the SIP elements disapproved elsewhere in this document items are not ''site-specific conditions,'' but rather use of the wrong costing methodology and improper categorization of costs, as well as other issues. An erroneous analysis of costs, whether due to methodological or to data flaws, prevents a state from conducting a meaningful consideration of the cost of compliance factor. *North Dakota* v. *U.S. EPA,* 730 F.3d 750, 761 (8th Cir. 2013).

EPA is not relegated to a ministerial role. *Id.* We have not replaced cost estimates, modeling analyses and other SIP elements submitted by the State solely for the purpose of ensuring consistency across states. When a state or source puts forward costs estimates that are atypical, it is reasonable for us to scrutinize such estimates more closely to determine whether they are reasonable or inflated. Also, given that the assessment of costs is necessarily a comparative analysis and one marker of reasonableness, it is reasonable to insist that certain standardized and accepted costing practices be followed absent unique circumstances. Such consistency is particularly relevant for BART determinations at fossil-fuel fired power plants having a capacity in excess of 750 MW, which must be made pursuant to the BART Guidelines.[53] To the extent a BART determination for such a power plant is plainly inconsistent with EPA-approved determinations for similar sources, it is more likely to be inconsistent with the RHR and the BART Guidelines and therefore to warrant greater scrutiny for compliance with the applicable requirements.

Comment: Basin Electric submits with these comments an updated cost estimate for SNCR and SCR emission controls at Laramie River Station. That report states that in Sergeant & Lundy's opinion SNCR would likely achieve a 48% reduction from EPA's input emission rate. However, when it made its BART determination the State did not have the benefit of this report and made its judgment based on the best information available at the time. EPA, in its August 3, 2009 comments on Wyoming's BART permit for Laramie River Station, stated that it estimated that ''SNCR can reduce NO_X by 40%–50% for most large boilers (EPA Air Pollutions Control Cost Manual, 2002, Sixth ed., EPA–452–02–001. Section 4.2, Chapter 1, pg. 1–3.).'' States are entitled to rely on information available at the time they make BART determinations, and EPA may not disapprove a state's BART based on information that becomes available later. This principle seems particularly appropriate when at the time EPA itself asserts the bona fides of information similar to that relied upon by the State.

Response: We disagree with this comment. EPA is required to take new information submitted as part of this rulemaking into consideration. Indeed, EPA has taken into consideration the updated cost estimate information submitted by Basin Electric for SNCR and SCR at Laramie River Station, which was not available to Wyoming. *See Sierra Club* v. *EPA,* 671 F.3d 955, 967 (9th Cir. 2012) (''if new information indicates to EPA that an existing SIP or SIP awaiting approval is inaccurate or not current, then, viewing air quality and scope of emissions with public interest in mind, EPA should properly evaluate the new information and may not simply ignore it without reasoned explanation of its choice''); *see also* 42 USC 7607(d)(6)(B) (''The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and *new data* submitted . . . during the comment period.'') (emphasis added). Thus, EPA is required, at a minimum, to take new information into account during the SIP approval process and, if necessary, alter its final decision accordingly. As explained in detail elsewhere, section 307(d) of the Act explicitly provides for the consideration of information developed after the proposed rule is published.

EPA considered this new cost information and the assessment of our evaluation regarding this information appears elsewhere in this document.

Comment: EPA is again overstepping its role in this process. Wyoming completed its BART analysis in 2009, more than three years ago, and it would have been impossible to incorporate the alleged urea price increases in that analysis. Simply put, Wyoming's BART determination is hardly arbitrary and capricious simply because it failed to take into account alleged urea price increases some three years after Wyoming completed its BART analysis. Wyoming did precisely what the Guidelines instruct: made a BART determination based on information available before the close of its public comment period. 40 CFR Part 51, App. Y., Section IV(D)(2)(3). To disapprove Wyoming's cost analysis based on information that was not available to the State would be to employ a ''gotcha'' approach that runs contrary to EPA's own regulations and counter to EPA's commitment to do its job fairly and objectively. If the urea issue is truly material, EPA should, at a minimum, allow Wyoming to consider whether this new information would affect its BART determination before disapproving that determination.

Another commenter suggests that urea prices are relevant to operating costs for SNCR but are not relevant to SCR. If the State's urea prices were *too low,* that would mean the State had *underestimated* the cost of SNCR, which is what EPA claims in its proposal. 78 FR 34748. Such an underestimate would have no material impact on the State's BART determination and thus provides no basis for EPA's disapproval. Once again, this is a fact that in retrospect supports the State's BART decision, rather than demonstrating it to be arbitrary. If Wyoming's estimate of the cost of SNCR should have been higher, as EPA maintains, the higher cost would tend to add further support for rejecting SNCR—the more expensive a control technology, the stronger the reason to reject it as BART. So if EPA is correct in claiming the State's assumed urea price was too low, it is incorrect in claiming this made a difference in the State's BART determination. A mistake in a cost assumption, if there was a mistake, is not a *per se* reason to reject a BART determination. Such a mistake would help support disapproval of a cost analysis and resulting BART determination only if it *overstated* costs in a material way and thus tended to make a technology appear significantly more costly than it actually would be.

Response: We disagree with portions of these comments. As we explained in responses to similar comments below in the section on Overarching Comments on BART, we agree that a change in the market price of urea, in and of itself, may have not provided EPA sufficient grounds for rejecting the State's SNCR analysis. However, we identified a number of deficiencies in our proposed rule, that when taken collectively, led EPA to conclude that Wyoming's consideration of the costs of compliance and visibility improvement for the EGUs was inadequate and did not properly follow the requirements in the BART Guidelines and statutory requirements. 78 FR 34748. Therefore, regardless of the market price of urea, EPA would have reached the same conclusion.

Additionally, EPA is required to take into account the urea price information and we have taken that technical information into account as detailed elsewhere in this final notice and the

[53] CAA section 169A(b) and 40 CFR 51.308(e)(1)(ii)(B).

docket. As explained in detail above, while this information was not available to the State, EPA nonetheless had a duty to consider any new information submitted during public comment when reviewing the states' SIPs. *See Sierra Club* v. *EPA,* 671 F.3d 955, 967 (9th Cir. 2012).

Therefore, while the new urea cost information was not available to the State, EPA was nonetheless obligated to consider any new information submitted during public comment when reviewing the states' SIPs. Thus, EPA is required, at a minimum, to take new information into account during the SIP approval process and, if necessary, alter its final decision accordingly. Regarding the comment that Wyoming should get an opportunity to consider this information before EPA takes final action, see responses to similar comments above.

Comment: EPA relies on its consultant's report as a basis for rejecting Wyoming's cost analysis for SNCR and proposing to disapprove the State's NO_X BART for Laramie River Station. 78 FR 34748. EPA may not reject the State's estimate of the NO_X reduction achievable with SNCR just because EPA's consultant disagrees with the State. Under the appropriate legal standard, EPA must defer to the State's technical assessment absent demonstration it is arbitrary and capricious—which EPA has not attempted to prove. Nor can EPA mount a credible argument that its consultant's report is superior to the State's. The report does not comply with EPA's own Guidelines, as interpreted by EPA, and ignores site-specific conditions that have a huge impact on the cost of NO_X emission controls. Given the flaws in the report, EPA's reliance on it is not only arbitrary and capricious, but downright astonishing.

Response: We disagree with the commenter's assertion that we have rejected the State's estimate of cost analysis for SNCR and the NO_X reduction achievable with SNCR just because we disagree with the State. During the public comment period on our proposed rulemaking, Basin Electric, as well as other parties, submitted information concerning cost estimates. We have placed this information to the docket and as explained elsewhere in this document, taken it into account as part of this final rulemaking. This final action clearly explains the basis for our disapproval of State's NO_X BART for Laramie River Station, based on comments received and our cost and visibility analysis, we are disapproving others. We also disagree that we are required to defer to the State's technical judgments and to apply an arbitrary and capricious standard in reviewing the State's SIP submittal. We respond in detail to those arguments elsewhere.

Comment: This commenter stated that even if the Wyoming's cost analyses were revised to reflect the EPA's high urea prices, the average cost effectiveness of SNCR would still be consistent with the State's original analyses. The commenter noted that the EPA's average and incremental cost effectiveness numbers for SNCR fall well below the values considered by the State to be cost effective and therefore are consistent with the State's original conclusion that the costs of compliance from the application of SNCR to the EGUs were reasonable. The commenter added that even if the State-analyzed urea costs are adjusted to reflect EPA's urea costs, the average cost effectiveness values remain below $2,600 dollars per ton of NO_X reduced and with incremental cost effectiveness values below $5,000 dollars per ton of NO_X reduced (citing commenter's Exhibit 10), and those values are consistent with the State's original conclusion. The commenter believes that it is clear that the EPA does not take issue with Wyoming's cost analyses, but rather Wyoming's BART conclusions. The commenter contended that the EPA's allegation that Wyoming incorrectly analyzed costs is simply an excuse for EPA to override Wyoming's BART determinations because EPA does not like the result. The commenter asserted that the EPA must explain why Wyoming's ultimate BART determinations run afoul of the law, rather than hold up allegations of technical deficiencies as window dressing for EPA to take over the role Congress gave to states to make BART determinations.

Response: We disagree with this comment. As we explained earlier in this final notice, Congress crafted the CAA to provide for states to take the lead in developing implementation plans, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the CAA. EPA's review of SIPs is not limited to a ministerial type of automatic approval of a state's decisions. EPA must consider not only whether the State considered the appropriate factors but acted reasonably in doing so. EPA has the authority to issue a FIP either when EPA has made a finding that the State has failed to timely submit a SIP or where EPA has found a SIP deficient. Here, EPA has authority on both grounds, and we have chosen to approve as much of the Wyoming SIP as possible and to adopt a FIP only to fill the remaining gap. Our action today is consistent with the statute. We disagree that technical deficiencies are mere ''window dressing''; instead, appropriate technical analyses are fundamental to a reasoned BART determination. Finally, details of technical issues regarding urea costs are addressed elsewhere in this rule.

Comment: No single factor justifies disapproval of the State's BART. The authority to determine BART belongs to states, and BART determinations must be based on all five BART factors weighted together. States are responsible for balancing those factors and deciding how much weight to give to each factor. 70 FR 39123, 39130, 39170. To show that Wyoming had been arbitrary and capricious in making a BART determination, EPA would bear a heavy burden—a burden that it does not even begin to meet based on a disagreement that the State's cost analysis for SCR was in error. EPA's own incremental cost effectiveness for SCR is more than $5000/ton, which is a high cost even if lower than the State's. EPA makes no attempt to argue that the difference between its incremental cost effectiveness and the State's would have changed the State's selection of BART or rendered the State's BART arbitrary or illegal.

Response: We responded to similar comments elsewhere. First, as we explain in detail elsewhere, we disagree that EPA's review of a state's SIP submittal is limited to an arbitrary and capricious standard. Second, as we explain in detail elsewhere, we disagree that states have the sole authority to determine BART. Third, as we explain in detail elsewhere, we disagree that a ''harmless error'' standard should be applied.

Comment: In June of 2012, EPA issued a proposal that analyzed the cost effectiveness of various NO_X control technologies at Laramie River Station. 77 FR 33051. Although EPA disagreed with the State's NO_X BART determination for Laramie River Station, EPA accepted and relied on the State's cost analysis for NO_X controls, which concluded that SCR would cost $3305 per ton of NO_X removed, while SNCR would cost $2036 per ton of NO_X removed. 77 FR 33051, Table 30 (These values are for Unit 3. The State's conclusions for Units 1 and 2 were similar.) In light of these estimates, EPA eliminated SCR from consideration at Laramie River Station ''because the cost effectiveness value is significantly higher than LNBs with OFA and there is a comparatively small incremental visibility improvement over LNBs with

OFA.'' *Id.* EPA now expressly disavows its earlier finding, apparently as a result of comments that raised questions with the State's analysis and a cost analysis prepared by Andover. 78 FR 34740, 34748. Yet EPA's own cost analysis—based entirely on the findings of a technically infirm and legally indefensible contractor analysis of the costs of SNCR and SCR at Laramie River Station—concludes that the cost effectiveness of SCR at Laramie River Station ranges from $3,589 to $3,903, which exceed Wyoming's cost effectiveness demonstrations. *Id.* at 34774–34775. For EPA to take the position SCR is now cost effective, based on a higher estimate of tons NO_X removed that is inconsistent with its earlier position and without any further explanation, is arbitrary and capricious. *Cf. W. States Petroleum,* 87F.3d at 284 (EPA ''may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case'').

Response: We disagree with this comment. EPA's June 2012 **Federal Register** notice was a ''proposal,'' not a final agency action. Based on additional information and analyses, on June 10, 2013 we reproposed to partially approve and partially disapprove the Wyoming SIP. Therefore, contrary to commenter's assertions, we had not taken a final agency action in June 2012 and the Western States Petroleum case in not applicable here. In addition, we fully explained the reasons for the changes in our proposed action. We note that adjustments in cost-effectiveness of SCR were not the only factor in our proposed changes. We also revised modeling of visibility benefits of SNCR and SCR and cost-effectiveness of SNCR, which played a role in our reproposed BART determination.

2. Compliance With Section 307(d)

Comment: EPA cannot adopt a FIP using a procedure that simultaneously proposes both disapproval of a SIP BART determination and a different BART determination as a FIP. Doing so results in a violation of Section 307(d), which requires EPA to first announce the ''statement of basis and purpose'' that accompanies the FIP, including a summary of ''the factual data on which the . . . rule is based'' and ''the major legal interpretations and policy considerations underlying the . . . rule.'' 42 U.S.C. 7607(d)(1)(B), (d)(3)(A) & (C), (d)(6)(A). The reason is simple. BART determinations are inherently technical evaluations that consider costs, feasibility, potential plant shut-downs, etc. The same requirement would apply to any BART determination undertaken by EPA as part of a FIP. Thus, any response by EPA to comments that Basin Electric and others submit in support of Wyoming's BART determination will necessarily have to deal with new detailed technical information and data, particularly when, as here, EPA has initially proposed to reject a BART determination as inadequately supported and thus has invited extensive comments. EPA's responses to comments will then necessarily become part of the grounds supporting any new BART determination in a FIP, but will not have been publicly disclosed until EPA's response to comments on the SIP. Thus, EPA will be unable to provide a substantive statement of basis and purpose for the FIP in the same proposal to disapprove the SIP unless it intends to ignore comments. Yet this violates EPA's statutory obligation to announce all the facts and grounds supporting a FIP before adoption. It also wholly undermines the underlying purposes of the APA's notice and comment obligations. *See, e.g., United States* v. *Cain,* 583 F.3d 408, 420 (6th Cir. 2009) (these obligations are intended to ''ensure fair treatment for persons to be affected by regulation'' and to ''ensure that affected parties may participate in decision making at an early stage''') (citations omitted); *NRDC* v. *Thomas,* 805 F.2d 410, 437 (D.C. Cir. 1986) (the purposes of these obligations include that ''notice improves the quality of agency rulemaking by ensuring that agency regulations will be tested by exposure to diverse public comment,'' that ''notice and the opportunity to be heard are an essential component of fairness to affected parties,'' and that ''by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review'') (quoting *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 547 (D.C. Cir. 1983).

This must be true, unless EPA's proposed course of action has already been determined, meaning that EPA has already decided to reject the SIP BART determinations and replace them with its own regardless of the comments submitted. Such prejudgment would be contrary to law. *See, e.g., Davis* v. *Mineta,* 302 F.3d 1104, 1112 (10th Cir. 2002) (plaintiffs were likely to prevail in showing agency acted arbitrarily and capriciously, in part because the agency ''prejudged the NEPA issues''); *Metcalf* v. *Daley,* 214 F.3d 1135, 1146 (9th Cir. 2000) (agencies' environmental assessment prepared under NEPA was ''demonstrably suspect'' and ''fatally defective'' because the agencies ''were predisposed'' to a particular finding; agencies must conduct ''an objective evaluation free of the previous taint''). Yet that is plainly what EPA is suggesting by its effort to simultaneously disapprove one BART determination while proposing another. Either EPA must ignore the comments so as not to establish new grounds for the FIP, or it must reject the comments on substantive grounds that become justification for the FIP but have never been publicly disclosed. Either way, its action violates APA standards.

This is a consequence of the procedural posture into which EPA has put itself by taking no action on the SIP until the end of the Sections 110(c) FIP clock. To follow the requirements of Sections 307(d), EPA must first propose to disapprove a SIP, take comment, and then make a decision after full and fair consideration of the comments. If, after open-minded consideration of the comments, EPA continues to believe the SIP must be disapproved, then and only then can EPA lawfully propose a different BART determination in a FIP, articulating for public comment why the proposed federal BART determination is legal and the State BART determination is not.

Failure to follow this procedure necessarily results in a violation of the law, one way or another. Nor does the existence of a Consent Decree excuse EPA's failure to follow the correct procedure. A court-fashioned decree may not foreclose the total range of procedural options available to an agency. *See Watt* v. *Energy Action Educ. Found.,* 454 U.S. 151, 168–69 (1981) (refusing to limit the procedural options within the discretion of an agency); Marina T. Larson, *Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?,* 1 Pace Envt'l L. Rev. 147, 160–63 (1983) (arguing that consent decrees may not limit agency procedural options). EPA waited until compelled by Court Order to propose disapproval of the State BART determination, but could have done so much earlier. In any event, the obligations EPA negotiated for itself in the Consent Decree cannot be used to deprive Wyoming or Basin Electric the substantive procedural rights afforded by the CAA.

Response: EPA disagrees with this comment, which fundamentally misunderstands the nature of notice-and-comment rulemaking. As the Ninth Circuit stated in another context:

> Nothing prohibits the Agency from adding supporting documentation for a final rule in response to public comments. In fact, adherence to the [petitioners'] view might

result in the EPA's never being able to issue a final rule capable of standing up to review: every time the Agency responded to public comments, such as those in this rulemaking, it would trigger a new comment period. Thus, either the comment period would continue in a never-ending circle, or, if the EPA chose not to respond to the last set of public comments, any final rule could be struck down for lack of support in the record.

Rybachek v. *U.S. EPA,* 904 F.2d 1276, 1286 (9th Cir. 1990).

In the context of the CAA, the specific rulemaking provisions in section 307(d) are in accord with this. Under section 307(d)(3), the notice for the *proposed* rule must be accompanied by a statement of basis and purpose, including ''a summary of (A) the factual data on which the *proposed* rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the *proposed* rule.'' 42 USC 7607(d)(3) (emphasis added). ''All data, information, and documents referred to in [section 307(d)(3)] on which the *proposed* rule relies shall be included in the docket on the date of publication of the proposed rule.'' *Id.* (emphasis added). Then, under section 307(d)(6), the *promulgated* rule must ''be accompanied by (i) a statement of basis and purpose *like* that referred to in [section 307(d)(3)] with respect to a *proposed* rule.'' 42 USC 7607(d)(6)(A) (emphasis added). In other words, the statement of basis and purpose must provide a summary of (among other things) the factual data and methodologies on which the *promulgated* rule is based. In addition, section 307(d)(6) specifically requires a ''response to each of the significant comments, criticisms, and *new data* submitted . . . during the comment period.'' 42 USC 7607(d)(6)(B) (emphasis added). And finally, ''the promulgated rule may not be based . . . on any information or data which has not been placed in the docket as of the date of such promulgation,'' *id.* 7607(d)(C), which by implication allows EPA to base the promulgated rule on information and data that is placed in the docket before the date of promulgation. Thus, section 307(d)(6) specifically contemplates that the Agency can in its promulgated rule rely on additional information and data that EPA develops after the proposed rule has been published.

In this instance, our FIP proposal was in accord with the requirements of section 307(d) of the Act. In particular, before the proposed rule was published, we included in the docket all the factual data, such as cost estimates and visibility modeling, on which the proposed rule was based. The comment identifies no deficiency in this regard. Instead, according to the comment the supposed deficiency is the failure to include in the docket *for the proposal* the data and information that EPA will develop to respond to comments. But, as discussed above, this is no deficiency; instead section 307(d) specifically contemplates that this will happen.

The argument in the comment regarding EPA's alleged prejudgment of its decision also belies a misunderstanding of notice-and-comment rulemaking. Under the comment's theory, in order to not have ''prejudged'' the outcome, EPA would have to avoid proposing any particular outcome in its notice of proposed rulemaking. However, under section 307(d)(3), ''the notice of proposed rulemaking shall be published in the **Federal Register**, as provided under section 553(b) [of the APA].'' Under section 553(b) of the APA, the ''notice shall include'' (among other things) ''either *the terms or substance of the proposed rule* or a description of the subjects and issues involved.'' 5 USC 553(b)(3) (emphasis added). Thus it is of course explicitly permitted under the CAA and the APA for a proposal notice to contain EPA's proposed disapproval of the State's BART determinations and EPA's proposed FIP BART determinations. This does not indicate prejudgment at all; indeed in this action EPA is adjusting certain determinations in response to certain comments, and in fact EPA previously reproposed its action on Wyoming's SIP based upon new information submitted by the public (77 FR 3302). The cases cited by the comment regarding prejudgment concern NEPA analysis and are not on point.

As the commenter noted, regional haze requirements apply both to our action on Wyoming's SIP submittal and our FIP. EPA disagrees that the BART determinations in its FIP, which must meet the same regional haze requirements as the BART determinations in Wyoming's SIP, must be published in a separate rulemaking procedure. To the extent that a comment on our proposed disapproval was identified as also relevant to our proposed FIP, we have responded to it. The commenter was not deprived of procedural rights merely because the commenter could not submit information twice in two separate rulemakings. All affected parties had ample opportunity to submit any pertinent information to EPA.

Regarding the consent decree, we have elsewhere explained that it did not limit or modify EPA's substantive discretion. With respect to the comment's argument that it improperly limited EPA's procedural discretion, any such limits are found in the statutory deadlines and mandatory duties in the Act itself. The case cited in the comment, *Watt* v. *Energy Action Educ. Found.,* 454 U.S. 151 (1981), did not concern a consent decree and is not on point. In it, the Supreme Court was ''unable to find anything, either in the legislative history or in the 1978 Amendments [to the Outer Continental Shelf Lands Act] themselves, that compels the conclusion that the Congress as a whole intended to limit the Secretary of the Interior's discretion'' with respect to choice of bidding systems for oil and gas leases. *Id.* at 168. By contrast, the CAA sets certain statutory deadlines for EPA's action on SIP submittals and FIP promulgations and thereby explicitly limits the Administrator's discretion for final action. We elsewhere respond to comments that EPA's promulgation of its FIP was outside EPA's authority under 110(c) of the Act. Finally, the cited law review article, Marina T. Larson, *Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?,* 1 Pace Envt'l L. Rev. 147 (1983), is also not on point. It discusses a settlement agreement which ''set[ ] forth specific methods and formalized criteria for the [A]dministrator to use in assessing the need for regulation. These rules [would] control the nature of the data collected and its subsequent interpretation, and [would] have a significant influence on the substantive decisions reached.'' *Id.* at 162. No such constraints have been placed on our methods and use of data in the aforementioned consent decree. We respond elsewhere to comments about procedural due process rights.

3. Compliance With Section 169A(d)

Comment: One commenter argued that section 169A(d) of the CAA requires that before holding a hearing on a proposed regional haze plan, ''the State (or the Administrator, in the case of a [FIP]), shall consult in person with the appropriate federal land manager (FLM) or managers and shall include a summary of the conclusions and recommendations of the FLMs in the notice to the public.'' 42 U.S.C. 7491(d). In its proposed action, EPA recites this land manager consultation requirement as it applies to SIPs, 78 FR 34744, but, EPA notably ignores that this requirement applies equally to FIPs.

The commenter asserted that not once in any of EPA's public notices of the hearings EPA held on its proposed FIP did EPA include a summary of the conclusions and recommendations of the FLMs in the notice to the public. See 78 FR 34738 (June 10, 2013); 78 FR 40654 (July 8, 2013). Consequently, the commenter argued that EPA cannot rely on the State's public notices because the State held its public hearings years before EPA proposed its FIP and because the SIP differs substantially from the FIP.

The commenter argued that EPA's failure to comply with Section 169A(d) can be understood only as arbitrary and capricious. The CAA has required consultation with FLMs, which oversee the Class I areas the regional haze program aims to protect, from the very beginning of the regional haze program, *see* 42 U.S.C. 749l(a)(2), and continuously through the development of each implementation plan, *id.* Sections 749l(d). Congress therefore understood the importance of working closely with FLMs in regional haze planning.

In 1999, EPA plainly understood the significance of consulting the FLMs when it promulgated the RHR. *See* 64 FR 35714, 35747 (July 1, 1999) (describing land manager consultation as ''important and necessary''). Both times EPA proposed action on Wyoming's SIP—in 2012 and again in 2013—EPA reiterated the need to consult with FLMs when developing a regional haze implementation plan. 77 FR 33022, 33028 (June 4, 2012); 78 FR 34738, 34744–45 (June 10, 2013).

Against this backdrop, the commenter explained, EPA's failure to explain why EPA believed it did not have to consult with the FLMs when promulgating its FIP for Wyoming, let alone comply with the simple consultation process set forth in Section 169A(d), is plainly arbitrary and capricious. Because FLMs play a critical statutory role in the regional haze program, there is a substantial likelihood that EPA's proposed FIP would be significantly different if EPA had complied with Section 169A(d).

Response: EPA agrees that consultation with the FLMs is an important aspect of the regional haze program. EPA has engaged with the appropriate FLMs on all of its regional haze actions, including its proposed actions on the Wyoming regional haze SIP. While EPA did not include a summary of the FLMs' conclusions and recommendations on the proposed FIP in the public hearing notices, those conclusions and recommendations are readily available to the public in the online docket for this rulemaking.[54]

EPA also disagrees with the commenter that the consultation materials contained in the State's public notices are irrelevant just because the State conducted its public hearings many years ago. The FLMs concluded at that time that the Wyoming regional haze SIP did not adequately protect the State's Class I areas, and these conclusions and recommendations informed EPA when we proposed to disapprove portions of the Wyoming regional haze SIP and issue a FIP.

Finally, there is no basis to the commenter's claim that EPA's proposed FIP would be significantly different if we had included the FLMs' conclusions and recommendations in the public hearing notices. We carefully considered the comments of the FLMs and have responded to them elsewhere throughout this document. As those responses explain in more detail, we have chosen not to change our proposed NO_X BART determinations in all of the ways in which the FLMs requested. We point out, however, that had EPA adopted the FLMs' recommendations, we would be requiring SCR on all of the BART-eligible EGUs in Wyoming, a result that this particular commenter has vigorously opposed.

Comment: The processes Congress required EPA to follow under the regional haze program were circumvented. For example, the CAA requires both states and EPA to consult with FLMs on regional haze implementation plans. Public notice of the FLMs' conclusions and recommendations is to occur before holding a hearing on the plan. While EPA recites this requirement in its proposed action, it utterly failed to include any FLM consultation on behalf of its agency. EPA held three hearings and not once in any hearing did the EPA indicate it had consulted the FLMs in Wyoming and no conclusions or recommendations of any consultations were provided.

Response: See above response.

4. Public Hearings

Comment: EPA's regional haze plan promulgation regulations require EPA to provide public notice at least thirty days in advance of a hearing on a proposed implementation plan. 40 CFR 51.102(d) (a plan hearing ''will be held only after reasonable notice, which will be considered to include, at least 30 days prior to the hearing(s)''); *see also* 40 CFR 51.100(i). Although EPA held three public hearings on its proposed FIP for Wyoming, not once did EPA provide the public at least thirty days advance notice of the hearing. EPA proposed its FIP on June 10, 2013 and provided only fourteen days notice of its hearing on the proposal. 78 FR 34738, 34738. After Governor Mead, Wyoming's Congressional Delegation, and the Wyoming Department of Environmental Quality (DEQ) pointed out to EPA that fourteen days provided far too inadequate notice for the public to understand the proposed FIP and therefore meaningfully participate in the public hearing, EPA agreed to hold two additional hearings. On July 8, 2013, EPA publicly noticed its plans to hold the additional hearings on July 17, 2013 and July 26, 2013. 78 FR 40654, 40654. Thus, although EPA had the opportunity to correct its errors, it failed to do so by again providing less than thirty days notice of its hearings.

Here again, EPA's noncompliance with its own regulatory processes is arbitrary and capricious. EPA cannot ignore the law for its own benefit without at least providing a reasoned justification for doing so. In this case EPA has provided no such explanation, thereby rendering its failure an arbitrary abuse of power. And by shortcutting public participation, EPA undermined the central democratic purposes of notice-and-comment rule-making. Had EPA honored the law and held itself to the same standards it holds states, the public could have more meaningfully commented on EPA's proposal. As a result of that public input, EPA's proposed FIP might be considerably different, assuming, as we must, that EPA would have considered those comments with an open mind.

DEQ understands that EPA rushed its FIP promulgation process in order to meet the deadlines it consensually established with a third party in litigation to which Wyoming was not a party. But, EPA's outside arrangements do not excuse it from complying with the law, or allow it to shortcut public participation in the promulgation of a rule, especially one that will harm Wyoming. DEQ discourages EPA from imposing its illegally promulgated FIP on Wyoming. But, in the event EPA decides nevertheless to do so, DEQ encourages EPA to re-propose its FIP in a manner that complies with the statutory and regulatory plan development processes. To do otherwise is to arbitrarily hold states to a different plan promulgation standard than EPA itself adheres to, even though the CAA makes no such distinction. Such irrationally unequal treatment is the essence of arbitrary regulation.

[54] EPA–R08–OAR–2012–0026–0134, and EPA–R08–OAR–2012–0026–0068.

Response: EPA disagrees with this comment. First, 40 CFR 51.102(d) implements the requirement in section 110(a)(2) that *state* plans ''be adopted by the State after reasonable notice and hearing.'' *See* 72 FR 38787 (July 16, 2007). When EPA—which is not a state—promulgates a FIP, EPA instead is bound by the requirements in section 307(d) of the Act. EPA has not promulgated specific regulations governing EPA's processes under section 307(d); however, EPA complied with the public hearing requirements in 307(d) as explained below. The definition of ''State agency'' in 51.100(i) does not contradict this; indeed the commenter elsewhere protests vigorously elsewhere that states, not EPA, are ''primarily responsible for development and implementation of a plan under the Act.'' 40 CFR 51.100(i). Thus, EPA does not fall under the definition of ''State agency.'' We also note that EPA initially provided a 60-day comment period for this action and then extended it 15 more days; under 40 CFR 51.102. States need only provide a 30-day period for written comments. *See* 72 FR at 38788 (''Whether or not a public hearing is held, the State is required to provide a 30-day period for the written submission of comments from the public.'').

In promulgating a FIP under CAA section 110(c), EPA is required to: ''give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; keep a transcript of any oral presentation; and keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.'' [55] In this rulemaking, EPA held three public hearings on its proposed FIP. In addition to the public hearing initially scheduled on June 24, 2013 in Cheyenne, Wyoming, additional public hearings were held on July 17, 2013 in Cheyenne, Wyoming and on July 26, 2013 in Casper, Wyoming. The transcripts for those hearings consisted of 321 pages. These hearings were announced in the **Federal Register** on June 10, 2013 and July 8, 2013,[56] and a pre-publication version of the proposal was posted on EPA's Web site prior to publication in the **Federal Register**. The proposal was published in the **Federal Register** on June 10, 2013 and was initially scheduled to close on August 9, 2013. The public comment period was extended in response to letters received from the Governor and Congressional delegation, which are in the docket for this action, and public comments were accepted through August 26, 2013, 30 days after the last hearing, as required. EPA received over 1900 comments on the reproposal, including over 130 unique comments submitted from organizations, companies, and individuals. The major comments consisted of over 1130 pages, including attachments. The commenters have not explained how their ability to comment was impaired in any way by the opportunities for public comment that EPA provided, including three public hearings and the 75-day comment period.

Comment: EPA failed to follow its own rules for providing public notice of hearings on regional haze implementation plans. Those rules require a minimum of 30 days advance public notice of hearings on implementation plans. The first notice in the **Federal Register** of a public hearing was issued on June 10, 2013, for a public hearing to be held on June 24, 2013. EPA issued a second notice for additional public hearings on July 8, 2013 in the **Federal Register**. The notice identified July 17, 2013 and July 26, 2013 as dates set. This provided the public nine and eighteen days notice of the respective hearings.

Response: We disagree with this comment, see above response.

5. RHR and BART Guidelines

Comment: Regardless of the effect of AFUDC on cost effectiveness as demonstrated by the Sargent & Lundy sensitivity analyses, EPA has no authority, as part of its interpretation of a non-binding guidance document, to impose restrictions on the categories of costs that states can include when assessing the ''costs of compliance'' in a BART determination. EPA has failed to make a showing that Wyoming's compliance with Sections 169A(g)(2) or otherwise violates governing law. Including AFUDC is not a lawful ground for disapproving Laramie River Station BART, and it is improper to exclude AFUDC in EPA's FIP analysis for Laramie River.

Response: EPA disagrees with this comment. EPA's revised cost-effectiveness values are consistent with EPA's regulations and the parameters set forth in the Control Cost Manual. EPA explained in promulgating the BART Guidelines that ''[s]tates have flexibility in how they calculate costs. ''See 70 FR at 39127 (July 6, 2005). A state may deviate from the Control Cost Manual provided its analysis is reasonable. EPA independently evaluated Sargent & Lundy cost-effectiveness calculation, explaining elsewhere in this document that the CCM explicitly excludes AFUDC from control costs, and EPA's estimates were correct in excluding AFUDC. *See Oklahoma* v. *U.S. EPA,* 723 F.3d 1201, 1212 (10th Cir. 2013) (''The EPA therefore had a reasonable basis for rejecting the 2008 Cost Estimates [that were based on the overnight costing method] as not complying with the guidelines.'')

Furthermore, as Region 9 explained in responding to similar comments: [57]

> EPA disagrees ''with commenters' assertions that AFUDC is a cost that should be incorporated into our cost analysis, as it is inconsistent with CCM methodology. The utility industry uses a method known as ''levelized costing'' to conduct its internal comparisons, which is different from the methods specified by the CCM. Utilities use ''levelized costing'' to allow them to recover project costs over a period of several years and, as a result, realize a reasonable return on their investment. The CCM uses an approach sometimes referred to as overnight costing, which treats the costs of a project as if the project were completed ''overnight'', with no construction period and no interest accrual. Since assets under construction do not provide service to current customers, utilities cannot charge the interest and allowed return on equity associated with these assets to customers while under construction. Under the ''levelized costing'' methodology, AFUDC capitalizes the interest and return on equity that would accrue over the construction period and adds them to the rate base when construction is completed and the assets are used. Although it is included in capital costs, AFUDC primarily represents a tool for utilities to capture their cost of borrowing and return on equity during construction periods. AFUDC is not allowed as a capitalized cost associated with a pollution control device under CCM's overnight costing methodology, and is specifically disallowed for SCRs (i.e., set to zero) in the CCM.[58] Therefore, in reviewing other BART determinations, EPA has consistently excluded AFUDC.[59]

Comment: EPA claims that Wyoming should have used actual emissions during the baseline period instead of calculating baseline emissions from the actual average heat input and actual average emission rate. EPA apparently claims that this deviated from the BART Guidelines. 78 FR 34773–34774.

[55] See CAA section 307(d).

[56] 78 FR 34738, and 78 FR 40654.

[57] 77 FR 72512, 72531 (Dec. 5, 2012)(BART for Apache, Cholla and Coronado).

[58] CCM (Tables 1.4 and 2.5 show AFUDC value as zero).

[59] See, e.g., 77 FR 20894, 20916–17 (Apr. 6, 2012) (explaining in support of the North Dakota Regional Haze FIP, ''we maintain that following the overnight method ensures equitable BART determinations . . .''); 76 FR 52388, 52399–400 (August 22, 2011) (explaining in the New Mexico Regional Haze FIP that the Manual does not allow AFUDC).

However, the Guidelines do not mandate EPA's approach. They say, rather, that the baseline emissions rate ''should represent a realistic depiction of anticipated annual emissions for the source'' and ''in general'' states should estimate anticipated emissions based on actual baseline emissions. 70 FR 39167. Nothing in the text of the Guidelines requires states to use any particular approach to estimate future emissions. The Guidelines were constructed to assist the states in making cost assessments, not to mandate the same assessment and the same results in every case by use of mandatory checklists. The word ''should'' in the Guidelines makes clear there is no mandatory action required. *See Aragon* v. *United States,* 146 F.3d 819, 826 (10th Cir. 1998) (describing Air Force Manual 85–14's use of the word ''should'' as ''suggestive, rather than mandatory language'' in a Federal Tort Claims Act case); *In re Glacier Bay,* 71 F.3d 1447, 1452–53 (9th Cir. 1995) (interpreting the National Oceanic and Atmospheric Administration's use of the word ''should'' in manuals and instructions as ''suggestive'' language conferring hydrographers with discretion); *Culbert* v. *Young,* 834 F.2d 624, 628 (7th Cir. 1987) (holding that use of the word ''should'' in a Wisconsin Administrative Code provision governing inmate discipline ''only advises the security director on what criteria to consider but does not require him to consider them,'' and explaining that ''[t]he word 'should,' unlike the words 'shall,' 'will,' or 'must,' is permissive rather than mandatory''). *See also Dickson* v. *Sec'y of Defense,* 68 F.3d 1396, 1401 (D.C. Cir. 1995) (''When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show deference to the agency's determination.'') (emphasis omitted).

EPA is therefore merely disagreeing with a judgment call made by the State, not pointing to violation of a mandatory methodology. And, even though not required to do so, Wyoming did follow the recommendation in the Guidelines. Although EPA contends that the State used a baseline based on annual average heat input for 2001–2003 and an emission rate of 0.27 rather than the ''actual annual average'' emissions, 78 FR 34773–34774, the State's May 28, 2009 BART Analysis actually says ''[b]aseline emissions [are] based on continuous emissions monitoring (CEM) annual averages for 2001–2003.''

But even if EPA were correct, EPA would still be wrong in asserting that the State failed to follow the BART Guidelines. The approach that EPA objects to would be an appropriate method to realistically depict anticipated annual emissions. Certainly it would be reasonable to multiply the actual annual amount of heat in Laramie River coal during the baseline period by the same baseline emission rate of 0.27 lb/MMBtu that was used by EPA's own consultant. 78 FR at 34773; Review of Estimated Compliance Costs for Wyoming Electric Generating (EGUs)—Revision of Previous Memo, memo from Jim Staudt, Andover Technology Partners, to Doug Grano, EC/R, Inc., Feb. 7, 2013 (''Andover Report'') at 15 Table 4, *EPA docket cite* EPA–R08–OAR–2012–0026–0086. Any estimate of anticipated emissions is necessarily a projection, and by definition cannot require exclusive reliance on past actual emissions.

That the State's approach to baseline emissions was a realistic projection is borne out by the fact that the annual baseline emissions the State used to calculate cost effectiveness for Laramie River differs from EPA's baseline by only the following *de minimis* amounts: 269 tons higher than EPA's 6051 tons for Unit 1, a difference of only 4%; 8 tons lower than EPA's 6285 tons for Unit 2, a difference of only 0.1%; and 73 tons higher than EPA's 6375 tons for Unit 3, a difference of only 1%. No fair assessment could conclude that such *de minimis* differences violate the Guidelines or yield an ''implausible'' result so extreme as to be arbitrary and capricious. 78 FR 34773–34776.

If EPA's values are realistic, the State's values are realistic. There is no material difference between them. The objective of a BART determination is to arrive at a technology selection that weighs and takes into account the five BART factors. The negligible difference between EPA's baseline emissions and the State's is not material and therefore is not a valid ground for disapproving the State's NO_X BART for Laramie River, and EPA has made no effort to show otherwise. EPA's role is not to fly speck each and every aspect of the BART process in a search for reasons to disapprove the State's determination.

In fact, EPA proposes to approve other BART determinations made by Wyoming despite the same alleged ''errors,'' unequivocally demonstrating that its disagreement with Wyoming's approach to baseline calculations does not amount to proof of a legal violation by the State. EPA claims that for several Wyoming sources subject to BART, Wyoming committed the same ''cost and visibility errors'' that EPA claims for Laramie River, but proposes nonetheless to approve the BART determinations for these sources ''because we have determined that the State's conclusions were reasonable despite the cost and visibility errors.'' 78 FR 34750. EPA contradicts itself when it overlooks errors for other sources and yet claims those same ''errors'' as *per se* reasons to disapprove BART for Laramie River Station. Such inconsistent treatment is erroneous. See *W. States Petroleum* v. *EPA,* 87 F.3d 280, 282 (9th Cir. 1996). EPA's own behavior therefore demonstrates that the baseline used for Laramie River is not a material departure from any requirement and is not a basis for disapproval of the State's BART determination. EPA is stretching to find any excuse to impose its own technology preferences, contrary to law.

Wyoming's choice of baseline emissions is neither inconsistent with the BART Guidelines nor materially different from EPA's allegedly correct baseline emissions, and therefore is not a valid ground for disapproving Wyoming's NO_X BART for Laramie River.

Response: We disagree with some aspects of this comment, but agree with others. First, we disagree with the commenter's characterization of the BART Guidelines as other than mandatory in the case of Laramie River Station, including in regard to how baseline emissions are calculated. The generating capacity of Laramie River Station of 1,705 MW surpasses the threshold of 750 MW used to determine whether the BART Guidelines must be applied. As stated in the RHR: ''The determination of BART for fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts *must* be made pursuant to the guidelines in appendix Y of this part (Guidelines for BART Determinations Under the Regional Haze Rule).'' [60] Moreover, the commenter's attempts to turn ''should'' into ''may'' are of no avail. Because the BART Guidelines are mandatory for EGUs larger than 750 MW, EPA's use of the word ''should'' indicates a mandate, not a suggestion. Elsewhere in the Guidelines, EPA uses ''may'' when EPA means ''may.'' *See, e.g.* 40 CFR Part 51, App'x Y, II.A.4 (''In order to simplify BART determinations, States *may* choose to identify *de minimis* levels of pollutants at BART-eligible sources (but are not required to do so).'') (emphasis added). Furthermore, the Tenth Circuit Court of Appeals has interpreted ''should'' in the Guidelines to mean ''required.'' *See*

[60] 40 CFR 51.302(e)(1)(ii)(B) (emphasis added).

Oklahoma v. *U.S. EPA,* 723 F.3d 1201, 1213 (10th Cir. 2013) (''The guidelines *require* that states provide support for any site-specific costs that depart from the generic numbers in the Control Cost Manual. See 40 CFR part 51 app. Y(IV)(D)(4)(a) n.15 (''You *should* include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the *Control Cost Manual.''*)'') (emphasis added).

Notwithstanding that the BART Guidelines are mandatory for Laramie River Station, we agree that Wyoming's approach, having used both the *actual* NO_X emission rate and the *actual* heat input from the baseline period, resulted in a realistic depiction of anticipated annual emissions consistent with the BART Guidelines, that these emissions differed only slightly from baseline emissions estimated by EPA and that, therefore, Wyoming's treatment of baseline emissions by itself was not a basis for EPA to disapprove NO_X BART for Laramie River Station. Nonetheless, as discussed in response to other comments, we maintain that there were other deficiencies in Wyoming's BART analysis for Laramie River Station that remain a valid basis for our disapproval. Most notably, Wyoming did not consider the visibility impacts of SNCR as required by the CAA and BART Guidelines.

Comment: Against its longstanding 30-year history of interpreting and applying the RHR and Guidelines, EPA has now embarked on a spate of BART disapprovals demonstrating that the agency is now interpreting and applying the Guidelines and CCM very differently than it did in the past, and signaling that EPA has actually decided to reinterpret the statute and Guidelines without notice and comment to the states.

EPA is manufacturing requirements in the Guidelines that do not exist, for the purpose of abandoning the administrative structure conferring state primacy that Congress created with both the CAA generally and the Regional Haze Statute in particular. EPA is doing so by interpreting the BART Guidelines and CCM as setting forth detailed, mandatory regulatory requirements that are not actually in the text, and by seeking to make any deviation from the recommendations in the Guidelines or CCM grounds for voiding states' BART choices.

EPA is attempting to convert recommendations into mandates. This new interpretation of the Guidelines and Cost Manual is erroneous, contrary to their statutory role, unannounced, and calculated to federalize BART decisions by making them all follow identical paths whether or not local considerations and costs warrant separate treatment in control decisions.

Response: Our proposal clearly laid out the bases for our proposed approval and disapproval of the State's BART and reasonable progress determinations, as well as other SIP elements. We have relied on the standards contained in our regional haze regulations and the authority that Congress granted us to review and determine whether SIPs comply with the minimum statutory and regulatory requirements.[61] To the extent we have found that the State's cost analysis relies on values that do not conform to applicable requirements of the Act and regulations, we have disapproved those elements of the analysis. To the extent the state has considered visibility improvement from potential emissions controls in a way that is inconsistent with the CAA and regulations, we have disapproved those elements of the analysis.

Where, as explained in our proposed notice and final notice, a state determines that a less stringent control technology is the ''best available,'' as was the case here with regard to NO_X emissions, the state must justify its decision by explaining how the BART factors led it to choose that level of control over more stringent options. *See* 70 FR 39170–71. While a state has significant discretion regarding how to conduct its BART analysis, EPA must ultimately ensure that the state has demonstrated it has a reasoned basis, consistent with the Act's requirements, for determining that a given emissions control technology is ''the best available'' for each source. See *Oklahoma,* 723 F.3d at 1208 (''[W[hile it is undoubtedly true that the statute gives states discretion in balancing the five BART factors, it also mandates that the state adhere to certain requirements when conducting a BART analysis.'').

In determining SIP adequacy, we inevitably exercise our judgment and expertise regarding technical issues, and it is entirely appropriate that we do so. Courts have recognized this necessity and deferred to our exercise of discretion when reviewing SIPs. *See, e.g., Connecticut Fund for the Env't., Inc.* v. *EPA,* 696 F.2d 169 (2nd Cir. 1982); *Michigan Dep't. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000); *Mont. Sulphur & Chem. Co.* v. *EPA,* 666 F.3d 1174, 1190 (9th Cir. 2012) *cert. denied,* 133 S. Ct. 409, (2012). Contrary to the commenter's assertion, we have not abandoned the State's primacy. In fact, we have approved the vast majority of the State's determinations. We are only disapproving the State's analyses and decisions that do not conform to the CAA and regulations. We are authorized to do so.

Comment: As early as 1979, EPA recognized that the regional haze program is organized around ''goals'' and ''reasonable progress,'' and not hard objective requirements: Section 169A of the CAA provides for consideration of the degree or significance of visibility improvement, costs, energy, and other factors in applying retrofit controls to major sources and in making ''reasonable'' progress toward the national goal. These provisions indicate that some flexibility can be allowed in implementing control programs for remedying existing impairment and that priorities can be established.

Thus, while the BART analysis may include consideration of factors similar to those applied in a BACT analysis, BART does not require any threshold level of control. As EPA acknowledged in its 2004 re-proposal of the BART Guidelines, ''for the BART analysis, there is no minimum level of control required.'' 69 FR. 25184, 25219 (May 5, 2004). The RHR's ''national goal'' is not a mandate but, rather, a foundation for analytical tools to be used by the states in setting RPGs. The BART Guidelines were therefore developed to assist states in making their own BART determinations by providing analytical tools. They were not designed or intended by Congress to impose inflexible mandates that become tripwires for EPA to use as a means of federalizing BART decisions with set criteria. EPA's current effort to convert the Guidelines into something they were not intended to be is improper and calculated to shift to EPA authority over BART determinations that Congress reserved to the states. ''[A]n agency cannot create regulations which are beyond the scope of its delegated authority.'' *Nagahi* v. *INS,* 219 F.3d 1166, 1169 (10th Cir. 2000). Nor can an agency reinterpret regulations for that purpose.

[61] EPA is responsible for reviewing State-submitted SIPs and SIP revisions to ensure that they ''meet[ ] all of the applicable requirements of [the Act].'' CAA Section 110(k)(3); *see also* CAA Section 110(*l*) (EPA shall not approve SIP revision if it would interfere with ''any . . . applicable requirement of this chapter''); *Oklahoma,* 723 F.3d at 1204 (EPA reviews all SIPs to ensure plans comply with the Act). There is nothing unusual about regional haze SIPs in this regard—they, like any other SIPs, must be reviewed by EPA, and may be approved only if they meet all applicable requirements of the Act, including provisions related to visibility. *See Oklahoma,* 723 F.3d at 1207; *North Dakota,* 730 F.3d at 756–57.

Congress authorized EPA to provide guidelines only as to limited aspects of a state's BART decision-making process, and left the majority of that process to the states' discretion. Specifically, in the subsection immediately preceding the reference to the Guidelines, Congress directed EPA to conduct a study on available methods for implementing the national goal and provide recommendations to Congress for (1) ''methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas''; (2) ''modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment''; and (3) ''methods for preventing and remedying such manmade air pollution and resulting visibility impairment.'' CAA Sections 169A(a)(3)(A)–(C), 42 U.S.C. 7491(a)(3)(A)–(C).

In the next subsection, Congress directed EPA to promulgate regulations—but with any regulation of the states' BART determinations confined to those limited areas on which EPA had been directed to conduct studies and make a report to Congress. Specifically, CAA Section 169(b) provides, in pertinent part, that the regulations ''shall—(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and (2) require each applicable implementation plan for a State . . . to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.'' *Id.* Sections 7491(b)(1)–(2).

Accordingly, Congress only authorized EPA to promulgate regulations or guidelines on the identification and measurement of visibility impairment, the methods for measuring and predicting future visibility impairment, the methods for preventing and remedying air pollution and resulting visibility impairment, and the CAA's general requirement that states develop SIPs to include the BART and reasonable progress determinations required by the RHR. Congress did not authorize EPA to promulgate regulations or guidelines mandating exactly how the states should conduct their BART analyses, and made clear that the purpose of the guidelines was to provide ''recommendations'' to the states.

Consistent with the statute and regulations, the BART Guidelines contemplate a two-step process: (1) the ''Attribution Step,'' which consists of analyzing which sources are appropriately subject to BART controls; and (2) the ''Determination Step,'' which consists of determining, based on the five statutory BART factors, an appropriate level of control. 70 FR 39108, 39126; *see also Utility Air Regulatory Group,* 471 F.3d at 1335–36 (discussing two-step process). The Guidelines for the Determination Step are designed as a ''step-by-step guide'' for states to identify the ''best system of continuous emissions control technology,'' taking into account the five BART factors. 70 FR 39127. *See also id.* at 39158 (the Guidelines describe a ''process for making BART determinations''). They are merely ''helpful guidance'' for sources other than power plants with a capacity greater than 750 MW. *Id.* at 39108; *Utility Air Regulatory Group,* 471 F.3d at 1339. Yet, even for larger power plants, the Guidelines are procedural in nature, setting forth criteria for evaluating control alternatives, but not mandating a substantive result. As EPA acknowledges, to mandate a choice of technology would infringe on ''those areas where the Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision makers.'' 70 FR 39137. *See also id.* at 39107 (''The State must determine the appropriate level of BART control'').

The flexibility afforded by the Guidelines is critical to ensuring that states maintain primacy in making BART determinations. When EPA re-proposed the Guidelines in 2004, for example, EPA requested comment on a sequential process—similar to a BACT analysis—for considering the five statutory BART factors. 69 FR 25197–25198. In the final rule, however, EPA concluded that ''States should retain the discretion to evaluate control options in whatever order they choose, so long as the State explains its analysis of the CAA factors.'' 70 FR 39130. EPA also expressed that the Guidelines confer authority on the state to make ''a BART determination based on the estimates available for each criterion, and as the CAA does not specify how the state should take these factors into account, the states are free to determine the weight and significance to be assigned to each factor.'' *Id.* at 39123.

EPA further emphasized the flexibility inherent in each step of the BART determination: ''States have flexibility in how they calculate costs,'' *id.* at 39127, and ''have the flexibility to develop their own methods to evaluate model results,'' *id.* at 39108. EPA points out that ''States should have flexibility when evaluating the fifth [visibility] statutory factor.'' *Id.* at 39129. *See also id.* (''Because each Class I area is unique, we believe States should have flexibility to assess visibility improvements due to BART controls by one or more methods, or by a combination of methods . . .''). Even the presumptive emission limits for power plants greater than 750 MW ''are presumptions only; in making a BART determination, states have the ability to consider the specific characteristics of the source at issue and to find that the presumptive limits would not be appropriate for that source.'' *Id.* at 39134.

Response: EPA agrees that states play an important role in the regional haze program. However, EPA disagrees that this action conflicts with the State's statutory role or that this rule is beyond EPA's authority. First, the regional haze program explains that EPA ''shall . . . *require* each applicable implementation plan for a State . . . to contain such emission limits, schedules of compliance, and other measures as may be necessary to make reasonable progress toward meeting the national goal.'' 42 U.S.C. 7491(b)(2). The CAA makes clear that EPA is statutorily obligated to reject a SIP that would ''interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter.'' 42 U.S.C. 7410(l). Thus the CAA provides EPA with the authority to review and reject an inadequate regional haze SIP. *Oklahoma* v. *EPA,* 723 F.3d 1201, 1207 (10th Cir. 2013); *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013).

Second, EPA is required to establish guidelines to ensure that states achieve the visibility goals set forth in the Act. 42 U.S.C. 7491(b)(1). EPA agrees that states have some flexibility in BART determinations, but that flexibility is limited and states must provide EPA with reasoned analysis for their SIP decisions. *Oklahoma* v. *EPA,* 723 F.3d 1201, 1207 (10th Cir. 2013) (noting that while ''it is undoubtedly true that the statute gives states discretion in balancing the five BART factors, it also mandates that the state adhere to certain requirements when conducting a BART analysis''); *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013) (explaining EPA is not required to ''approve a BART determination that is based upon an analysis that is neither reasoned nor moored to the CAA's provisions''). The regional haze guidelines provide states

with methods to determine BART that EPA considers reasonable, although states may consider methods not provided for in the guidelines in certain circumstances. For example, in explaining a state's flexibility to determine costs, the guidelines note that ''if there are elements or sources that are not addressed by the Control Cost Manual or there are additional cost methods that could be used, we believe that these *could* serve as useful *supplemental information.''* 70 FR No. 128 39127. (July 6, 2005). A state, however, must demonstrate that any methods it has used to determine BART that are not found within the guidelines are reasonable.

EPA may, and has, approved state BART determinations that do not rigidly follow the BART guidelines, so long as the state's determinations are reasonable. Here, however, Wyoming's methods were inconsistent with the BART guidelines, unreasonable, and inconsistent with the CAA's statutory and regulatory requirements, as explained elsewhere in these comments. Nothing in this rule displaces a state's discretion to balance the five factors, if the state calculates the factors using reasonable methods that are consistent with the regulatory and statutory requirements of the CAA.

Comment: EPA is now construing the BART Guidelines to treat ''recommendations'' as ''mandates'' such that states no longer have the authority to vary from the recommendations, however insignificantly, without finding EPA disapproving their BART determinations. Such an interpretation violates both the plain language of the CAA and its underlying cooperative federalism structure. First, Section 169A(b)(2)(A) provides that BART shall ''be determined by the State.'' 42 U.S.C. 7491(b)(2)(A). Section 169A(g)(2) provides that states are to determine the ''costs of compliance'' and the ''degree of improvement in visibility.'' *Id.* Section 7491(g)(2). Any interpretation and application of the BART Guidelines and CCM that has the effect, whether directly or indirectly, of mandating particular outcomes or approaches to reaching a BART determination invades state authority. States do the cost of compliance and visibility assessments, not EPA. Treating recommendations as mandates has the effect of forcing all states to follow each recommendation precisely the same way, effectively federalizing the BART determination by affording EPA the authority to employ the SIP approval process as a means of forcing all states to take the same approach required by EPA in all cases or find their independent decisions overruled. This violates the structure and design by Congress, and conflicts with the congressional commitment of the BART decision to the States. *American Corn Growers,* 291 F.3d at 7–10. This problem did not exist when EPA historically construed the ''recommendations'' in the Guidelines to be ''recommendations'' rather than mandates, but EPA's current approach of identifying deviations from the CCM or from the ''recommendations'' of the Guidelines as ''errors of law'' destroys state primacy and thus conflicts with the plain language of the statute and is unreasonable and not entitled to deference.

EPA's interpretation of the BART Guidelines violates Section 169A of the CAA because it also restricts state discretion in the decision-making process. It is the states, not EPA, that are authorized to determine BART. 42 U.S.C. 7491(b). In doing so they are directed to take into consideration the five BART factors—costs of compliance, energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the improvement in visibility that would be achieved by the use of control technology. *Id.* Section 7491(g)(2). The states must determine how to balance these factors, and how much weight to give each of the factors, on a case-by-case basis.

However, EPA interprets the BART Guidelines as authorizing it to disapprove the State's BART determination based on alleged technical failures to follow each and every paragraph and recommendation in the Guidelines. By relying on isolated instances of alleged deviation from the Guidelines, such an interpretation totally undermines the State's prerogative to determine how to weigh and balance all factors and therefore conflicts directly with the statutory grant of authority to the states to make BART determinations in accordance with all five BART factors. Section 169A does not tell the states how to take the factors into account, nor does it describe how each of the factors must be treated. The provision directing EPA to provide guidelines to the states, *id.* Section 7491(b)(1), must be read in concert with the broad grant of authority and discretion to states, and does not change the fundamental thrust of the statute. EPA's interpretation that states are constrained to dot every ''i'' and cross every ''t'' the way EPA insists directly conflicts with the statute's grant of BART decision making authority to the states. If the BART Guidelines mean what EPA claims they mean, the Guidelines violate the CAA.

Response: As explained elsewhere in this document, we disagree with the commenter's assertions. The CAA does not give states unlimited discretion to determine BART; EPA retains the same supervisory role it has with respect to any SIP submission. We also disagree that our proposal is inconsistent with the *American Corn Growers* decision. We have determined that Wyoming utilized flawed cost assessments and incorrectly estimated the visibility impacts of controls. We have determined these issues resulted in non-approvable BART determinations for the units for which we proposed a FIP. We recognize the State's broad authority over BART determinations, and recognize the State's authority to attribute weight and significance to the statutory factors in making BART determinations. As a separate matter, however, a state's BART determination must be reasoned and based on an adequate record. Although we have largely approved the State's regional haze SIP, we cannot agree that CAA requirements are satisfied with respect to certain specific BART determinations and other necessary FIP elements.[62]

Comment: The BART Guidelines provide that the ''basis for equipment costs estimates'' should be documented. *Id.* at 39166. The Guidelines give states the option of using ''data supplied by an equipment vendor (*i.e.,* budget estimates or bids) or by a referenced source (such as the Cost Manual, fifth Edition, February 1996, EPA 453/B–96–001).'' *Id.*3.

In footnote language, the Guidelines reiterate that costs should be documented, including ''any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the Control Cost Manual.'' *Id.* at 39167 n.15. EPA relies heavily on this footnote to assert that states, including Wyoming, have failed to comply with the Guidelines because they have not adequately documented strict compliance with the CCM. This is an erroneous and unreasonable interpretation of the Guidelines. When read in conjunction with the CAA-which bestows substantial discretion on the states in making BART

[62] The commenter cannot challenge EPA's duly promulgated regulations and Guideline. Indeed, the time for such a challenge has long passed, since the Guidelines were promulgated July 6, 2005, and could only have been challenged within 60 days. 70 FR 39,104; 42 U.S.C. 7607(b), (d)(1)(J).

determinations—and other statements made in the BART Guidelines and the preamble, this footnote language does not require states to supply vendor quotes or other specific information documenting every single deviation from the CCM, nor does it confer authority on EPA to reject a state's BART determination when the state fails to do so. *Cf. United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.,* 484 U.S. 365, 371 (1988) (a provision read in isolation ''is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law''); *United States* v. *Boisdore's Heirs,* 49 U.S. 113, 122 (1850) (''[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'').

Treating the CCM as a binding checklist conflicts with the CAA, both in a general sense, by attempting to mandate exactly how a state must evaluate and apply the five BART factors, and in a specific sense, by excluding certain costs from consideration in a BART analysis in the face of statutory language mandating that BART be determined based on the actual ''costs of compliance,'' not some artificial costs of compliance. As to the first issue, EPA itself has recognized that the CCM is ''a good reference tool,'' which can be supplemented ''if there are elements or sources that are not addressed by the Control Cost Manual or there are additional cost methods that could be used.'' 70 FR at 39127. ''States have flexibility in how they calculate costs,'' which is not appropriately circumscribed by recommendations set out in a non-binding manual. *See id. See also id.* at 39153 (States retain discretion in considering ''a number of the factors set forth in section 169A(g)(2), including the costs of compliance''). As to the second issue, EPA cannot cite to or rely upon the CCM to challenge any decision by the states taking into account *actual* rather than *theoretical* costs, because the statute requires that real costs be considered. CAA Section 169A(g)(2), 42 U.S.C. 7491(g)(2). The CCM does not impose binding obligations on states undertaking BART determinations, and failure to comply with its overly general and non-source specific recommendations is not grounds for rejection of a state's analysis of the costs of compliance.

Additionally, the CCM has not been subject to notice and comment under the APA, 5 U.S.C. 701–706; it has not been published in the Code of Federal Regulations (CFR); and it is not formally incorporated by reference into the BART Guidelines. Therefore, it is merely a policy statement that is not binding on the states. Furthermore, simply referencing the CCM in the BART Guidelines is not adequate to make that non-binding guidance document legally enforceable. ''Agency statements 'having general applicability and legal effect' are to be published in the Code of Federal Regulations.'' *NRDC* v. *EPA,* 559 F.3d 561, 564 (D.C. Cir. 2009), citing 1 CFR 8.1(a). *See also Brock* v. *Cathedral Bluffs Shale Co.,* 796 F.2d 533, 539 (D.C. Cir. 1986) (''The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contains only documents 'having general applicability *and legal effect* . . .' '') (emphasis in original). Accordingly, EPA's assertion that a state has failed to comply with the BART Guidelines by using costing methodology other than that set forth in the CCM is contrary to federal law and is arbitrary and capricious.

Federal regulations require that in order for material to be formally incorporated by reference into the **Federal Register** and the CFR, EPA must seek approval from the Director of the Federal Register. 1 CFR 51.1. Documents are eligible for incorporation only if they meet certain criteria; incorporation of a document ''produced by the same agency that is seeking its approval'' is generally inappropriate unless the Director of the Federal Register finds that the document also ''possess[es] other unique or highly unusual qualities.'' *Id.* Section 51.7(a)–(b). Furthermore, language incorporating a publication by reference must be ''as precise and complete as possible,'' including a statement that the document is ''incorporated by reference'' and ''[i]nform[ing] the user that the *incorporated publication is a requirement.'' Id.* Section 51.9(b)(1), (3). Finally, dynamic incorporations into the CFR are prohibited. *Id.* Section 51.1(f) (''Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.''). *See also* 76 FR 33590, 33593 (June 8, 2011) (OSHA noting that ''it cannot incorporate by reference the latest editions of consensus standards without undertaking new rulemaking because such action would . . . deprive the public of the notice-and-comment period required by law'').

EPA has not complied with the requirements for incorporating the CCM into the regulations directing states to undertake BART Determinations or into the BART Guidelines. The regulations make no mention of the CCM. The BART Guidelines reference the CCM, but do not indicate that EPA was seeking approval for incorporation by reference; and, in any event, it is unlikely that the CCM meets the requirements for incorporation by reference. Additionally, the Guidelines reference the 5th edition of the CCM but direct states to use the most recent version of the CCM, 70 FR 39167 n.14, and dynamic incorporation is expressly prohibited by the regulations governing incorporation by reference, 1 CFR 51.1(f). Where EPA has failed to comply with the requirements for incorporation by reference, the referenced material is ''ineffective to impose obligations upon, or to adversely affect'' third parties. *NRDC* v. *Train,* 566 F.2d 451, 457 (D.C. Cir. 1977). Therefore, the CCM does not constitute binding law, and EPA has no authority to reject Wyoming's BART determinations on grounds the State allegedly strayed from the CCM's cost methodology.

Response: EPA disagrees with this comment. First, with regards to notice-and-comment procedures, the BART Guidelines, including the references within them to the Control Cost Manual, have gone through appropriate public comment procedures and the time to challenge the BART Guidelines' references to the CCM has passed. If the commenter believes the BART Guidelines improperly incorporated by reference the CCM, the commenter could have requested judicial review within 60 days of the publication of the BART Guidelines in the **Federal Register**. We note that the BART Guidelines have indeed been published in the Code of Federal Regulations, in Appendix Y to Part 51 of Title 40. In addition, the reference to the CCM in Appendix Y provides adequate notice to the public that EPA intended the most recent version of the CCM to be used, and provides a link to the CCM itself.

Moreover, the very action that we are completing today has gone through notice-and-comment procedures. Thus, the public has had full opportunity to comment on our application of the CCM. Furthermore, the commenter's arguments that incorporation by reference is necessary for anything with binding legal effect miss the mark. The BART Guidelines do not contain a legally binding requirement to use the CCM, because as we explain next, the Guidelines clearly state that states may deviate from the CCM.

Commenter mischaracterizes EPA's use and application of the Control Cost Manual. EPA's revised cost-effectiveness values are consistent with

CAA and RHR requirements. EPA explained in issuing the BART Guidelines that ''[s]tates have flexibility in how they calculate costs.'' See 70 FR at 39127 (July 6, 2005). A state may deviate from the Control Cost Manual provided its analysis is reasonable and the deviations are documented. Here, as discussed elsewhere in this document, Wyoming's cost-effectiveness values were not reasonable. We disagree with commenter's view that our cost analysis is improper, but we agree that the CCM is not the only source of information for the BART analysis. For instance, the reference to the CCM in the BART Guidelines clearly recognizes the potential limitations of the CCM and the need to consider additional information sources:

> The basis for equipment cost estimates also should be documented, either with data supplied by an equipment vendor (i.e., budget estimates or bids) or by a referenced source (such as the OAQPS Control Cost Manual, Fifth Edition, February 1996, EPA 453/B–96–001). In order to maintain and improve consistency, cost estimates should be based on the OAQPS Control Cost Manual, where possible. The Control Cost Manual addresses most control technologies in sufficient detail for a BART analysis. The cost analysis should also take into account any site-specific design or other conditions identified above that affect the cost of a particular BART technology option.[63]

As to unusual circumstances, the BART Guidelines call for ''documentation'' to be provided for ''any unusual circumstances that exist for the source that would lead to cost-effectiveness estimates that would exceed that for recent retrofits,[64] which as discussed elsewhere in this final notice were not provided.

Comment: If EPA is making a BART determination as part of a FIP, it must comply with the RHR. Section 169A(g)(2) requires the BART determination to take into consideration five statutory factors. These factors ''were meant to be considered together'' to arrive at a single judgment: a BART emission limit. *Am. Corn Growers,* 291 F.3d at 6. EPA's proposed FIP, however, does not present a discussion, finding, or evaluation of the five statutory factors taken together. Instead, EPA merely states that it proposes to find that Wyoming's BART analysis fulfills all of the BART requirements except as to cost-effectiveness and visibility benefits. EPA then proposes to engraft onto Wyoming's consideration of the five statutory BART factors its own cost-effectiveness and visibility analysis, to arrive at the conclusion that SCR is BART. This fails to comply with the statute. The selection of the BART emission limit is arrived at by considering all five BART factors taken together. This requires, for example, that the selection of SCR as BART represents an acceptable balancing of energy and non-air quality environmental factors. When Wyoming made this assessment, however, it was considering LNBs and OFA, and thus its conclusion—which EPA proposes to approve—noted that ''combustion control using LNB with OFA does not require non-air quality environmental mitigation for the use of chemical reagents (*i.e.,* ammonia or urea) and there is a minimal energy impact.'' This weighing of statutory factors does not discuss or apply SCR, and therefore cannot be adopted by EPA to support its own BART emissions limit in its FIP. EPA is therefore proposing a BART emission limit *without* independently considering the five statutory BART factors, in violation of Section 169A(g)(2).

Nor does EPA articulate any reasoning supporting its proposed BART emission limit that applies all of the statutory factors. This violates EPA's obligation to cogently explain and articulate each step in its reasoning for proposed action. *State Farm,* 463 U.S. at 48 (''[A]n agency must cogently explain why it has exercised its discretion in a given manner.''). In fact, even as to the cost-effectiveness and visibility improvements EPA relies upon for its BART emission limit, EPA states that they are adopted because they are ''in the range of what EPA has found reasonable for BART in other SIP and FIP actions.'' 78 FR 34776. But EPA does not identify which ''actions'' it is talking about, EPA does not show how the five factors considered in those other ''actions'' make those ''actions'' comparable this action, and EPA does not pay even minimal lip service to the statutory requirement that emission limits must be based upon local considerations arrived at by a careful weighing of statutory factors unique in each case. EPA is just selecting a preferred technology (SCR) because it considers the cost of such technology to be acceptable to impose upon Basin Electric, without regard to whether, when considered for its impacts locally in Wyoming as Congress intended, it is the ''best'' control option for all of the circumstances fully considered. This violates five-factor decision-making process required by the CAA.

Response: We disagree with this comment. Contrary to commenter's assertions, EPA selected the BART emission limits by considering all five BART factors taken together and has complied with CAA and RHR requirements. As discussed in our proposal (see for example discussion starting at 78 FR 34774) and in our response to comments in this action (see sections V.B, V.C, and V.D), we clearly consider all five factors.

6. Reasonableness Standard

Comment: EPA cannot sidestep the CAA's mandate for state discretion by developing and applying a new ''reasonableness'' standard for evaluating and rejecting that discretion. EPA's regional haze FIP action, however, does just that. For example, EPA incorrectly declared ''the state's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.'' (See 78 FR 34743) This overly broad and illegal ''reasonableness'' standard allows EPA to reject any BART determination that EPA dislikes by merely arguing that a state's BART determination is ''unreasonable'' and without comparing the state's determination to any firm or fixed standards. EPA's ''reasonableness'' standard requires statutory and regulatory limitations on EPA's authority to disapprove a reasoned RH SIP. The fallacy of EPA's improper reasonableness standard is made even more apparent in its application by EPA, which simply rejects as ''unreasonable'' many of Wyoming's BART-related decisions without offering sufficient justification of why that is the case.

In creating and employing its reasonableness standard, EPA goes to an even greater extreme by defining ''reasonable'' in the most self-serving manner imaginable. In short, EPA defines ''reasonable'' to mean that EPA agrees with the state's exercise of discretion, and it defines ''unreasonable'' to mean EPA does not agree with the state. (See e.g., 78 FR 34,767, where EPA substitutes its consideration of costs and visibility improvement for Wyoming's). In this way, EPA attempts to bootstrap itself into the role of the sole decision-maker of what is BART and what is not. The CAA does not countenance such overreaching by EPA. For all of the criticism that EPA makes concerning the state's analyses, the reality is that the results of the analyses of both agencies are very similar. In some cases, EPA's numbers (such as the cost of SNCR at Wyodak) provide less of a justification for EPA's chosen BART controls than Wyoming's numbers did in its analyses. However, EPA has used its broad and unjustified criticisms of the State's work to discredit the State's studies and

[63] 70 FR 39104, 39166.

[64] 70 FR 39104, 39168.

usurp the discretion the State has applied to its BART determinations.

We also received numerous earlier comments pertaining to EPA's use of a ''reasonableness'' standard for evaluating BART determinations. For example, commenters pointed out that EPA incorrectly declared ''the State's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.'' Commenters asserted that the fallacy of this improper reasonableness standard is apparent in its application by EPA, which simply rejects as ''unreasonable'' many of Wyoming's BART-related decisions without offering a sufficient explanation of why that is the case. Commenters state that EPA makes no attempt to explain how any of Wyoming's BART determinations are ''unreasonable,'' but simply decrees that they are unsupported by any comparison to any standards, regulations, or statutes.

Commenters argued that the reasonableness standard employed by EPA is not found in the CAA, the RHR, its Preamble, or Appendix Y. Commenters go on to point out that nowhere does EPA define or explain what constitutes ''reasonable in light of the overarching purpose of the regional haze program'', and that this standard has not been defined or subjected to notice and comment rulemaking. Commenters pointed out that the CAA does not authorize EPA to adopt and employ ''a reasonable in light of the overarching purpose of the regional haze program'' criterion for approving or disapproving a state BART determination as CAA Section169A(b)(2)(A) only requires the State to consider five statutory factors. Commenters asserted that the CAA does not impose an additional requirement that the final BART determination is ''reasonable in light of the overarching purpose of the regional haze program'' as determined by EPA and as such EPA's imposition of this additional criterion is therefore lacking in statutory authority. One commenter stated that there are no numerical minimums that emission rates much achieve in a BART determination and there are no statutory minimum ''visibility improvement'' obligations.

One commenter went on to point that the failure to define how it will determine reasonableness leads to inconsistent and subjective agency action, as illustrated by EPA's inconsistent treatment of BART decisions around the country. The commenter pointed to BART decisions in Oklahoma, North Dakota, and Nevada as examples where EPA's failure to define reasonableness has led to inconsistent BART decisions.

Another commenter argued that throughout its proposal, EPA claims to have reviewed Wyoming's SIP under a ''reasonableness'' standard. *See, e.g.,* 78 FR 34776 (''we do not consider Wyoming's analyses . . . to be reasonable''); *see also id.* at 34778. EPA apparently believes that this standard allows EPA to substitute its judgment for the State's whenever EPA generally alleges that the State's conclusions or methods are not reasonable. Yet EPA cites no statutory or regulatory authority to support its malleable application of this ''reasonableness'' standard of review. EPA appears to have crafted its flexible reasonableness standard from *Alaska Department of Environmental Conservation* v. *EPA,* 540 U.S. 461 (2004). That case stands for the proposition that EPA has authority to reject a state decision that ''is not based on a reasoned analysis[.]'' *Id.* at 490 (internal quotation omitted). EPA has misapplied that standard in its proposal to disapprove Wyoming's SIP.

The commenter further argued that the *ADEC* standard does not allow EPA to disapprove SIPs whenever, in EPA's opinion, some element of the SIP is not reasonable. Instead, EPA must provide SIPs ''considerable leeway'' and may not ''second guess'' state decisions[.]'' *ADEC,* at 490 (internal citation omitted). Accordingly, EPA may disapprove a SIP under *ADEC* only by showing that the SIP is arbitrary. *See id.* at 490–91. EPA therefore must defer to the Wyoming's determinations in the SIP, and may not simply substitute its judgment for the State's. And, of course, EPA carries the burdens of production and persuasion to show that the State acted unreasonably in light of the statutes and administrative record. *Id.* at 494.

The commenter asserted that EPA has failed to carry those burdens in its proposed partial disapproval of Wyoming's regional haze SIP. The administrative record demonstrates that Wyoming's SIP will achieve the statutory goal of reasonable progress. EPA has not shown otherwise. EPA has shown only that if it had crafted the implementation plan in the first instance, it would have done so differently than Wyoming did. But the law does not allow EPA to simply substitute EPA's preferences for the State's. Before EPA can disapprove the SIP, it must show that the SIP is arbitrary, in light of the statutes and the record, and with consideration for the deference owed the State's determinations. For example, with respect to Jim Bridger Units 1 and 2 the only meaningful difference in outcomes between EPA's proposed FIP and the SIP is a roughly five-year period in which EPA's proposed controls will result in lesser emissions, though without a perceptible visibility improvement. Save for this distinction, the SIP and FIP create essentially equal improvements in visibility. EPA does not explain why a reduction in NO_X emissions that is more expensive but not more effective at improving visibility is more reasonable than the SIP. That lack of explanation renders EPA's proposal arbitrary, and decidedly ''unreasonable.''

Response: EPA disagrees with this comment. The CAA requires states to submit SIPs that contain such measures as may be necessary to make reasonable progress toward achieving natural visibility conditions, including BART. The CAA accordingly requires the states to submit a regional haze SIP that includes BART as one necessary measure for achieving natural visibility conditions. In view of the statutory language, it is logical that the reasonableness of the State's BART analysis and determination would be evaluated in light of the purpose of the regional haze program. In addition, our regional haze regulations, at 40 CFR 51.308(d)(ii), provide that when a state has established a RPG that provides for a slower rate of improvement in visibility than the URP (as has Wyoming), the state must demonstrate, based on the reasonable progress factors—i.e., costs of compliance, time necessary for compliance, energy and non-air quality environmental impacts of compliance, and remaining useful life of affected sources—that the URP to attain natural visibility conditions by 2064 is not reasonable and that the progress goal adopted by the state is reasonable. 40 CFR 51.308(d)(iii) provides that, ''in determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator will evaluate'' the state's demonstrations under section 51.308(d)(ii). It is clear that our regulations and the CAA require that we review the reasonableness of the State's BART determinations in light of the goal of achieving natural visibility conditions. This approach is also inherent in our role as the administrative agency empowered to review and approve SIPs. Thus, we are not establishing a new reasonableness standard, as the commenter asserts. As we discuss elsewhere, *ADEC* supports the use of this standard, and does not require EPA to apply a sort of ''arbitrary and

capricious'' standard in reviewing Wyoming's SIP submittal. The language regarding the burdens of production and persuasion in *ADEC* are inapplicable, as they refer to a litigation context that is not present here.

Furthermore, this is a SIP review action, and we believe that EPA is not only authorized, but required to exercise independent technical judgment in evaluating the adequacy of the State's regional haze SIP, including its BART determinations, just as EPA must exercise such judgment in evaluating other SIPs. In evaluating other SIPs, EPA is constantly exercising judgment about SIP adequacy, not just to meet and maintain the NAAQS, but also to meet other requirements that do not have a numeric value. In this case, Congress did not establish NAAQS by which to measure visibility improvement; instead, it established a reasonable progress standard and required that EPA assure that such progress be achieved. Here, contrary to the commenter's assertion, we are exercising judgment within the parameters laid out in the CAA and our regulations. Our interpretation of our regulations and of the CAA, and our technical judgments, are entitled to deference. See, e.g., *Michigan Dep't. of Envtl. Quality* v. *Browner,* 230 F.3d 181 (6th Cir. 2000); *Connecticut Fund for the Env't., Inc.* v. *EPA,* 696 F.2d 169 (2nd Cir. 1982); *Voyageurs Nat'l Park Ass'n* v. *Norton,* 381 F.3d 759 (8th Cir. 2004); *Mont. Sulphur & Chem. Co.* v. *United States EPA,* 2012 U.S. App. LEXIS 1056 (9th Cir. Jan. 19, 2012).

Finally, regarding commenters' assertions that we are being inconsistent, because the comment is not specific about what aspect of our proposed disapproval is believed to be inconsistent with other EPA decisions, it is not possible for EPA to address in this response any specific concerns. As articulated in our proposed rulemaking and further explained in our responses to other comments, EPA's partial approval and partial disapproval of the Wyoming regional haze SIP is consistent with the CAA, the RHR, BART Rule, and EPA guidance.

Comment: In the absence of criteria or standards by which ''reasonableness'' may be assessed, EPA's claim that the State's BART for Laramie River Station is unreasonable is by definition a mere subjective conclusion without basis or foundation. EPA must instead articulate a standard grounded in the statute by which it evaluates and disapproves a SIP and then must support its decision with a plausible explanation connecting the facts to its standard.

Response: The CAA requires states to submit SIPs that contain such measures as may be necessary to make reasonable progress toward achieving natural visibility conditions, including BART. The CAA accordingly requires the states to submit a regional haze SIP that includes BART as one necessary measure for achieving natural visibility conditions. In view of the statutory language, it is reasonable for the State's BART analysis and determination to be evaluated in light of the purpose of the regional haze program.

In addition, our regional haze regulations, at 40 CFR 51.308(d)(ii), provide that when a state has established a RPG that provides for a slower rate of improvement in visibility than the URP (as has Wyoming), the state must demonstrate, based on the reasonable progress factors—i.e., costs of compliance, time necessary for compliance, energy and non-air quality environmental impacts of compliance, and remaining useful life of affected sources—that the rate of progress to attain natural visibility conditions by 2064 is not reasonable and that the progress goal adopted by the state is reasonable. 40 CFR 51.308(d)(iii) provides that, ''in determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator will evaluate'' the state's demonstrations under section 51.308(d)(ii). Therefore, it is clear that our regulations and the CAA require that we review the reasonableness of the State's BART determinations in light of the goal of achieving natural visibility conditions. This approach is also inherent in our role as the administrative agency empowered to review and approve SIPs. Thus, we are not establishing a new reasonableness standard, as the commenter asserts.

Here, Wyoming concluded that a limit of 0.21lb/MMBtu for Laramie River Station could be achieved with operation of LNBs with OFA. As presented in the Introduction section and elsewhere in the notice, the State's regional haze SIP determined that NO_X BART for Laramie River Units 1, 2, and 3 is new LNB/SOFA. We proposed to disapprove the State's determination because the State did not reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines. 78 FR 34766. After revising the State's costs and modeling and re-evaluating the statutory factors, we proposed to determine that NO_X BART is LNB/SOFA + SCR, with an emissions limit of 0.07 lb/MMBtu for each unit. As the result of the comments received on our proposal, we have further revised our calculation of the costs of compliance and visibility modeling. For example, as explained in the BART section of this document, we corrected cost estimates for elevation and provided detailed comments regarding how site characteristics were addressed using available satellite imagery and why this is a valid approach for providing estimates that are acceptable for BART analysis and consistent with CAA and regulations. While we accepted some of the revised costs, again as explained in the BART section of this document, we did not accept others. For example, we did not accept cost assumptions where the necessary supporting documentation was not provided. After re-evaluating the BART factors, we continue to find that LNB/SOFA + SCR is reasonable as BART and are therefore finalizing our proposal. As a result, we are finalizing our proposed disapproval of the State's NO_X BART determination for Laramie River Station and finalizing our proposed FIP that includes a NO_X BART determination of LNB/SOFA + SCR, with an emission limit of 0.07 lb/MMBtu (30-day rolling average). The facts presented here and elsewhere in our final notice, provided a basis and foundation, grounded on the CAA and regulations, for the EPA to reach its decision regarding the unreasonableness of Wyoming's BART for Laramie River Station.

Comment: EPA attempted to use post-hoc, immaterial changes that it calculated in costs and visibility improvements to justify usurping Wyoming's BART decision-making authority. This runs counter to the vast discretion EPA has given to other states' regional haze SIPs. In Oregon, for example, despite EPA and Oregon differing in how each calculated BART costs that resulted in cost variance of over $700 per ton, EPA stated that such difference between the two estimates would not materially affect Oregon's evaluation. The difference between the cost analyses under EPA's FIP action and the Wyoming regional haze SIP similarly is immaterial. Similarly, in Colorado, the State's plan included a cost analysis that, according to EPA, was not conducted in accordance with EPA's Control Cost Manual. In addition, EPA explained that Colorado should have more thoroughly considered the visibility impacts of controlling emissions from one BART unit on the various impacted Class I areas and not focused on just the most impacted Class I area. Nevertheless, EPA approved the State's SIP, explaining that ''Colorado's

plan achieves a reasonable result overall.'' EPA should afford Wyoming the same degree of deference it afforded Colorado and Oregon. As demonstrated by the impacts of the Wyoming SIP, it ''achieves a reasonable result overall.''

EPA's inconsistency is not just limited to its disparate actions between states. In Wyoming, EPA acted inconsistently in its BART determinations between sources within the state. For example, EPA accepted Wyoming's cost and visibility BART analyses for FMC Westvaco and General Chemical, along with the PM BART analyses for PacifiCorp's and Basin Electric's BART units. At the same time, EPA rejected the NO_X BART cost and visibility analyses for PacifiCorp's and Basin Electric's BART units. Wyoming, however, used the same BART analysis methodology for those BART units at which EPA accepted the Wyoming BART analysis as it did at those BART units for which EPA did not. By rejecting some cost and visibility analyses on the basis that they were improperly performed, while accepting others that were performed in the same manner, EPA acted arbitrarily and capriciously.

Response: We disagree with this comment. In evaluating a State's BART determination, EPA has the discretion to develop additional information, such as cost and visibility analyses. In the end, this additional information, may confirm the State's BART determination as reasonable, or it may lead EPA to disapprove the State's BART determination as unreasonable. However, EPA is not required to develop additional information for all BART determinations in order to review the State's BART determination. If a State's BART determination appears to have reached a reasonable conclusion, taking into account existing information and the potential magnitude or effect of technical flaws in cost or visibility analyses, EPA may approve the BART determination. However, if the potential technical flaws in analyses make it possible that the State's BART determination would be unreasonable, then EPA may develop additional information to try to determine whether the State's BART determination would fall within the range of reasonable outcomes using proper technical analyses. For example, as we explain elsewhere in responding to comments on modeling, in this action EPA was unable to ascertain the visibility benefits of individual NO_X controls for the PacifiCorp units from the State's modeling because the emission reductions for multiple pollutants were modeled together, and therefore we were unable to assess the reasonableness of the State's BART determinations.[65] Similarly, for the Basin Electric units, we were unable to ascertain the visibility benefits of SNCR. For that reason, we developed additional modeling. In some cases, the additional modeling confirmed the reasonableness of the State's decisions while in others it did not.

With respect to the State's PM BART determinations, the dollar per ton costs for higher-than-current levels of control were generally high (regardless of potential flaws in determining those costs), so existing information was adequate to find that the PM BART determinations were reasonable. With respect to FMC Westvaco and General Chemical, the State's modeling (which as we discuss elsewhere used a conservative estimate of background ammonia which would tend to result in an overestimation of visibility impacts) showed fairly low visibility benefits from NO_X controls. Based on consideration of the five BART factors, the State selected combustion controls for these BART sources. EPA also finds these determinations reasonable, and EPA has no reason (nor does the commenter provide one) to think otherwise.

With respect to the comments regarding Oregon and Colorado, although consistency with similar determinations is one hallmark of reasonableness, the BART determinations are very fact-specific and cannot be easily compared across states. For example, in the Oregon action, EPA noted that (among other things) the source would shutdown in 2020, so ''it [was] reasonable for the state to consider the sizable capital cost difference between [two technologies], and the relatively small incremental visibility improvement between the two technologies.'' 76 FR 38900. Thus, EPA could assess on the basis of existing information that the State's BART determination was reasonable. With respect to the Colorado SIP, we disagree with the commenter that the Wyoming and Colorado SIPs would achieve comparable visibility improvement.

With respect to consistency generally, in this action we have considered the five factors in the context of each facility. Although one factor (such as visibility improvement or costs of compliance) may be similar for a unit in another state, each factor must be weighed in the context of the other source-specific BART factors.

Comment: Section 169A(g)(2) of the CAA requires states, in determining BART, to ''take into consideration the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing air pollution control technology in use at the source, the remaining useful life of the source, and the degree of visibility improvement which may reasonably be anticipated to result from the use of such technology.'' 42 U.S.C. 7491(g)(2). The CAA does not require the achievement of any specific degree of visibility improvement, and only requires that a BART determination eliminate or reduce impairment to visibility. *See id.* Section 7491. If the state's determination does so, the state has complied with the statute and nothing authorizes EPA to propose or impose its own BART decision.

EPA's proposed action, however, articulates a number of *additional* grounds that must be met for a SIP to be ''approvable.'' These additional grounds are not found in the text of the CAA and have never been defined or promulgated with notice and comment rulemaking. For example, EPA's proposed action articulates a two pronged test for BART SIP approval: *First,* ''a state must meet the requirements of the CAA and our regulations for selection of BART''; and then *second,* ''the state's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.'' 78 FR 34743.

Basin Electric has no problem with the first prong of this test, *i.e.,* that a state's SIP must ''meet the requirements of the CAA'' and ''any [applicable] regulations''—so long as those regulations are confined to the areas Congress allowed EPA to regulate. However, the second prong, *i.e.,* that ''the State's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program,'' sets out a new ''reasonableness'' obligation that is neither defined in nor separately set forth in the Act. Essentially, EPA is proposing to measure a BART determination not just against the statutory criteria but also against EPA's own subjective view whether the result reached is *reasonable enough* to meet

[65] As we explain later in this document ''[t]hat is, since the visibility improvement for each of the State's control scenarios was due to the combined emission reductions associated with SO_2, NO_X, and PM controls, it was not possible to isolate what portion of the improvement was attributable to the NO_X controls alone. For this reason, in the modeling conducted by EPA, we held SO_2 and PM emission rates constant (reflecting the ''committed controls'' for those pollutants identified by Wyoming), and varied only the NO_X emission rate. This allowed us to isolate the degree of visibility improvement attributable to the NO_X control option.'' See response to comments in the modeling section for further information.

the ''overarching goal'' of the Act. But since EPA acknowledges that neither the Act nor the regulations ''mandate specific milestones or rates of progress,'' 76 FR 58577, EPA's subjective reasonable enough requirement imposes a new legislative standard that either goes beyond or, for the first time, purports to define ''the requirements of the Act.'' This empowers EPA to disapprove a state BART determination and replace it with its own on reasonableness grounds that have never been defined or vetted through public notice and comment.

The same is true with EPA's assertion that Wyoming did not provide ''sufficient documentation.'' 78 FR 34749. EPA is asserting the existence of, and then a failure to meet, a ''sufficient documentation'' requirement that is both undefined and entirely of EPA's own creation. This allows EPA to extend its regulatory reach to determine and impose its own view of BART when a state's reasoning, according to EPA, fails to meet unannounced and undefined legislative criteria. Such an expansion of EPA's substantive powers is illegal. EPA may not employ evaluative criteria that effectively extend or define the reach of the CAA without first subjecting those criteria to public notice and comment. *See, e.g., Syncor Int'l Corp.* v. *Shalala,* 127 F.3d 90, 95–96 (D.C. Cir. 1997) (requiring the FDA to subject a rule that extended its regulatory reach to notice and comment before applying it); *U.S. Tel. Ass'n* v. *FCC,* 28 F.3d 1232, 1233–34 (D.C. Cir. 1994) (finding that the FCC's application of a new standard was a substantive rule requiring notice and comment); *Am. Mining Congress* v. *Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (outlining the factors to apply in determining when a rule is substantive and thus requires notice and comment).

As the D.C. Circuit Court has explained, when an agency implements a substantive change to its regulations that alters the boundaries of what the agency can regulate, the change must be subject to public notice and comment so that an agency does not expand its power without public involvement. *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1024 (D.C. Cir. 2000). The same is true when EPA purports, for the first time, to vet a state SIP revision against criteria of its own making not set forth in the governing statute or the existing regulations. Here, EPA is effectively stating that: (1) The most cost-effective (on a dollar per ton basis) control technology must be selected as BART; (2) a state BART determination must be ''adequately justified,'' ''sufficiently documented,'' and ''properly made''; and (3) the state's determination must meet EPA's subjective view of ''reasonableness'' in reaching the non-binding goal of the regional haze Program. Each of these new criteria is outcome determinative, according to EPA, and each must be met for the State to be considered in compliance with Section 169A. As such, these are new legislative rules that cannot be adopted and imposed without first being submitted to notice and comment rulemaking as required by CAA Section 307(d), 4207 U.S.C. 7607.

An important indicator of when public notice is required is that the change would allow the agency to extend its own power: ''[A] substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority* . . . And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.'' *Syncor,* 127 F.3d at 95 (emphasis in original). EPA's current proposal to disapprove Wyoming's BART determination does exactly that. EPA uses its own authority to modify the legal norm for reviewing State BART decisions to give itself the ultimate authority to impose its own favored BART standards.

The need for advance rulemaking is particularly acute when EPA interprets and applies a statute that itself establishes no concrete, objective requirements. No specific rates of progress, technologies, or visibility improvements are mandated by the RHR. Unlike review of a SIP, where EPA applies specifically defined ambient concentrations to determine if the SIP should be approved, there are no objective criteria against which to measure the ''reasonableness'' of any state BART determination with respect to cost and visibility judgments.

Under EPA's self-defined standards, EPA is left with unfettered discretion to disapprove any decision with which it disagrees on the grounds that it is not ''reasonable'' enough to meet EPA's preferences. This is why the law requires EPA to first define and promulgate rules explaining what is ''reasonable'' enough, or what is ''sufficiently documented'' enough, to support a BART determination. Otherwise, EPA can trump state discretion on the basis of internally conceived and unexamined evaluative criteria that extend EPA's reach without public involvement.

Response: EPA disagrees with this comment. First, even assuming that EPA's proposed action on the Wyoming regional haze SIP articulated new grounds for evaluating a regional haze SIP, the proposed action provides the public with the opportunity to comment. As evidenced by the commenter's submission, the commenter had the opportunity to comment on EPA's approach to evaluating the Wyoming regional haze SIP and to identify any concerns associated with the statement at issue from our proposal and other aspects of our action.

Second, the CAA requires states to submit SIPs that contain such measures as may be necessary to make reasonable progress toward achieving natural visibility conditions, including BART. The CAA accordingly requires the states to submit a regional haze SIP that includes BART as one necessary measure for achieving natural visibility conditions. In view of the statutory language, it is reasonable that the State's BART analysis and determination would be evaluated in light of the purpose of the regional haze program. In addition, our regional haze regulations, at 40 CFR 51.308(d)(ii), provide that when a state has established a RPG that provides for a slower rate of improvement in visibility than the URP (as has Wyoming), the state must demonstrate, based on the reasonable progress factors—i.e., costs of compliance, time necessary for compliance, energy and non-air quality environmental impacts of compliance, and remaining useful life of affected sources—that the rate of progress to attain natural visibility conditions by 2064 is not reasonable and that the progress goal adopted by the state is reasonable. 40 CFR 51.308(d)(iii) provides that, ''in determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator will evaluate'' the state's demonstrations under section 51.308(d)(ii). It is clear that our regulations and the CAA require that we review the reasonableness of the State's BART determinations in light of the goal of achieving natural visibility conditions. This approach is also inherent in our role as the administrative agency empowered to review and approve SIPs. Thus, we are not establishing a new reasonableness standard, as the commenter asserts.

As explained above, our proposal clearly laid out the bases for our proposed disapproval of the State's BART and reasonable progress determinations, and we have relied on the standards contained in our regional haze regulations and the authority that Congress granted us to review and determine whether SIPs comply with

the minimum statutory and regulatory requirements. In determining SIP adequacy, we inevitably exercise our judgment and expertise regarding technical issues, and it is entirely appropriate that we do so. Courts have recognized this necessity and deferred to our exercise of discretion when reviewing SIPs.

Finally, we disagree with the argument that we must approve a BART determination where the SIP reflects consideration of the five factors and the BART selection will result in some improvement in visibility. We think Congress expected more when it required the application of ''best available retrofit technology.''

Comment: In 2004, EPA represented to the United States Supreme Court that it would act only very rarely to overrule a state decision selecting control technology for specific sources. *ADEC.* Relying upon this representation to rebut doubts expressed by the dissent, the Supreme Court affirmed EPA's decision to overrule a BACT decision made by the State of Alaska on the grounds that the State's decision was not ''reasonable'' because the record lacked the information necessary to support the State's cost assessment. The *ADEC* Court held that EPA could review state BACT determinations to ascertain whether they were ''reasonable in light of the statutory guides and the state administrative record.'' *Id.* at 494.

EPA now relies upon the Supreme Court's use of the word ''reasonable'' in the BACT context to assume authority to judge the ''reasonableness'' of state BART decisions when reviewing SIP revisions under Section 110, and thus to disapprove any BART determination it considers ''unreasonable'' ''in light of the over-arching purpose of the regional haze program.'' 78 FR 34743. This formulation seriously misconstrues and misstates the Supreme Court's holding and runs counter to the CAA's conferral of authority on the State in selecting BART. ''Reasonableness in EPA's subjective view'' cannot be applied as a rubric for approving state BART decisions, as it allows EPA to impose its own BART preferences. Rather than adhere to the core principles of cooperative federalism codified in the RHR by only rarely overruling state technology choices, EPA instead does exactly what it represented to the Supreme Court it would not do—routinely overrule state determinations—and it does so under the rubric of authority to evaluate ''reasonableness'' on a subjective basis.

Examination of EPA's action in this and related BART proceedings around the country demonstrates that EPA is not using the ''reasonableness'' standard that was actually approved in *ADEC.* Far from endorsing a generic ''reasonableness in EPA's view'' standard, the *ADEC* Court echoed the language of APA arbitrary and capricious review and upheld EPA's rejection of a State BACT determination on grounds that the State's determination was not supported by the administrative record. The Court stated that ''[o]nly when a state agency's BACT determination is '*not based on a reasoned analysis*' may EPA step in to ensure that the statutory requirements are honored,'' and that the Act ''authorizes EPA to act in the *unusual case* in which a state permitting authority has determined BACT *arbitrarily.''* 540 U.S. at 490–91; citation omitted). The Court added that ''EPA adhered to that limited role here, explaining why ADEC's BACT determination was '*arbitrary*' and *contrary to [the State]'s own findings.'' Id.* The Court thus held that EPA had properly exercised its authority to reject the State's BACT determination when the State switched from an initial finding that a certain technology was economically feasible to finding that the same technology was economically infeasible with ''no factual basis in the record'' to support the change. *Id.* at 496–500.

Here, EPA makes no effort to formulate and apply a ''reasonableness'' standard that appropriately preserves for EPA only the ''limited role'' of insuring that a state decision is not arbitrary and capricious and lacking in record support. Instead, EPA scours the record for inconsequential actions taken by states which it can portray as ''inconsistent with'' the massively complex, out-dated, and non-binding CCM or with the largely advisory Guidelines so that EPA can declare the state's decision to be ''unreasonable'' and take over the choice of BART technology. EPA does not demonstrate any arbitrary or capricious conduct, any lack of reasoned decision making, or any other documented failure by the State to follow the requirements of the statute, as contemplated by the standard actually approved in *ADEC.* As a result, EPA is not employing the ''reasonableness'' test properly, and with that error is arrogating power Congress left to the States, precisely as predicted by the *ADEC* dissent. In state after state, EPA is now striking down state BART decisions and cloaking its disregard for state primacy by adjudging those decisions as ''unreasonable,'' purportedly in reliance upon authority granted by *ADEC.* But it strains credulity for EPA to assert that state after state is making essentially the same repeated arbitrary and capricious decisions, the remedy for which is almost always mandatory imposition by EPA of its preferred technology choice: SCR. EPA's ''reasonableness'' test is therefore fundamentally erroneous. EPA may not exercise authority ''in a manner that is inconsistent with the administrative structure that Congress enacted into law,'' *ETSI Pipeline Project,* 484 U.S. at 517, by applying a subjective reasonableness standard to federalize BART decisions.

Response: We responded to similar comments elsewhere in this document.

Comment: Because EPA's proposed disapproval of Wyoming's BART determination for Laramie River Station is inconsistent with EPA's prior approval of other state BART choices, EPA's proposed decision is an abuse of discretion and not entitled to deference from a reviewing court.

For instance, in a CAA case involving EPA approval of state Title V programs, the Ninth Circuit reversed EPA's disapproval of one state's program where EPA's decision ''conflict[ed] substantially with numerous EPA decisions in other states and localities.'' *W. States Petroleum,* 87 F.3d at 282. In that case, EPA had conditioned final approval of Washington's proposed Title V program on the State's repeal of certain insignificant emissions units (''IEU'') exemptions. EPA eventually approved the State's Title V program, but disapproved the IEUs exemptions as inconsistent with the applicable regulations. *Id.* at 283. Industry members and the State challenged EPA's disapproval on the basis that EPA's decision was inconsistent with its prior interpretation and application of the regulations in other states. *Id.* at 282–83. Specifically, EPA had condoned the exemption of IEUs from the permit content requirements of the regulations in at least eight other state and local programs. *Id.* at 283. Based on this evidence, the Ninth Circuit held that EPA's rejection of Washington's IEU rules was ''undeniably a change in agency interpretation.'' *Id.* at 284. Accordingly, EPA was required to support its change by ''reasoned analysis,'' which it did not do. *Id.* (EPA ''may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case''). The court held that EPA abuses its discretion where it approves numerous state programs that include the very same aspects forming the basis for EPA's denial of another state's program. *Id.* at 285.

Other courts have similarly expressed that an agency acts arbitrarily and capriciously when it departs from prior interpretations or precedent without adequately explaining the reasons for its departure. *See, e.g., Cnty. of Los Angeles* v. *Shalala,* 192 F.3d 1005, 1022 (D.C. Cir. 1999) (''A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.''); *Shaw's Supermarkets, Inc.* v. *N.L.R.B.,* 884 F.2d 34, 41 (1st Cir. 1989) (''Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.''); *Puerto Rican Cement Co.* v. *EPA,* 889 F.2d 292, 298 (1st Cir. 1989) (noting ''the well-established legal doctrine that an agency 'must either follow its own precedents or explain why it departs from them' '') (citation omitted); *Int'l Internship Programs v. Napolitano,* 853 F. Supp.2d 86, 94 (D.D.C. 2012) (''[I]f an agency adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation,' the agency must comply with the notice and comment requirements of the APA.'') (citation omitted). Moreover, consistency is a factor to be weighed in determining how much deference an agency's interpretation is entitled to receive. *Good Samaritan Hosp.* v. *Shalala,* 508 U.S. 402, 417 (1993) (''[T]he consistency of an agency's position is a factor in assessing the weight that position is due.''). When an ''Agency's regulations reflect the Agency's own longstanding interpretation,'' a court ''will normally accord particular deference'' to such ''interpretation of 'longstanding' duration.'' *Barnhart* v. *Walton,* 535 U.S. 212, 219–20 (2002). But ''the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.'' *Pauley,* 501 U.S. at 698. ''An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'' *I.N.S.* v. *Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987). *See also Watt* v. *Alaska,* 451 U.S. 259, 273 (1981) (''The Department [of Interior]'s current interpretation, being in conflict with its initial position, is entitled to considerably less deference.''); *W. States Petroleum,* 87 F.3d at 285 (the court ''need not defer to the EPA because the EPA has abused its discretion in departing from its own prior standards'').

Here, EPA has taken an inconsistent approach in interpreting the RHR, the Guidelines, and the CCM. In particular, EPA's current interpretation of its role and the states' role under these provisions conflicts with its prior, long-held understanding that states serve the primary role in determining BART and that EPA should not interfere with the many judgments that go into making BART determinations.

More specifically, EPA's application of its improper and subjective ''reasonableness'' standard when reviewing BART determinations in the SIP approval process has yielded inconsistent, and therefore arbitrary and capricious, results. Here, EPA identifies what it describes as ''cost and visibility errors for EGUs'' in Wyoming's SIP sufficient to permit EPA to disapprove the BART determination for Laramie River, yet EPA proceeds to approve other Wyoming BART decisions as ''reasonable'' ''despite the[se] . . . errors.'' 78 FR 34750. Either EPA is applying the law arbitrarily and capriciously, or it is simply approving as ''reasonable'' only those choices with which it agrees, either of which is erroneous. EPA must be reasonably consistent in reviewing state BART determinations.

Response: We responded to similar comments above.

Comment: EPA's implementation of the RHR does not satisfy the CAA's requirements of consistency. The conclusions reached by EPA on similar issues vary from case to case in ways that cannot be explained by statute, regulation, or guiding principle. EPA seems to act on BART determinations with an eye towards achieving its desired outcome rather than implementing the CAA even-handedly. This is the definition of caprice. States, regulated entities, and the public are left guessing as to what will be required in any given case. Because EPA has been so inconsistent in the current case and in its overall administration of the RHR, its proposal to disapprove Wyoming's BART determinations for Laramie River and to impose a FIP is arbitrary and capricious and must be abandoned.

Response: We responded to similar comments above.

7. Reliance on Emission Reductions

Comment: EPA's regional haze FIP action is also illegal, arbitrary, and capricious because it relies upon factors outside of the BART five-factor analysis. Nowhere in the five-factor analysis, or anywhere in the Appendix Y Guidelines, is there any support for EPA using an ''emissions reduction'' factor. But this is exactly what EPA has done in its FIP. For example, EPA cited ''emission reductions'' as the basis for the FIP BART NO_X decisions for Dave Johnston Unit 3 (*See* 77 FR 33052), Wyodak (*See* 77 FR 33055) and Laramie River (*See* 77 FR 33001), among others. In doing so, however, EPA failed to account for the fact that the regional haze program is not an emissions reduction program *per se,* but is a visibility improvement program.

Additionally, it is improper for EPA to reject Wyoming's BART determinations, which relied upon the proper balancing of all five BART factors, and replace those BART determinations with EPA's analysis, which relied upon factors outside the five-factor analysis, such as emissions reductions. (*See e.g.,* 77 FR at 33,052.) Courts have held that when an agency relies on factors ''which Congress has not intended it to consider,'' then such action is arbitrary and capricious. *Arizona Public Service Co.* v. *US EPA,* 562 F.3d 1116, 1123 (10th Cir. 2009).

Earlier comments asserted that EPA's regional haze FIP is also illegal, arbitrary, and capricious because it relies upon factors outside of the BART five-factor analysis. Nowhere in the five-factor analysis, or anywhere in Appendix Y, is there any support for EPA using an ''emissions reduction'' factor. But this is exactly what EPA has done. For example, EPA cites ''emission reductions'' as the basis for the regional haze FIP BART NO_X decisions for Dave Johnston Unit 3, Wyodak, and Laramie River Station, among others. In doing so, however, EPA fails to account for the fact that the regional haze program is not an emissions reduction program *per se,* but is a visibility improvement program.

EPA's over-reliance on ''emissions reductions'' outside of the mandated BART factors has caused EPA to overstep the boundaries of the regional haze program. This is evidenced by the virtually non-existent visibility improvements associated with SNCR at Wyodak and Dave Johnston that EPA approved because of the associated emission reductions. Additionally, it is improper for EPA to reject Wyoming's BART determinations, which relied upon the proper balancing of all five BART factors, and replace those BART determinations with EPA's analysis, which relied upon factors outside the five-factor analysis. Courts have held that when an agency relies on factors ''which Congress has not intended it to consider,'' then such action is arbitrary and capricious. *Arizona Public Service*

Co. v. *US EPA,* 562 F.3d 1116, 1123 (10th Cir. 2009).

Response: We disagree with the commenter's characterization of the role of emission reductions in the BART analyses. The RHR provides that:

> The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART * * *[66]

Thus, the BART Guidelines clearly contemplate the assessment of emission reductions.

Emission reductions are a consideration in calculating both average and incremental cost effectiveness in order to evaluate the cost of compliance (one of the five factors). 70 FR 39167 and 39168. Contrary to the commenters' assertions, however, our disapproval of Wyoming's DEQ's BART analyses is not ''based'' on emission reductions, rather the analyses was based on the best system of continuous emission control technology and associated emission reductions achievable, as used in developing the BART factor information. For example, as discussed elsewhere in this section and final notice, contrary to the Guidelines' admonition that ''cost estimates should be based on the CCM, where possible,'' the control cost calculations supplied by the utilities and relied upon by Wyoming included costs not allowed by the CCM, such as owner's costs and Allowance for Funds Utilized During Construction (AFUDC). Thus, Wyoming's consideration of the ''cost of compliance'' for these units was not consistent with the Guidelines. Furthermore, as explained elsewhere in this document, Wyoming's consideration of visibility benefits was inconsistent with the Guidelines because the State did not provide visibility modeling from which the visibility improvement from individual controls could be ascertained. EPA's analyses comports with the CAA and RHR requirements; therefore, we did not consider factors outside the Agency's authority.

In regard to EPA's disapproval of Wyoming's BART decisions on five units, EPA's decision was based on a careful weighing of the five factors, including cost of compliance (average and incremental) and visibility improvement. Just because EPA points out the emission reductions does not mean that it has cited ''emission reductions'' as the only basis for the regional haze FIP BART NO_X decisions for these units.

[66] 40 CFR 51.308(e)(1)(ii)(A).

8. Presumptive Limits

Comment: EPA's regional haze FIP is improper because it requires post-combustion NO_X controls as BART, when EPA guidelines make clear that only combustion controls for NO_X are contemplated. (*See e.g.* 77 FR at 33,053.) EPA's Preamble and other guidance confirm that the combustion controls of LNBs and OFA (in some form) are ''BART technology'' for the BART units. In the Preamble and the RHR, EPA stated that, except for cyclone boilers, the ''types of current combustion control technology options assumed include low NO_X burners, over-fire air, and coal reburning.'' 70 FR 39134; *see also* 39,144 (''For all other coal-fired units, our analysis assumed these units will install current combustion control technology.'') (emphasis added). In fact, in the Technical Support Document used to develop the presumptive BART NO_X emissions limits, EPA explained that the ''methodology EPA used in applying current combustion control technology to BART-eligible EGUs'' included applying ''a complete set of combustion controls. A complete set of combustion controls for most units includes a low NO_X burner and over-fire air.'' (''Technical Support Document, Methodology for Developing NO_X Presumptive Limits,'' EPA Clean Air Markets Division, pg. 1 (dated June 15, 2005)).

EPA's Preamble and Appendix Y identify post-combustion controls for NO_X, such as SCR and SNCR, as ''BART technology'' for only ''cyclone'' units. EPA made it clear that for ''other units, we are not establishing presumptive limits based on the installation of SCR.'' 70 FR 39136. Therefore, EPA's presumptive ''BART technology'' is LNBs and some type of OFA. EPA further elaborated in the Preamble on SCR costs, stating that although ''States may in specific cases find that the use of SCR is appropriate, we have not determined that SCR is generally cost-effective for BART across unit types.'' *Id.; see also* 40 CFR Part 51, Appendix Y, Section IV.E.5.[67] Because EPA improperly requires post-combustion controls in its regional haze FIP, EPA should withdraw this requirement and approve the Wyoming SIP. If EPA desires to impose post-combustion controls as BART NO_X, it must first amend Appendix Y through a proper rulemaking procedure.

Commenters further assert that, when EPA issued the RHR, it established presumptive NO_X BART limits for power plants based on EPA's conclusions about the cost effectiveness of certain emissions control technologies, including SCR and combustion controls. 70 FR at 39131, 39134–39136. These limits are based on EPA's acknowledgment that NO_X controls vary considerably and only in ''relatively rare cases'' would SCR be appropriate. 69 FR 25184, 25202 (May 5, 2004). EPA's own pronouncement on the cost effectiveness of SCR belie its finding that SCR is cost effective at Laramie River Station.

The presumptive limits for NO_X are differentiated by boiler design and type of coal because NO_X control technologies are not ''one size fits all'' and cost effectiveness is variable. *Id.* at 39134. As EPA noted in proposing presumptive NO_X BART limits, ''the removal efficiencies and costs associated'' with NO_X controls ''vary considerably, depending upon the design and operating parameters of the particular boiler being analyzed.'' 69 FR at 25202. For that reason, EPA proposed (and ultimately finalized) presumptive NO_X BART limits that would not require post-combustion controls: ''States should require the lowest emission rate that can be achieved without the installation of post-combustion controls'' because they are ''applicable to most EGUs, are relatively inexpensive, and are already widely

[67] Commenters also suggest that, EPA has methodically changed or selectively ignored the requirements from those which were established in 40 CFR Part 51 and Appendix Y, which were published in 2005. The states' SIPs, written shortly after that period, were based on the rules and guidance provided at that time. Since then, however, EPA has arbitrarily and continually changed its interpretation of the regional haze regulations in order to achieve emission reductions and other objectives well beyond those allowed by the regional haze program. Here are a few examples of how EPA's position has changed over the past few years with respect to the guidance given for determining NO_X BART controls.

Appendix Y provides a presumptive BART NO_X rate differentiated by boiler design and type of coal burned. EPA now requires post-combustion controls significantly more aggressive than the presumptive rates prescribed in Appendix Y. Appendix Y makes distinctions for unit size, with more aggressive controls targeted at the largest units. In Wyoming, EPA now proposes to require SCR on units as small as 160 megawatts. The preamble to the regional haze rules suggests that 75 percent of the electric generating units would have BART NO_X controls cost between $100 and $1,000 per ton. EPA is now imposing costs, based on its own calculations, of $3,700 to $6,000 per ton on 100 percent of PacifiCorp's Wyoming BART-eligible units.

SCR controls were only expected to be cost-effective controls for cyclone units with high NO_X emission rates. EPA is now proposing post-combustion NO_X controls on every BART-eligible unit in Wyoming, including the installation of eleven SCRs. EPA must stop changing its interpretations of the regional haze rules and guidelines that were formalized in 2005 and move ahead with approving the Wyoming BART analysis and the regional haze SIP which complies with those rules and guidelines.

applied.'' *Id.* Indeed, EPA ''recognize[d] that a small number of the largest power plants may need to install an SCR unit to meet this control level. *In such relatively rare cases, a State, at its discretion, may find SCR to be appropriate if the source causes visibility impacts sufficiently large to warrant the additional capital cost.'' Id.* (emphasis added).

EPA's presumptive BART determinations for coal-fired EGUs of various boiler configurations demonstrate that emissions control devices with an average cost effectiveness greater than $1,350 per ton are not cost effective. Sargent & Lundy analyzed the presumptive BART limits in EPA's ''Technical Support Document for BART NO_X Limits for Electric Generating Units Excel Spreadsheet'' and EPA's ''Technical Support Document—Methodology for Developing BART NO_X Presumptive Limits,'' and compiled EPA's cost effectiveness thresholds for each boiler design and coal type. Sargent & Lundy, ''BART Cost Effectiveness Thresholds'' (Jan. 6, 2010). Exhibit 17 to commenter 0148. The report was prepared to supplement North Dakota's BART determination for Basin Electric's Leland Olds Station Units 1 and 2, but is equally applicable to any BART determination for coal-fired utility boilers, including Laramie River Station. Sargent & Lundy concludes that based on EPA's own assumptions about acceptable cost effective levels, ''a threshold of $1,350/ton should be used to establish the cost-effectiveness of NO_X retrofit control technologies.'' *Id.* at 12.

Sargent & Lundy's report demonstrates that EPA consistently found control technologies to be cost effective if the cost of NO_X removal was less than $1,350/ton, and not to be cost effective if the cost of NO_X removal was greater than $1,350/ton. *Id.* at Figure 3 and accompanying text. For example, for all boiler categories other than cyclone units, SCR had an overall average cost effectiveness of $1,749/ton NO_X removed and was considered not to be cost effective. *Id.* at 11. Combustion controls at non-cyclone boilers had an overall average cost effectiveness of $535/ton NO_X removed and were found to be cost effective. *Id.*

SCR is not cost effective at Laramie River Station because it greatly exceeds the $1,350/ton threshold used by EPA in its presumptive BART determinations. EPA's own flawed cost effectiveness analysis estimates that installation of SCR at Laramie River Station would range from between $3,589 and $3,903 per ton of NO_X removed—far above the $1,350/ton threshold used in its presumptive BART determination. 78 FR at 34775–34776. EPA does not mention its presumptive BART limits in its proposed disapproval of Wyoming's BART determinations, and offers no explanation for departing from the presumptive levels and the associated use of combustion controls. 78 FR at 34772–34777. Moreover, when Sargent & Lundy estimated costs of SCR at Laramie River Station based on a detailed scoping-level study, it found that costs per ton of NO_X removed would range from $8,531 to $9,048, an amount seven times greater than the threshold used in the presumptive BART determination. Sargent & Lundy Evaluation, Table 7. *See also* Section XVIII.A.

We received numerous comments earlier that EPA's regional haze FIP is improper because the BART units are meeting the presumptive limits in the BART guidelines based on the installation of combustion controls. Commenters go on to assert that the BART Guidelines only require the installation of LNBs/OFA and that EPA determined in the guidelines that SCR was generally not cost-effective for BART. One commenter noted that EPA has completely ignored the presumptive BART limits in the proposed action and that this is contrary to the express requirements in both the RHR and the BART Guidelines. The commenter goes on to say that EPA's attempt to completely ignore the BART limits makes the presumptive BART limits meaningless and this is contrary to the requirements of the CAA and the clear intent of the BART Guidelines. One commenter asserted that the BART Guidelines show that an alternative analysis is required only when a source cannot meet the presumptive limits, and that while a state may choose to establish a limit that is more stringent than the BART limit, there is nothing in the BART Guidelines that would require a state to do so.

Commenters asserted that EPA adopted the presumptive BART limits to establish the specific control levels required for EGUs. Commenters point out that EPA has not repealed the presumptive limits from the promulgated BART Guidelines, but in this action EPA does not even deign to acknowledge the existence of the presumptive limits, as if the presumptive BART limits were no longer a binding regulation. Commenters argued that unless and until EPA goes through notice and comment rulemaking to remove the presumptive emissions limits and establish other requirements consistent with the CAA, then EPA must approve a state's BART determination that meets the presumptive regulatory limits.

Response: We disagree with the commenters. The CAA states the following regarding emission limits for fossil-fuel fired generating power plants having a total generating capacity in excess of 750 MW:

> In the case of a fossil-fuel fired generating power plant having a total generating capacity in excess of 750 megawatts, the emissions limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

EPA disagrees that the CAA mandates specific control levels (*i.e.,* presumptive emission limits) for power plants with a total generating capacity of 750 MW or greater. Rather, the CAA directed EPA to develop guidelines for states to establish BART emission limits, and required that power plants having a total generating capacity in excess of 750 MW follow the guidelines when establishing BART emission limits. In response, in 2005 EPA promulgated the BART Guidelines, which provide a detailed description of how a state must approach the BART determination process for certain large EGUs, and required that the determination of fossil-fuel fired power plants having a total generating capacity greater than 750 MW must be made pursuant to the BART Guidelines. As such, the plain reading of the CAA language makes it clear the intent was to make the BART Guidelines mandatory for EGUs larger than 750 MW, as opposed to presumptive limits.

Compliance with EPA's ''presumptive'' NO_X emission limits does not excuse a state from performing such an analysis, because the presumptive limits serve as a floor, not a ceiling, for BART. Furthermore, the presumptive limits in the Guidelines do not supplant the Act's mandate to consider the five statutory factors, as codified in the RHR.[68] Additionally, commenters provide no showing that the assumptions underlying EPA's older, generic calculations representative of hundreds of plants in fact represent BART, under current circumstances, at these particular plants. Moreover, far from rendering the

[68] Given the statutory mandate, a state may only avoid full consideration of the five statutory factors if an initial consideration demonstrates that further analysis is moot—for example, where the state demonstrates that the subject unit already employs the ''most stringent control available.'' 70 FR at 39165. Where these unique circumstances are not present, a state's failure to consider the five factors (for large EGUs, by complying with the BART Guidelines' five-step analysis) is grounds for disapproval. CAA Section 110(k)(3), (*l*); *see Oklahoma,* 723 F.3d at 1207–08.

presumptive limits ''meaningless,'' EPA's interpretation is in fact necessary to effectuate the purpose of the Haze Rule. The fundamental purpose of the BART requirement is to determine the ''*best* system of continuous emission control technology *available* and associated emission reductions achievable for each BART-eligible source.'' 40 CFR 51.308(e)(1)(ii)(A) (emphasis added). To allow states to adopt the presumptive limits without any assessment of whether those limits represent the ''best'' control for a particular EGU at the time of the determination would be unreasonable in light of the overarching purpose of the Haze Rule and the CAA's visibility requirements. The presumptive limits ensure that states aim to achieve, at a minimum, the level of emissions reduction that was available and cost-effective at the time the BART Guidelines were adopted. EPA elaborated in the BART Guidelines themselves, clarifying that the Agency expected states to not only meet, but in appropriate cases exceed the presumptive limits: ''While these [presumptive] levels may represent current control capabilities, we expect that scrubber technology will continue to improve and control costs continue to decline. You should be sure to consider the level of control that is *currently best achievable at the time that you are conducting your BART analysis.''* 40 CFR part 51, App. Y, at IV.E.4 (emphasis added). Therefore, EPA's proposed rulemaking on the Wyoming regional haze SIP is not contrary to the requirements of the CAA and regulations.

Additionally, for each source subject to BART, the RHR, at 40 CFR 51.308(e)(1)(ii)(A), requires that states identify the level of control representing BART after considering the factors set out in CAA section 169A(g), as follows: ''[s]tates must identify the best system of continuous emission control technology for each source subject to BART taking into account the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of visibility improvement that may be expected from available control technology.'' 70 FR 39158. In other words, the presumptive limits do not obviate the need to identify the best system of continuous emission control technology on a case-by-case basis considering the five factors. A state may not simply ''stop'' its evaluation of potential control levels at the presumptive level of control if more stringent control technologies or limits are technically feasible. We do not read the BART guidelines in appendix Y to contradict the requirement in our regulations to determine ''the degree of reduction achievable through the application of the best system of continuous emission reduction'' ''on a case-by-case basis,'' considering the five factors. 40 CFR 51.301 (definition of Best Available Retrofit Technology); 40 CFR 51.308(e).

Also, our interpretation is supported by the following language in our BART guidelines: ''While these levels may represent current control capabilities, we expect that scrubber technology will continue to improve and control costs continue to decline. You should be sure to consider the level of control that is currently best achievable at the time that you are conducting your BART analysis.'' 70 FR 39171.

The presumptive limits are meaningful as indicating a level of control that EPA generally considered achievable and cost effective at the time it adopted the BART guidelines in 2005, but not a value that a state could adopt without conducting a five factor analysis considering more stringent, technically feasible levels of control.

Commenters focus on narrow passages of the BART guidelines to support their view that the presumptive limits represent the most stringent BART controls that EPA can require for regional haze. However, these passages must be reconciled with the language of the RHR cited above, as well as other passages of the BART guidelines and associated preamble. A central concept expressed in the guidelines is that a state is not required to consider the five factors if it has selected the most stringent level of control; otherwise, a state must fully consider the five factors in determining BART. 40 CFR part 51, appendix Y, section IV.D.1, step 1.9.

Undoubtedly, as the commenters note, the presumptive limits for NO_X represent cost effective controls, but it is well-understood that limits based on combustion controls do not represent the most stringent level of control for NO_X. Thus, a state which selects combustion controls and the associated presumptive limit for NO_X as BART may only do so after rejecting more stringent control technologies based on full consideration of the five factors. Our interpretation reasonably reconciles the various provisions of our regulations. We have clearly communicated our views on this subject in other states, and, following our interpretation, Wyoming conducted an analysis of control technologies that would achieve a more stringent limit than combustion controls.

In promulgating a FIP for the Wyoming BART sources, we arrived at an emission limit based on consideration of the five factors. Contrary to the commenter's suggestion, EPA's BART guidelines do not establish a presumptive cost effectiveness level that is a ''safe harbor'' or ''shield'' for state BART determinations, or that EPA, when promulgating a FIP, may not exceed in determining BART. Once a FIP is required, we stand in the state's shoes. This is not EPA establishing a new presumptive limit or national rule; it is EPA, acting in the State's shoes, conducting a reasonable source-specific consideration of cost and the other regulatory factors.

9. Compliance With 40 CFR 51.308

Comment: EPA should have judged Wyoming's BART determinations on the basis of whether or not the Wyoming BART determinations are ''necessary'' to make ''reasonable progress.'' EPA's RHRs provide two regulatory paths to address regional haze. (See 77 FR 30953, 30957 (May 24, 2012).) ''One is 40 CFR 51.308, requiring states to perform individual point source BART determinations and evaluate the need for other control strategies.'' *Id.* ''The other method for addressing regional haze is through 40 CFR 51.309, and is an option for nine states termed the 'Transport Region States' which include: . . . Wyoming, . . . By meeting the requirements under 40 CFR 51.309, states are making reasonable progress toward the national goal of achieving natural visibility conditions for the 16 Class I areas on the Colorado Plateau.'' *Id.* Wyoming submitted the Wyoming regional haze SIPs under Section 309. Therefore, the requirements of Section 308 only apply to the extent required by Section 309. Importantly, NO_X emissions and controls under Section 309 are treated differently than NO_X emissions and controls under Section 308. This is because Congress and EPA purposefully focused Section 309 on addressing the issue of SO_2 emissions, the predominant cause of regional haze on the Colorado Plateau in the western US. By contrast, Section 309 recognizes that NO_X emissions have a significantly smaller impact on visibility on the Colorado Plateau. In fact, the WRAP report estimated that ''stationary source NO_X emissions result in nitrates that probably cause about 2 to 5 percent of the impairment on the Colorado Plateau.'' Several illustrations in the WRAP NO_X report show that nitrate emissions have very little impact on Class I areas in or near Utah and

Wyoming. The WRAP report also explains that ''NO_X controls will have a relatively small impact on PM and visibility in the West.''

The Wyoming SIP, including BART determinations for NO_X, is consistent with the WRAP's NO_X information, and also properly acknowledges the relatively small impact nitrates from stationary sources like PacifiCorp's BART units have on visibility impairment in Wyoming. Wyoming's SIP, page 62, states that ''the majority of nitrate stems from mobile sources.'' The SIP also explains that in all but one Class I area ''contributions from other states and Canada are much larger than contributions from inside Wyoming.'' *Id.* Wyoming correctly determined, consistent with the WRAP reports and other data, that controlling NO_X emissions from stationary sources like PacifiCorp's BART units would yield very little visibility improvement in Wyoming. EPA's own regional haze visibility map shows that visibility in Wyoming is among the best in the country.

In light of the above information, it is understandable that Section 309 focuses on addressing SO_2 emissions. Indeed, WRAP focused their efforts primarily on SO_2 emissions because the research indicated this pollutant had the greatest impact on visibility. ''Recommendations for Improving Western Vistas,'' authored by the Grand Canyon Visibility Transport Commission, (June 10, 1996) at page 32 (identifying sulfates as ''the most significant contributor to visibility impairment'' from stationary sources). In a separate action, EPA acknowledged that Wyoming has complied with the Section 309's SO_2 requirements and made great progress towards improving and protecting visibility as a result. For all of these reasons, Section 309 takes a different approach to NO_X emissions than does Section 308, placing much less emphasis on the need for significant reductions in NO_X emissions and instead focusing almost all attention and resources in the western U.S. on reducing SO_2 emissions. EPA's FIP, with its incredibly expensive and unneeded NO_X control equipment, ignored the focus and intent of Section 309 and refused to acknowledge the discretion available to Wyoming to balance this information in making its BART determinations.

Additionally, as a result of the lesser emphasis in Section 309 on NO_X emissions, Section 51.309(d)(4)(vii) requires a regional haze SIP to ''contain any necessary long term strategies and BART requirements for stationary source . . . NO_X emissions.'' Section 308, by contrast, does not include a similar ''necessary to achieve reasonable progress'' threshold for BART. The difference between the two requirements is both intentional and meaningful. If a state like Wyoming finds that a particular BART requirement is not ''necessary'' to make ''reasonable progress,'' then that BART requirement should not be required as part of the regional haze SIP. This interpretation is supported by EPA's own position in *Central Arizona Water Conservancy District* v. *United States,* 990 F.2d 1531 (9th Cir. 1993). There, ''EPA chose not to adopt the emission control limits indicated by the BART analysis, but instead to adopt an emissions limitations standard that would produce greater visibility improvement at a lower cost.'' *Id.* at 1543. The court agreed with EPA, stating that ''Congress's use of the term 'including' in Section 7491(b)(2) prior to its listing BART as a method of attaining 'reasonable progress' supports EPA's position that it has the discretion to adopt implementation plan provisions other than those provided by BART analyses in situations where the agency reasonably concludes that more 'reasonable progress' will thereby be attained.'' Id. This same rationale applies to the term ''necessary'' in Section 309. Therefore, in rejecting Wyoming's regional haze SIP and adopting a FIP, EPA is required to show that the Wyoming SIP will not achieve ''necessary reasonable progress'' towards the visibility goal, and EPA's FIP will. EPA has failed to provide any support for such a position.

Other comments suggest that by meeting the requirements under 40 CFR 51.309, states are making reasonable progress toward the national goal of achieving natural visibility conditions for the 16 Class I areas on the Colorado Plateau. Wyoming submitted its regional haze SIPs under section 51.309. Therefore, the requirements of section 51.308 only apply to the extent required by section 51.309.

Wyoming's regional haze SIP is consistent with WRAP's NO_X information, and also emphasizes the relatively small impact nitrates that stationary sources have on visibility issues in Wyoming. Wyoming correctly determined, consistent with the WRAP reports and other data, that controlling NO_X emissions from stationary sources like PacifiCorp's units would yield very little visibility improvement in Wyoming. Section 51.309 understandably is intended to focus on SO_2 due to the greater visibility impact from SO_2. In a separate action, EPA acknowledged that Wyoming has complied with the section 51.309's SO_2 requirements and made great progress towards improving and protecting visibility as a result.

As a result of the lesser emphasis in section 51.309 on NO_X emissions, 40 CFR 51.309(d)(4)(vii) requires a regional haze SIP to ''contain any necessary long term strategies and BART requirements for stationary source . . . NO_X emissions.'' Section 51.308, by contrast, does not contain a similar ''necessary'' threshold for BART. If a BART requirement is not ''necessary'' for a section 51.309 state, such as Wyoming, to make ''reasonable progress,'' then it is not required as part of the regional haze SIP. In other words, section 51.309 allows a state even more discretion because of this ''necessary'' requirement than would otherwise be allowed under section 51.308. Wyoming has authority to adopt those regional haze SIP provisions that it believes provide for ''reasonable progress,'' even when those plan provisions do not align directly with BART as that may be determined under Section 51.308.

40 CFR 51.309(d)(4)(vii) provides that ''[a]ny such BART provisions may be submitted pursuant to either 51.308(e)(1) or 51.308(e)(2).'' By using the permissive term ''may,'' EPA makes clear that such a submission, under either subsection, is voluntary and not mandatory for section 51.309 states. For this reason, Wyoming, as a WRAP state, was never required to comply with 40 CFR 51.308(e)(1)(ii)(A) and is only required to include whatever BART NO_X determinations are ''necessary,'' as determined by the State. If Wyoming's section 51.309's SO_2 controls already provide the adequate level of visibility improvement and protection, then, by definition, little or no BART NO_X controls would be ''necessary.'' EPA has failed to show how any ''necessary'' NO_X controls were excluded from the Wyoming regional haze SIP; therefore it should approve Wyoming's regional haze SIP.

Response: We disagree with these comments. As explained in our proposed rulemaking for section 51.309(d)(4)(viii), we explained that the provision ''is intended to clarify that if EPA determines that the SO_2 emission reductions milestones and backstop trading program submitted in the section 51.309 SIP makes greater reasonable progress than BART for SO_2, this will *not* constitute a determination that BART for PM or NO_X is satisfied for any sources which would otherwise be subject to BART for those pollutants'' (emphasis added). 70 FR 44169 (Aug. 1, 2005). EPA does not interpret this rule to mean that there are different BART requirements for section 308 and 309

regional haze SIPs. EPA's rulemaking made no finding that BART determinations conducted for a state submitting a SIP under section 51.309 should be conducted any differently than a state submitting a FIP under only section 308. The use of the word ''necessary'' in section 51.309(d)(4)(viii) was to explain that some states may have BART NO_X emission limitations, while others may not. As already explained elsewhere in proposal and our response to other comments, Wyoming did not conduct a proper evaluation of the five statutory factors, as required by 40 CFR 51.308(e)(1)(ii)(A) and section 169A(g) of the CAA.

EPA also disagrees with commenter's assertion that a BART submission is discretionary. 40 CFR 51.309(d)(4)(viii) is clear in that the implementation plan ''must'' contain BART requirements. The proposed rulemaking explained that the provision that provides that ''[a]ny such BART provisions may be submitted pursuant to either Section 51.308(e)(1) or 51.308(e)(2),'' was included to ''allow States the flexibility to address these BART provisions either on a source-by-source basis under Section 51.308(e)(1), or through an alternative strategy under Section 51.308(e)(2).'' 70 FR 44169 (Aug. 1, 2005).

Moreover, EPA's proposal made clear that ''[i]n limited circumstances, it may be possible for a State to demonstrate that an alternative program which controls only emissions from SO_2 could achieve greater visibility improvement than application of source-specific BART controls on emissions of SO_2, NO_X and/or PM. We nevertheless believe that such a showing will be quite difficult to make in most geographic areas, given that controls on SO_2 emissions alone in most cases will result in increased formation of ammonium nitrate particles.'' 70 FR 44169 (Aug. 1, 2005). Wyoming's RH SIP does *not* include a demonstration that the backstop SO_2 trading program under Section 51.309 achieves greater visibility improvement than application of source-specific PM BART controls. Therefore, Wyoming's Section 51.309 SIP does not provide the adequate level of visibility improvement to meet the BART requirements.

With respect to the relationship of BART and requirements for reasonable progress under 40 CFR 51.308, EPA interprets the reasonable progress requirements to apply to BART sources. As explained in our guidance, due to the similarity of the BART and reasonable progress factors, states may reasonably rely on their BART determinations to show reasonable progress for those sources for the first planning period. However, BART is an independent requirement of the statute and the RHR. We have disapproved certain BART determinations by Wyoming not due to a failure to make reasonable progress, but due to a failure to consider the BART factors appropriately.

10. Legal Analysis

Comment: We received comments that the proposed rule is costly and that preliminary calculations by the State of Wyoming showed that the BART and long-term strategies under the proposed rule will cost over $170 million on an annualized basis; with total capital cost will be over $1 billion, and annual operating costs of nearly $600 million. Commenters went on to say that since the rulemaking action will exceed $100 million dollars in annual costs it should be reviewed according to the standards established in Executive Orders 12866 and 13563. * * *

Another commenter notes that EPA has also failed to conduct any analysis of the impacts under the Unfunded Mandates Reform Act (UMRA). In addition to the capital costs of nearly $750,000,000 for Laramie River Station alone, the annual operating costs of an SCR system at Laramie River Station are over $ 15,000,000. The commenter asserts that this amount is nearly double that projected by EPAs expert Andover of just under ($5,000,000), using generalized information. These annual operating costs, on top of the capital costs, for the three units at Laramie River Station alone, are significant, and when coupled with the impacts for the remaining five PacifiCorp units, far exceed the thresholds of the UMRA.

The UMRA is designed to ensure that Congress and federal agencies analyze the impact of proposed statutes and regulations on local governments and other entities before taking action. Where the estimates indicate at least a $50 million per fiscal year direct cost of all intergovernmental mandates, or a $100 million per fiscal year direct cost of private sector mandates, an analysis is required to evaluate the impact on local governments and private entities, and if necessary, the mandate must be funded. Western Minnesota, Missouri River Energy Services, and the governmental entities they serve—together with the others served by the remaining co-owners of Laramie River Station—will feel an annual impact in excess of $50 million per year should the EPA's FIP become final. Failure of EPA to conduct any analysis of the impact of imposing an unfunded mandate on the small governmental entities served by Laramie River Station, and the other BART units in Wyoming shows a blatant disregard for the regulatory process and protections that are to be accorded such significant rulemakings.

Earlier comments argued that the UMRA has been applied to EPA actions where the costs to regulated entities in numerous states have been aggregated. Based upon this precedent, PacifiCorp believes that EPA should aggregate all regional haze compliance costs across Wyoming, Utah, Colorado and Arizona for PacifiCorp, which would easily exceed the $100 million threshold. At a minimum, EPA should aggregate costs for EPA's FIPs in Wyoming and Arizona, which would also exceed the $100 million threshold.

Additional earlier comments suggested that the UMRA requires federal agencies to identify unfunded federal mandates. For rules that contain federal mandates, such as EPA's regional haze FIP action requiring expensive pollution controls, title II of UMRA requires the agencies to prepare written statements, or ''regulatory impact statements,'' (RIS) containing specific descriptions and estimates, including a qualitative and quantitative assessment of the anticipated costs and benefits of the mandate. This requirement is triggered by any rule that ''may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year. . .'' 2 U.S.C. 1532(a).

When a RIS is required, the agency is also required to ''identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost effective, or least burdensome alternative that achieves the objectives of the rule'' or explain why that alternative was not selected. 2 USCA Section 1535.

Here, EPA has failed to comply with the UMRA, arguing that the regional haze FIP ''does not contain a federal mandate that may result in expenditures that exceed the inflation adjusted UMRA threshold of $100 million.'' EPA is wrong. PacifiCorp currently anticipates spending more than $100 million dollars in at least 2014 ($104 million), 2015 ($175 million), and 2016 ($154 million) to comply with EPA's regional haze FIP for Wyoming (based on alternative ''one'' for the Jim Bridger plant). If the regional haze compliance costs imposed by EPA's proposed FIP in Arizona and EPA's approval of the Colorado regional haze SIP are factored in, the costs to PacifiCorp in a given

year would be significantly higher. Also, when the BART NO_X and PM determinations are approved by EPA for Utah, these costs to PacifiCorp in a given year could be much, much higher.

Response: We disagree with this comment. Under section 202 of the UMRA, before promulgating any final rule for which a general notice of proposed rulemaking was published, EPA must prepare a written statement, including a cost-benefit analysis, if that rule includes any ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more (adjusted for inflation) in any one year. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million (in 1996 dollars) by State, local, or Tribal governments or the private sector in any one year. We estimate that the total annual costs in the aggregate are approximately $93 million (see Table 1).

Comment: EPA's regional haze FIP states that EPA's proposed action is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28,355 (May 22, 2001)), because the proposed action ''is not a significant regulatory action under Executive Order 12866.'' 78 FR 34790. EPA further claims the proposed regional haze FIP is not a ''significant regulatory action'' under Executive Order 12866 because the ''proposed FIP applies to only five facilities'' and is ''therefore not a rule of general applicability.'' EPA is incorrect, and should withdraw its regional haze FIP.

Executive Order 13211 provides that agencies shall submit a statement of energy effects for matters ''identified as significant energy actions.'' A ''significant energy action'' is defined as ''any action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation . . . *that is a significant regulatory action under Executive Order 12866 or any successor order''* and ''likely to have a significant adverse effect on the supply, distribution, or use of energy''; or is ''designated by the Administrator of the Office of Information and regulatory Affairs as a significant energy action.'' *Id.* Section 4(b) (emphasis added). Executive Order 12866, in turn, which concerns Regulatory Planning and Review, defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. 58 FR 51735, 51738 (Oct. 4, 1993)

According to PacifiCorp's current estimates (excluding allowance for funds used during construction (AFUDC)), it will spend more than $100 million dollars in capital costs alone in 2014 ($225 million), 2015 ($139 million), 2017 ($146 million) and 2018 ($118 million) to comply with EPA's regional haze FIP for Wyoming (based on alternative ''one'' for the Jim Bridger plant). If regional haze compliance costs currently imposed or approved by EPA on PacifiCorp's BART Units in Arizona and Colorado are factored in, the total capital cost impacts to PacifiCorp in any given year would be significantly higher; increasing to approximately $246 million in 2014, $190 million in 2015, $168 million in 2016, $181 million in 2017, and $118 million in 2018. Also, because the BART NO_X and PM determinations have not yet been approved by EPA for PacifiCorp's BART Units in Utah, EPA's ultimate BART requirements in Utah likely will add even more costs in overlapping installation and compliance years, with total project costs for SCR installations on PacifiCorp's Utah units currently estimated to cost in excess of $150 million per unit to install (again, excluding AFUDC). Based upon these basic costs alone, there is no doubt that EPA's FIP meets the definition of a ''significant regulatory action.'' Other large costs, including those related to EPA's BART determinations for Basin Electric, also should be factored into this analysis together with PacifiCorp's costs because they are part of the same ''sector of the economy.'' Also, as demonstrated by PacifiCorp's July 12, 2012, submittal in this docket, EPA's regional haze FIP will have an adverse effect on the supply and distribution of electricity within PacifiCorp's system. Therefore, EPA's determination that Executive Order 13211 did not apply is incorrect, and arbitrary and capricious.

Moreover, EPA has admitted in the proposed rule that system-wide ''affordability'' costs should be part of the BART analysis. 78 FR 34756. Because EPA's FIP is a ''significant regulatory action,'' EPA must prepare a ''Statement of Energy Effects'' for the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget. (*See* Executive Order 13211, Section 2.) Because EPA did not do so, the regional haze FIP is improper.

Executive Order 12866, in turn, which concerns Regulatory Planning and Review, defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''

Also, as demonstrated by PacifiCorp's July 12, 2012 submittal in this docket, EPA's regional haze FIP action will have an adverse effect on the supply and distribution of electricity within PacifiCorp's system. Therefore, EPA's determination that Executive Order 13211 did not apply is incorrect, and arbitrary and capricious.

Moreover, because EPA's regional haze FIP action is a ''significant regulatory action,'' before imposing its regional haze FIP EPA must first prepare a ''Statement of Energy Effects'' for the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget. Such a statement must include a ''detailed statement'' by the agency concerning ''any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases . . .) should the proposal be implemented,'' and ''reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.'' Accordingly, based on an analysis of the relevant factors, EPA's regional haze FIP is improper because EPA failed to conduct the required regulatory analysis and failed to prepare the required documentation.

Executive Order 12866, in turn, which concerns Regulatory Planning and Review, defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''

Response: EPA disagrees that Executive Order 13211 applies to this action. Order 13211 is only applicable to an agency regulation that is a ''significant regulatory action'' under Executive Order 12866. Executive Order 13211(4)(b). Order 13211 also explicitly adopts the definitions of ''regulation'' and ''rule'' as explained in Executive Order 12866. Executive Order

13211(4)(a). However, this action does not fit within the definition of Executive Order 12866, which defines a ''regulation'' or ''rule'' as an ''agency statement of general applicability.'' Executive Order 12866(3)(d). Here, EPA's action was individually tailored for a limited number of BART eligible sources in Wyoming and is not generally applicable. Thus this action is not governed by Order 12866 and, therefore, is also not governed by Executive Order 13211. As discussed in more detail in Statutory and Executive Orders Review section of this document, the costs for this action are about $93 million annually.

Moreover, as explained in more detail elsewhere, EPA took the cost of compliance into consideration when making BART determinations to ensure this rule's requirements are beneficial and not unduly burdensome. The commenter is correct that EPA may, in its discretion, consider system affordability costs beyond the direct compliance costs on an individual facility in extraordinary circumstances. As explained in the Basis for Final Action section and elsewhere in the proposed and final actions, we proposed to approve the State's BART and reasonable progress determinations for Jim Bridger Units 1 and 2, but on a different basis.[69] In response to our proposal, we received both supportive and adverse comments regarding whether the affordability provisions of the BART Guidelines should apply to Units 1 and 2. As explained in more detail in our responses to these comments, we agree that PacifiCorp did not make a sufficient showing that it could not afford to install LNB/SOFA + SCR on Units 1 and 2 within the five-year compliance period. Nevertheless, we also received new information regarding the costs of compliance and visibility benefits associated with Jim Bridger and have revised our cost estimates and visibility modeling for all four units accordingly. Using this revised information, we re-evaluated the five BART factors. Ultimately however, while we believe that these costs and visibility improvements could potentially justify LNB/SOFA + SCR as BART, because this is a close call and because the State has chosen to require SCR as a reasonable progress control, we believe deference to the State is appropriate in this instance. We are therefore finalizing our approval of the State's determination to require SCR at Jim Bridger Units 1–4, with an emission limit of 0.07 lb/MMBtu (30-day rolling average), as part of its LTS. We also note that, neither the CAA nor the regional haze regulations require EPA to consider costs beyond an individual facility's direct compliance costs. 42 U.S.C.A. Section 7491(g)(1), (2); 40 CFR 51.301. Further, nothing in the Order is to be construed to impair or otherwise affect the authority granted by law to EPA, nor does it create any right or benefit enforceable at law.[70]

Comment: The EPA's FIP fails to account for the significant economic impacts on small entities as required by the Regulatory Flexibility Act. The estimated capital cost alone to install SCRs at Laramie River Station only is nearly $750,000,000. For Western Minnesota and its members the total impact would result in an increase in wholesale electric rates of twelve percent, which includes a ten percent increase due to the capital costs for installation of the SCRs and an additional increase of two percent annually for operating expenses. The members of Western Minnesota and Missouri River Energy Services are small governmental units, which must be given consideration under the Regulatory Flexibility Act.

Under the Regulatory Flexibility Act, EPA is required to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities. The certification that EPA has provided with this proposed rule is perfunctory at best, and does not seek to analyze the actual elements required by the Regulatory Flexibility Act.

The EPA has wholly failed to conduct any regulatory flexibility analysis pursuant to the Regulatory Flexibility Act, which further demonstrates the arbitrariness of this proposed FIP. If it had, it would acknowledge that the Wyoming SIP for NO_X provides a reasonable alternative that has a far less significant economic impact on small entities while providing virtually the same improvement in visibility.

Response: EPA disagrees with this comment. Courts have interpreted the Regulator Flexibility Act to require a regulatory flexibility analysis only when a substantial number of small entities will be subject to the requirements of the agency's action. See, e.g., *Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985). The economic analysis described in the Regulatory Flexibility Act is not required; however, if the head of an agency certifies that the rule will not have a significant economic impact on a significant number of small entities. 5 U.S.C. 605(b). As the commenter noted, such certification was made by EPA and published in the **Federal Register** as required by the act. No other action is required by EPA because the agency is not imposing any requirements on small entities. Here, only a limited number of entities have incurred compliance obligations under this action, and none of those entities are ''small entities.''

EPA still seeks to minimize the impact of its actions have on small entities. EPA sought comments regarding the economic impact from all entities affected by this action and carefully considered all relevant information. As described elsewhere, EPA believes that this action is necessary to achieve the objectives of the CAA and that the visibility improvements justify the costs of this rule, as established in the Act and implementing regulations.

Comment: The underlying purpose of Executive Order 12866 (Order) is to foster a regulatory regime that respects the role of local government, recognizes that the private sector is the ''best engine for economic growth,'' and appreciates the need to develop regulations that do not impose ''unacceptable or unreasonable costs on society.'' Exec. Order No. 12,866, 58 FR 51735 (Oct. 4, 1993). The Order requires agencies that propose a significant regulatory action to consider a multitude of quantitative and qualitative factors during the rulemaking process. *Id.*

A ''significant regulatory action'' is one in which the resulting rule is likely to ''[h]ave an annual effect on the economy of $100 million or more or

[69] There, we indicated that given the number of SCR retrofits PacifiCorp had to perform in Wyoming and in other states, it might not be affordable for PacifiCorp to install two additional SCRs on Jim Bridger Units 1 and 2 within the five-year BART compliance period. We requested additional information from commenters regarding whether the affordability provisions of the BART Guidelines should be applied to Units 1 and 2. In the alternative, we proposed to find that NO_X BART for Units 1 and 2 was an emission limit of 0.07 lb/MMBtu (30-day rolling average) based on the installation of LNB/SOFA + SCR with a compliance deadline of five years. Under this scenario, we acknowledged that the cost-effectiveness of LNB/SOFA + SCR at Units 1 and 2 was within the range of what EPA and the State itself had found reasonable in other BART determinations. We also considered the significant visibility improvement demonstrated by the State's modeling to warrant LNB/SOFA + SCR as BART.

[70] For example, EO 12866 (Sec. 10, Judicial review) explicitly states, ''This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.''

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs . . . or State, local, or tribal governments or communities.'' 58 FR 51735.

Allow us, by way of example, the opportunity to outline the significance that the proposed rule will have on one of Wyoming's counties. The Laramie River Station (Station), one of the five targeted EGUs under the proposed FIP, is the largest employer in Platte County. These are good paying jobs that include health and retirement benefits for the Station's employees. In a rural county with 8,800 people, where the average annual household income is $46,916, there is concern that the use of a control regime as proposed in the FIP may make operation of the Station substantially cost-prohibitive and therefore jeopardize some of the best jobs in Platte County. Moreover, the retrofitting outlined in the proposed rule will likely increase the electric rates of some of Wyoming's most vulnerable citizens.

The Station also provides a significant source of revenue for Platte County. In the 2012 Fiscal Year, the Station provided over $3.7 million in state assessed taxes. This is a significant source of revenue for Platte County, revenue that is needed to sustain essential government functions, such as operation of the county jail, maintaining county roads and bridges, and county health services. Platte County is but one example. Each of the other potentially affected counties (Converse, Lincoln, and Campbell) share those three principal concerns: (1) The targeted EGUs provide a significant source of employment to county residents, (2) volatility of electric rates on some of Wyoming's most vulnerable citizens, and (3) the EGUs provide a significant source of revenue in order to sustain essential county services.

For these reasons, Wyoming's County Commissioners cannot accept EPA's conclusion that the proposed rule is not a significant regulatory action. Accordingly, because the proposed rule is a significant regulatory action, it should be subject to review in accordance with Executive Order 12866 and, by extension, Executive Order 13563.

Response: Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. In general, the Order seeks to ensure the regulatory process is based on the best available science; allows for public participation and an open exchange of ideas; promotes predictability and reduces uncertainty; identifies and uses the best, most innovative, and least burdensome tools for achieving regulatory ends; and takes into account benefits and costs, both quantitative and qualitative. However, nothing in the Order shall be construed to impair or otherwise affect the authority granted by law to the Agency. In our review process the cost of compliance was one of the elements addressed to ensure that the requirements to achieve the goals stated in the CAA were beneficial and not burdensome to the regulated entity. Please refer elsewhere in our response to comments (e.g., Introduction and BART sections) for a detailed analysis of the elements required by the CAA and RHR for BART determinations.

Comment: EPA, through this proposed rule, fails to recognize, or even to make an effort to understand, the burden imposed upon Wyoming and its local governmental entities. If it had done so, it would have acknowledged the fundamental value and attainable progress derived from Wyoming's regional haze SIP. Instead, what EPA proposes is a disingenuous and poorly crafted rule that ignores fundamental realities existing in the counties of Wyoming, that they are rural, traditionally low-income, and the economic drivers are typically limited to tourism, agriculture, or industry. As such, the proposed rule would create a disproportionate impact on those communities playing host to industry.

''Not in my backyard'' is simply not an option for many rural communities. It therefore poses a fundamental question of equity, a concern reiterated in Executive Order 13563. Executive Order No. 13,563, 76 FR 3821 (Jan. 18, 2011). Concerns regarding equity require the EPA to consider who is bearing the cost of the proposed rule. The bottom line is that increased energy costs that will result from the proposed FIP will disproportionately hurt our local economies.

Additional comments argue that EPA is required to seek views of appropriate local officials' before imposing regulatory requirements that might significantly or uniquely affect a particular governmental entity. EPA must then seek to minimize any burdens that significantly or uniquely affect the local governmental entity in a manner that is consistent with achieving the underlying regulatory objective.

Response: EPA disagrees with this comment. Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866. Executive Order 13563 Section 1(b). In general, the Order seeks to ensure the regulatory process is based on the best available science; allows for public participation and an open exchange of ideas; promotes predictability and reduces uncertainty; identifies and uses the best, most innovative, and least burdensome tools for achieving regulatory ends; and takes into account benefits and costs, both quantitative and qualitative. However, nothing in the Order shall be construed to impair or otherwise affect the authority granted by law to EPA, nor does it create any right or benefit enforceable at law. Executive Order 13563 Section 7(b), (d). Each BART source was examined and the cost of compliance was one of the factors addressed to ensure the rule's requirements are beneficial and not unduly burdensome to the regulated entities. We also note the following: (1) There will likely be beneficial effects on tourism due to improved visibility at the Class I areas; [71] (2) emission controls can be installed over a period of time; and (3) in this final action we are mostly approving the provisions of the State's SIP. Moreover, as explained above, courts have interpreted the Regulatory Flexibility Act to require a regulatory flexibility analysis only when a substantial number of small entities will be subject to the requirements of the agency's action. While EPA has not made a determination that a substantial number of small entities will be subject to the requirements of this final action, we nevertheless seek to minimize the impact our actions have on small entities. EPA sought comments regarding the economic impact from all

[71] Results of visitor surveys from 22 studies demonstrate that clean air and scenic vistas in national parks consistently rank as the top priorities of 90 percent or more of visitors. ''National Park Service Visitor Values & Perceptions of Clean Air, Scenic Views & Dark Night Skies 1988–2011,'' Natural Resource Report NPS/NRSS/ARD/NRR–2013/632 (Feb. 2013), pp. 16–23 (including specific studies focused on Wyoming's national parks). Additionally, as explained in recent National Park Service (NPS) and U.S. Forest Service (USFS) reports, the national parks and U.S. Forest Service lands are important economic engines for local communities and businesses, with visitors generating significant economic activity and support thousands of jobs. *See,* ''Economic Benefits to Local Communities from National Park Visitation, 2011,'' National Park Service, Natural Resource Report NPS/NRSS/ARD/NRR–2013/632 (Feb. 2013) (NPS 2013 Report); and ''National Visitor Use Monitoring Results, National Summary Report,'' USDA Forest Service (May 20, 2013 update). In 2011, the NPS report indicates that non-local visitor spending to the national parks in Wyoming was $621 million, creating more than 9,000 jobs. NPS 2013 Report, p. 26. The Grand Teton National Park alone had more than 2.5 million visitors who spent $463 million which created more than 6,000 jobs. NPS 2013 Report, p. 19.

entities affected by this action and carefully considered all relevant information. As described elsewhere, EPA believes that this action is necessary to achieve the objectives of the CAA and that the visibility improvements justify the costs of this rule, as established in the Act and implementing regulations. Please refer elsewhere for a detailed analysis of the elements required by our regulations for BART determinations.

Comment: In imposing these additional costs the proposed action will unnecessarily impact power generation in Wyoming and lead ultimately to increased utility costs for Wyoming residents. Along these lines, we believe the proposed action fails to comply with Executive Order 13132. The notice of proposed action states: ''Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation.'' The notice switches that standard by concluding: ''This rule 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, because it merely addresses the State not fully meeting its obligation to prohibit emissions from interfering with other states measures to protect visibility established in the CAA. Thus, Executive Order 13132 does not apply to this action.'' (78 FR 34790).

The conclusion that Executive Order 13132 does not apply to this action appears inconsistent with the standard of the Order. The regulation will impose substantial direct compliance cost on local governments and there is no provision for funding those costs by the federal government. The Wyoming Municipal Power Agency (WMPA) is a joint powers board created by eight Wyoming municipalities to generate and transmit electricity for the residents of those municipalities. Through a partnership, WMPA and thus each of those municipalities, own a substantial interest in the Laramie River Station. WMPA estimates that the EPA's proposal would cost an estimated $600 million for the Laramie River Station. When costs are imposed upon a facility, owners of that facility must initially bear those costs. Whether the generating facility is owned 100% by a single municipality, or shared through a partnership or cooperative, as a result of that ownership interest a substantial direct compliance cost is imposed on the municipal owners.

Response: EPA disagrees that Executive Order 13132 applies to this action. The Order only applies to agency actions that fit within the Order's definition of ''policies that have federalism implications.'' The Order defines such actions as rules ''that have substantial direct effects on states, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Executive Order 13132 Section (1)(a). In contrast, this action merely addresses Wyoming's existing obligations under the CAA and thus does not impose any additional burdens beyond that which the law already requires. Because this rule does not fit within the definition of ''policies that have federalism implications,'' the Order does not apply to this action.

Moreover, the additional elements of the standard urged by the commenter do not apply to this action. EPA must consult a state or provide funding only if a regulation that has federalism implications (1) imposes substantial direct compliance costs on state and local governments, and (2) is not required by statute. Executive Order 13132 Section (6)(b). First, as the commenter noted, the regulation imposes compliance costs on Laramie River Station, not directly on state or local governments. Municipalities may possibly be indirectly impacted because of their membership in WMPA, which in turn retains a 1.37% ownership interest in Laramie River Station through a partnership with the Missouri Basin Power Project. However, this action does not impose any direct compliance costs on local governments. Second, the CAA requires that states promulgate adequate SIPs to achieve the CAA's visibility goals, and further requires EPA to promulgate FIPs if a state fails to meet its obligations. 42 U.S.C. 7492(3)(2), Section 7410(c)(1); *see also WildEarth Guardians* v. *Jackson,* No. 11–CV–00001–CMA–MEH, 2011 WL 4485964 at *6 (D. Colo. Separt 27, 2011) (finding EPA's duty to either approve a state regional haze SIP or promulgate a FIP is nondiscretionary). Because this action does not have federal implications, does not impose direct compliance costs on local governments, and is required by statute, Executive Order 13132 does not apply to this action.

Comment: EPA did not properly vet its proposed FIP against a number of requirements detailed throughout Presidential Executive Orders and within the CAA. Though Presidential Executive Orders are not binding by law, they foster an open, transparent rule-making process. For example, Executive Order 12866 states, ''The American people deserve a regulatory system that works for them, not against them: a regulatory system that . . . improves the performance of the economy without imposing unacceptable or unreasonable costs on society.'' Accordingly, the Order requires federal agencies, including EPA, to develop regulations ''in the most cost effective manner'' and to ''adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' An additional $1.2 billion in costs under EPA's proposal in exchange for no perceptible change in visibility does not qualify as ''a reasoned determination that the benefits of the intended regulation justify its costs.''

EPA's proposed action will result in over $170 million annual adverse economic impact, well over the $100 million annual threshold identified in Executive Order 12866. EPA failed to properly consider material effects its proposed action will have on the economy, productivity, competition, and jobs. By forcing unnecessarily expensive technologies, electricity rates will rise even further, putting additional strain on businesses and millions of customers that receive electricity from the generating stations in Wyoming.

Response: EPA disagrees with this comment. As explained elsewhere, this action does not fit within the definition of Executive Order 12866. The Order defines a ''regulation'' or ''rule'' as an ''agency statement of general applicability.'' Executive Order 12866(3)(d). Here, EPA's action was individually tailored for a limited number of BART eligible sources in Wyoming, and thus is not generally applicable and not governed by Order 12866. Moreover, as explained in more detail in the BART section, EPA took the cost of compliance into consideration when making its BART determinations to ensure the rule's requirements are beneficial and not unduly burdensome.

11. Consideration of Existing Controls

Comment: Several commenters asserted that EPA did not properly take into account the existing pollution control technology in use at the BART-eligible EGUs, as required by CAA section 169A(g)(2) and the BART

Guidelines. These commenters alleged that EPA was required to consider updated combustion controls, which were installed to comply with Wyoming's regional haze SIP, by adjusting the baseline emissions rate for each facility to account for any emissions reductions that have been achieved since the 2001–2003 baseline period. The commenters suggested that had EPA relied on available 2011–2012 emissions data, which reflect the NO_X reductions achieved by some of these newly installed controls, the cost-effectiveness values for SNCR and SCR would have been higher, while the visibility improvement associated with SNCR and SCR would have been lower.

For example, one commenter stated that the baseline emission rate for NO_X in 2001–2003 was 0.27 lbs/MMBtu at Laramie River, but that the emission rate had dropped to 0.19 lb/MMBtu after the installation of over-fire air and low NO_X burners. This commenter asserted that, had EPA adjusted the baseline to the latter emission rate, the average cost-effectiveness for SNCR would be between $6,967/ton and $7,014/ton, while the average cost-effectiveness for SCR would be between $8,531/ton and $9,048/ton. Based on these values, the commenter argued that neither SNCR nor SCR is cost-effective and therefore both technologies should be eliminated as NO_X BART for Laramie River.

Another commenter pointed to other EPA regional haze actions where EPA adjusted baseline emissions to account for recently installed controls, such as EPA's final actions on the Arizona regional haze SIP, 77 FR 72512, and Montana regional haze FIP, 77 FR 57864. This commenter argued that because EPA had adjusted baseline emissions for some Arizona and Montana EGUs to account for controls recently installed to satisfy consent decrees obligations or CAA requirements unrelated to regional haze, EPA was required to do so for Wyoming's EGUs as well.

One commenter submitted additional comments, after the close of the public comment period, in response to the decision of the U.S. Court of Appeals for the Eighth Circuit in *North Dakota* v. *EPA,* 730 F.3d 750 (8th Cir. 2013). This commenter again asserted that EPA had failed to consider the low NO_X burners and over-fire air the commenter had installed at its facilities to comply with the Wyoming regional haze SIP. The commenter argued that EPA's alleged failure to consider these controls violates the holding in *North Dakota,* that ''any existing pollution control technology'' includes all existing controls, including those that are voluntarily installed by the source. Moreover, the commenter explained, the low NO_X burners and over-fire air at its facilities were not voluntary controls because they were installed to meet CAA requirements, were federally enforceable, and were incorporated into the Wyoming regional haze SIP.

A final commenter also submitted late comments in response to the decision in *North Dakota* and the previous commenter's letter. This commenter argued that the *North Dakota* decision does not require EPA to account for existing controls by factoring their associated emissions reductions into baseline emissions. The commenter explained that using a consistent baseline prevents certain sources from claiming credit for minor emission reduction measures taken in the midst of the ongoing regional haze planning process, thereby making more stringent controls appear less beneficial. The commenter also explained that the fixed baseline period of 2001–2003 allows EPA to make ''apples-to-apples'' comparisons of the cost-effectiveness and visibility benefits of evaluated technologies across all BART sources. The commenter pointed out that EPA's method of evaluating combustion controls as a BART option, not as part of the emission baseline, was identical to the approach that Wyoming and the sources themselves had taken in their own BART analyses. The commenter argued that this approach is correct because it ensures that the emissions reductions associated with existing controls installed after the baseline period are evaluated in the BART analysis. It also factors the cost of such controls into the source's compliance costs, rather than assuming that such costs are zero simply because they already have been incurred. Finally, the commenter asserted that even if EPA were to adjust the baseline emissions for the EGUs in question, SCR would still be BART for all of the EGUs.

Response: One of the statutory factors EPA is to consider is ''any existing pollution control technology in use at the source.'' 42 U.S.C. 7491(g)(2). The CAA does not specify how states or EPA must ''take into consideration'' this factor. The BART Guidelines provide little additional guidance, stating only that ''[f]or emission units subject to a BART review, there will often be control measures or devices already in place. For such emission units, it is important to include control options that involve improvements to existing controls and not to limit the control options only to those measures that involve a complete replacement of control devices.'' 40 CFR part 51, app. Y, at IV.D.1.6. Consequently, we believe that states and EPA have considerable discretion in how they consider existing controls in use at a source, so long as that consideration is explained and reasonable. Ultimately, states or EPA should consider the totality of the circumstances (e.g., the purpose of any existing controls, when and why they were installed, compatibility with other control options, enforceability, and other pertinent factors) in determining how they will evaluate existing controls in a BART analysis.

For example, one way in which a state or EPA can consider existing controls, as contemplated by the BART Guidelines, is by evaluating whether additional control options are technologically compatible with a source's existing controls, or whether the presence of the existing controls would render the installation of some additional control options infeasible. In the case of NO_X, the presence of existing combustion controls at a source, such as low NO_X burners or over-fire air, does not impact the feasibility of installing post-combustion controls, such as SNCR or SCR. Consequently, EPA reasonably determined in this instance that the presence of existing combustion controls at several of the BART-eligible EGUs would not preclude the installation of either SNCR or SCR.

Pointing to our regional haze actions in Arizona and Montana, several of the commenters asserted that EPA was required to consider existing controls by adjusting the baseline emissions of several sources to account for reductions achieved after the baseline period. We disagree. The BART Guidelines recommend that baseline emissions should be ''based upon actual emissions from a baseline period.'' 40 CFR part 51, app. Y, at IV.D.4.d.1. While the BART Guidelines allow states or EPA to adjust baseline emissions to take into account projections of ''future operating parameters'' by making such assumptions into enforceable limits, *id.* at IV.D.4.d.2, the BART Guidelines are silent as to how reductions resulting from the post-baseline installation of controls should be treated. One way to take account of such reductions is to update the baseline, as we did in our regional haze actions for Arizona and Montana. In those rulemakings, we determined that updating the baseline was appropriate because several sources had recently installed combustion controls to comply with consent-decree obligations and acid-rain requirements, while another source had changed its coal supply. The fact that these controls were installed to comply with other CAA requirements heavily informed

EPA's decision to update the sources' baseline emissions. As we explained in our Arizona action, however, ''an 'updated baseline' might not be appropriate in all instances. For instance, if it appeared that controls had been installed early in order to avoid a more stringent BART determination, it would presumably not be appropriate to use a baseline representing these new controls.'' 72 FR 72526.

We believe that this is one such instance. First, unlike in Arizona and Montana, the sources did not install the combustion controls in question to comply with other CAA requirements. Rather, as stated above in the comment, the sources installed the controls to comply with Wyoming's selection of BART in its regional haze SIP. This distinction is important because, by their very nature, baseline emissions should be ''a realistic depiction of anticipated annual emissions'' *before* the installation of BART. 40 CFR part 51, app. Y, at IV.D.4.d. Thus, while baseline emissions can take into account newly installed controls and in some cases future operating parameters, baseline emissions still must represent a pre-BART scenario so that the cost-effectiveness and visibility benefits of all potential BART control options can be evaluated from a consistent benchmark. Indeed, it would be passing strange for EPA to update the commenters' baseline emissions to incorporate emission reductions that they admittedly achieved to comply with BART. Doing so would bias EPA's analysis of additional control options by giving the commenters credit for emissions reductions attributable to BART, but treating the costs they incurred to achieve those reductions as if they had never occurred.

Second, we note that the Wyoming regional haze SIP did not require compliance with BART until five years *after* EPA's approval of the SIP. At the time the sources installed the combustion controls, EPA had not yet acted upon Wyoming's regional haze SIP, and the sources had no way of knowing whether EPA would ultimately approve or disapprove Wyoming's BART determinations. Thus, it appears that the sources' decision to install the combustion controls early may have been motivated by an intent to avoid the possibility of a more stringent BART determination by EPA under the theory now advanced in the comment. To be consistent with our statements in the Arizona regional haze action, we believe that it would have been inappropriate for EPA to have ''taken into consideration'' the newly installed combustion controls at the commenters' facilities by updating the baseline in this case.

Nonetheless, EPA recognizes that we must ''take into consideration'' *all* existing controls to comply with the CAA, and have therefore taken the sources' existing combustion controls into consideration in other ways. For example, in addition to considering whether the source's existing combustion controls were compatible with the installation of post-combustion controls, we also used the source's current NO_X emission rates when we evaluated the size, design, and reagent/catalyst cost of SNCR and SCR. For example, in the case of Laramie River, we did not use the baseline emission rate of 0.27 lbs/MMBtu, but rather the current emission rate of 0.19 lb/MMBtu that appropriately reflects the installation of over-fire air and low NO_X burners. Due to the lower NO_X emission rate, the size of the SNCR and SCR systems and the amount of reagent/catalyst necessary to operate them are lower than if we had simply assumed the baseline emission rate.

Moreover, we do not believe that our action is inconsistent with the Eighth Circuit's decision in *North Dakota.* In our regional haze action for North Dakota, we refused to consider the DryFining™ control technology in use at Coal Creek Station when we promulgated a FIP. We argued to the court that the CAA did not require states or EPA to consider controls that were voluntarily installed after the baseline period. The court rejected this position, holding that ''EPA's refusal to consider the existing pollution control technology in use at the Coal Creek Station because it had been voluntarily installed was arbitrary and capricious.'' *North Dakota,* 2013 U.S. App. LEXIS 19442, at*30. The court explained that ''any existing pollution control technology'' included even voluntarily installed controls. However, the court did not opine as to *how* existing controls must be considered. Here, EPA reasonably considered the existing controls at the BART-eligible sources in the several ways described above. *North Dakota* does not require us to ''take into consideration'' existing controls by adjusting baseline emissions, which would have been inappropriate in this instance.

Finally, while we acknowledge the supportive comments from the final commenter on this issue and agree with many of the points that were made, we decline to require SCR at all of the BART-eligible EGUs, for reasons explained elsewhere in this document.

12. Consent Decree

Comment: As it had on other SIPs, EPA neglected to act on Wyoming's SIP, and as a result exposed itself to liability for violating Section 110(k) of the CAA. *See* 42 U.S.C. 7410(k)(2), (3) (setting deadlines for EPA action on SIPs). Wyoming could have sued EPA for failing to take action on Wyoming's SIP, but in the spirit of cooperation, elected not to. Instead, special interest groups sued EPA for its failure to comply with the Act. *See* Compl., *WildEarth Guardians* v. *Jackson,* No. 1:11-cv-00001–CMA–MEH (D. Colo. Jan. 2, 2011). Wyoming did not participate in this litigation for two reasons: First, Wyoming was not aware of the litigation until EPA published the proposed consent decree, 76 FR 34983 (June 15, 2011); and, second, EPA has repeatedly opposed state attempts to participate in litigation that impacts the processing of SIPs, *see, e.g.,* Def. Opp. to North Dakota's Motion to Intervene, *WildEarth Guardians* v. *Jackson,* No.4:09–CV–02453–CW (N.D. Cal. Oct. 20, 2011).

The special interest groups' litigation, in turn, has driven EPA's approach to Wyoming's SIP. The litigation has established arbitrary deadlines for EPA to act on Wyoming's SIP, which EPA and the special interest groups have repeatedly extended for their convenience. Not once has EPA consulted the State on these deadlines. More troubling, through settlement of that litigation, EPA has committed to particular courses of action on Wyoming's SIP. EPA has cut Wyoming out of the cooperative federalism Congress intended to guide the regional haze program.

This dubious approach to implementing the CAA harms states. The unprecedented influence the special interest groups have exerted over EPA's treatment of Wyoming's SIP, coupled with EPA's effort to conceal its communications with those groups, lead a reasonable observer to seriously question the objectivity of EPA's proposed action on Wyoming's SIP.

The commenter also asserted that the EPA let sue-and-settle tactics pervert what is typically a cooperative process. Nongovernmental groups should not be allowed to coerce an agency into setting policy as a result of litigation. Wyoming considers this an attack on states' rights, which does nothing to further the partnership between EPA and Wyoming, especially when Wyoming can't participate in those discussions.

Response: We disagree with commenter's assertions. The Act provides citizens with the right to sue EPA when EPA fails to meet a statutory

deadline, 42 U.S.C. 7604(a)(2), and courts have the authority to establish a remedy that sets new deadlines and compels EPA to do what Congress required. *Id.* Section 7604(a). When EPA is confronted with such suits, it is reasonable and proper for EPA, working with the Department of Justice, to decide that it is in the public interest, and a more efficient use of executive and judicial branch resources, to settle such cases rather than litigate them. Congress recognized that EPA has authority to settle cases, and directed EPA to provide public notice and an opportunity to comment on proposed consent decrees before finalizing them. *Id.* Section 7413(g).

As explained in the Introduction section of this document, the consent decree of which the commenter complains was the result of a citizen suit that sought to compel EPA to approve SIPs or promulgate FIPs to meet long overdue regional haze requirements.[72] The State of Wyoming did not submit its regional haze implementation plan in a timely fashion as required by the CAA and EPA's regulations. Facing substantial legal risk, EPA reasonably negotiated a settlement resulting in a consent decree that set new deadlines for EPA to take actions required by the Act.[73] The Consent Decree was published in the **Federal Register** as is required under the CAA section 113(g) and provided 30 days for public comment. *See* 76 FR 34983 (June 6, 2011). For Wyoming, EPA's obligations to fully approve SIPs or promulgate a FIP were now due six years after the original 2007 deadline for the submission of regional haze SIPs. The consent decree was also subject to district court review before its entry. Neither the commenters nor any other party objected to the deadlines established for EPA's action on the Wyoming regional haze SIP. The United States District Court for Colorado found the terms of the consent decree reasonable.

The commenter's argument that EPA used these consent decree deadlines and ''has committed to particular courses of action on Wyoming's SIP'' with regard to the Final Rule is without merit. The consent decree did not limit or change EPA's substantive rulemaking authority or discretion in any way. Rather, the consent decree specifically permitted EPA to satisfy its obligations either by approving the States' regional haze SIPs or by promulgating a FIP. EPA also provided more than 70 days from the date of publication in the **Federal Register** for interested parties to submit comments on the proposed rule, longer than the 30-day public comment period required by the Act. 42 U.S.C. 7607(h). EPA obtained several extensions of the consent decree deadline for Wyoming to provide the Agency with adequate time to conduct the rulemaking.[74] For all these reasons, neither the consent decree nor the deadlines it imposed rendered EPA's Final Rule arbitrary, capricious, or contrary to law.

Finally, EPA did not rely on information that was not in the docket for this rule. Therefore, contrary to commenter's assertions, all information relied upon has been disclosed.

Comment: EPA quickly entered into a settlement agreement to resolve the special interest groups' litigation, rather than defend its actions and honor Wyoming's patience with EPA's inaction. In settling the litigation, EPA agreed to take final action on Wyoming's SIP by April 15, 2012. Consent Decree, *WildEarth Guardians* v. *Jackson,* No. 1: 11–cv–00001–CMA–MEH, at 4, '1]6 (D. Colo. Separt 27, 2011) *(WildEarth Guardians).* Recognizing that it still could not meet its statutory obligation to act on Wyoming's SIP, EPA persuaded the special interest groups to extend that deadline thirty days to May 15, 2012. Stip. to Extend Four Deadlines in Consent Decree at 3, ~ 6, *WildEarth Guardians,* (D. Colo. Jan. 10, 2012).

On June 2, 2012, eighteen months after Wyoming submitted its SIP, EPA proposed to partially approve and partially disapprove the SIP. 77 FR 33022. But, as a result of EPA's unlawfully delayed action, Wyoming's SIP became complete by operation of law. *See* 42 U.S.C. 7410(k)(l)(B). Accordingly, EPA cannot now propose to disapprove Wyoming's SIP on the grounds that it lacks information. To do otherwise is to render Section 110(k)(l)(B) meaningless.

Response: EPA disagrees with this comment. First, the commenter offers no grounds on which EPA could have defended the cited litigation, which involved mandatory statutory deadlines under the Act.

Second, EPA disagrees with the commenter's interpretation of CAA section 110(k)(l)(B). Under the CAA, EPA's SIP review is a two-step process. *See* CAA Section 110(k). First, within six months of a SIP submission, EPA must make a threshold ''completeness determination'' to determine whether the SIP contains certain ''minimum criteria'' designated by EPA as ''the information necessary to . . . determine whether the plan submission complies with the provisions of [the CAA].'' *See id.* Section 110(k)(1)(A), (B). These minimum criteria are listed in Appendix V to 40 CFR. Part 51 and include a relatively short list of eight ''Administrative Materials'' and nine ''Technical Support'' requirements, such as evidence that the state properly adopted the SIP and technical demonstrations that allow EPA to evaluate compliance with the substantive requirements of the CAA. *See* 40 CFR. part 51, App. V. If EPA fails to make the completeness determination within six months, the SIP is deemed complete by operation of law. *See* CAA Section 110(k)(1)(C).

Importantly, however, a determination of completeness, either by EPA or by operation of law, does not mean that the SIP has been approved as compliant with the *substantive* requirements of the CAA. Indeed, Appendix V does not include any substantive requirements, such as the requirement that regional haze SIPs include a five-factor BART analysis. These requirements are included elsewhere in the CAA, the Haze Rule, and the BART Guidelines.

Instead, EPA evaluates SIPs for compliance with the substantive requirements in the second step of EPA's review, which EPA must complete within one year after the SIP is determined to be complete by EPA or deemed complete by operation of law. *See* CAA Section 110(k)(2), (3), & (*l*) (providing a one-year deadline by which EPA must determine whether the SIP ''meets all of the applicable requirements'' or ''interferes with any applicable requirement'' of the Act); *see also NRDC* v. *Browner,* 57 F.3d 1122, 1126 (D.C. Cir. 1995) (''Under the two-stage procedure established in [section] 110(k), EPA first makes an essentially *ministerial finding* of completeness, a process taking at most six months. By contrast, the plan approval process may take up to twelve months due to the more extensive technical analyses necessary to ensure that the SIP meets

[72] January 2, 2011 a Complaint was filed against EPA in the federal district court for the District of Colorado seeking declaratory and injunctive relief under the Clean Air Act due to EPA's failure to meet regulatory and statutory deadlines for the regional haze implementation plan. *See WildEarth Guardians* v. *Jackson,* Case No. 11–cv–0001–CMA–MEH (D. Colo.).

[73] The EPA resolved this complaint by means of a settlement agreement that was memorialized in a Consent Decree that was entered by the Court on June 6, 2011 (the ''Consent Decree'').

[74] EPA routinely notifies the states of these extensions. For example, on December 11, 2012, Region 8 Air Program Director Carl Daly called Wyoming DEQ's Steve Dietrich and his staff, to let them know the Agency had submitted a motion to the Court to re-propose the 309(g) rule. Mr. Daly also contacted Mr. Dietrich on March 26, 2013 to let the State know EPA was working on further extensions, as the Agency needed additional time to consult with our headquarters offices.

the Act's *substantive requirements.''* (emphasis added)). Accordingly, a completeness determination in Step 1 does not deprive EPA of authority to disapprove a SIP in Step 2 for failure to comply with substantive requirements of the CAA, the Haze Rule, and the BART Guidelines. Instead, a completeness determination merely triggers EPA's duty to evaluate the substance of a SIP in the first instance and either approve or disapprove the SIP as necessary within one year. As explained above, EPA has authority to substantively review states' five-factor BART analyses in Step 2, and must disapprove a SIP if its analysis fails to comply with the requirements of the CAA, the Haze Rule, or the BART Guidelines. *See Oklahoma,* 723 F.3d at 1207–10. Thus, the comment is incorrect in stating that EPA's action here renders section 110(k)(1)(B) meaningless.

Moreover, courts have repeatedly stated that EPA does not lose its statutory authority to act under the CAA for a failure to meet its statutory deadline and that the proper remedy in the case of delay is for a party to seek an order to compel action. *Oklahoma* v. *EPA.,* 723 F.3d 1201, 1224 (10th Cir. 2013) (explaining that although the CAA ''undoubtedly requires that the EPA promulgate a FIP within two years, it does not stand to reason that it loses its ability to do so after this two-year period expires''); *Montana Sulphur & Chem. Co.* v. *EPA.,* 666 F.3d 1174, 1190 (9th Cir. 2012) *cert. denied,* 133 S. Ct. 409, (2012) (explaining that although CAA has an ''explicit deadline . . . it does not follow that the agency loses authority to act if it fails to meet that deadline''); *Gen. Motors Corp.* v. *United States,* 496 U.S. 530, 541 (1990) (holding EPA does not lose authority under CAA because ''other statutory remedies are available when EPA delays action on a SIP revision''); *see also Brock* v. *Pierce Cnty.,* 476 U.S. 253, 260 (1986) (holding that when ''there are less drastic remedies available for failure to meet a statutory deadline . . . courts should not assume that Congress intended the agency to lose its power to act'').

Comment: Two months after the period for commenting on EPA's 2012 proposal closed, EPA and the special interest groups again modified the consent decree to allow EPA additional time to take action on Wyoming's SIP. *See* Stip. To Extend Deadline in Consent Decree., *WildEarth Guardians* (D. Colo. Oct. 3, 2012). Then, two months after extending the deadline for action on Wyoming's SIP, EPA asked the court to again extend EPA's deadline, this time until September 27, 2013. Def. Unopposed Mot. To Modify Two Deadlines in Consent Decree, at 1, *WildEarth Guardians* (Dec. 10, 2012).

As grounds for the request, EPA cited the special interest groups' comments, which EPA asserted ''necessitate[d] re-proposal of the rule.'' *Id.* at 3–4. The court, in turn, granted EPA's request. Order To Modify Consent Decree, *WildEarth Guardians* (Dec. 13, 2012). Even after extending its deadline to take action on Wyoming's SIP three times, EPA still needed more time. So, on March 25, 2013, EPA and the special interest groups again agreed to extend EPA's deadline for action on Wyoming's SIP. Stip. To Extend Deadlines in Consent Decree, *WildEarth Guardians* (March 25, 2013) (extending deadline until Nov. 21, 2013). Seemingly as a condition for obtaining the special interests groups' consent to the extension, EPA ostensibly agreed to a timetable for Wyoming sources to install emission controls faster than what Wyoming proposed. *Compare id.* at 2, ~ 6 (''EPA will propose to determine, for each source subject to BART, the period of time for BART compliance that is as expeditious as practicable''), with 78 FR 34778 (''We propose that PacifiCorp meet our proposed emission limit . . . as expeditiously as practicable, but no later than five years after EPA finalizes action''). Had Wyoming known when EPA proposed the consent decree in 2011 that EPA would commit to a particular course action on Wyoming's SIP, rather than just a date for taking some unspecified action, Wyoming would have sought to intervene in the litigation.

Response: EPA disagrees that it committed to any particular course of action in the Consent Decree. The Consent Decree only specified a timetable for EPA to promulgate rules consistent with its statutory obligations under the CAA, but did not commit the EPA to any particular course of action not already required by law. In fact, the Consent Decree specifically states: ''Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any final actions contemplated by this Consent Decree.''

We disagree with the commenter's allegations that EPA agreed in the Consent Decree to a timetable for Wyoming sources to install BART controls faster than what Wyoming proposed in its SIP. Paragraph 6 of the Stipulation To Extend Deadlines in Consent Decree, *WildEarth Guardians* (March 25, 2013) specifies that:

> By May 23, 2013, EPA shall sign a notice of re-proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007, under 40 CFR 51.309(g). In its re-proposal, EPA will propose to determine, for each source subject to BART, the period of time for BART compliance that is as expeditious as practicable, *as required by 42 U.S.C. Section 7491.* (emphasis added).

Commenter neglects to include the last phrase in this provision in its comment—''as required by 42 U.S.C. Section 7491.'' The Consent Decree required EPA to meet that CAA requirement.[75] Therefore, the Consent Decree mirrors and is consistent with the CAA BART requirements.

Finally, we are acting consistently with the Act and the RHR, as we discuss in detail elsewhere throughout this final action.

13. Monitoring, Recordkeeping and Reporting

Comment: EPA proposed a FIP for all monitoring, recordkeeping, and reporting requirements related to BART and reasonable progress sources for which there is a SIP or FIP emissions limit. EPA notes that the State's monitoring, recordkeeping, and reporting language in their SIP includes references to WAQSR chapters that EPA has not approved as part of the SIP and erroneously concludes that this means Wyoming's requirements are not federally enforceable.

Wyoming does not concur with EPA's findings. The monitoring, recordkeeping and reporting language in the State's regional haze SIP is taken directly from air quality permits issued under the SIP-approved permitting provisions in Chapter 6, Section 2 of the WAQSR, and are therefore federally enforceable. See 40 CFR 52.2620(c)(1). When drafting the monitoring, recordkeeping, and reporting requirements, the State incorporated the requirements of 40 CFR part 60 for trona facilities and for EGUs. Specifically, 40 CFR part 60 subparts D and Da were incorporated into the monitoring conditions for each

[75] Additionally, the CAA defines the term ''as expeditiously as practicable'' to mean ''as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 110(c) [*42 USCS Section 7410(c)*] for purposes of this section).'' 42 U.S.C. 7491(g)(4).

BART permit. In the case of EGUs, by relying upon subpart D and Da, the State is also incorporating the requirements of 40 CFR part 75, since the monitoring provisions of subpart Da refer back to the continuous emissions monitor requirements under the Acid Rain Program codified in 40 CFR part 75.

While Wyoming allows for data substitution using the methodology prescribed in 40 CFR part 75, this is only applicable to annual emissions to account for periods when the continuous emissions monitor is down and the emissions unit continues to operate. Substituting data for these operating periods is more conservative than removing them altogether. EPA asserts that there are numerous clarifications and rewording needed; however, these monitoring, recordkeeping, and reporting requirements are currently in effect for PacifiCorp and Basin Electric units, and the companies are able to demonstrate compliance using them. Furthermore, the recordkeeping and reporting requirements contained in Chapter 5, Section 2 of the WAQSR are modeled after 40 CFR part 60, as these provisions are delegated to the State by EPA. See 40 CFR 60.4(c). While WAQSR Chapter 5, Section 2 is not part of Wyoming's SIP, the requirements therein are analogous to the federal New Source Performance Standards requirements and are made federally enforceable through incorporation by a Chapter 6, Section 2 BART permit and EPA's delegation to Wyoming.

Since these monitoring, recordkeeping, and reporting requirements are contained in federally enforceable permits and the affected companies are already able to demonstrate compliance with the BART emissions limits using them, Wyoming concludes that it did include appropriate and adequate monitoring, recordkeeping, and reporting requirements in the SIP.

Response: EPA disagrees with this comment. As discussed above in this section, EPA's approach in this action is entirely consistent with section 169A(b)(2) which, as we wrote when we promulgated the BART Guidelines, ''provides that EPA must require SIPs to contain emission limits, schedules of compliance, and other measures as may be necessary to make reasonable progress towards meeting the goal'' (emphasis added). 70 FR 39120. The regulations require that the states ''must submit an implementation plan containing emission limitations representing BART.'' 40 CPR 51.308(e). The Guidelines require that states ''must establish an enforceable emission limit for each subject emission unit at the source and for each pollutant subject to review that is emitted from the source.'' 70 FR 39172. CAA section 110(a)(2)(A) also requires that SIPs shall ''include enforceable emission limitations . . . as may be necessary or appropriate to meet the applicable requirements of [the Act].''

Therefore, EPA disagrees that the use of BART permits to implement the monitoring, recordkeeping, and reporting necessary to ensure compliance with BART emission limitations is adequate under the CAA. In addition, in response to another comment, we are removing the requirements for annual emission limits for BART and reasonable progress sources. (See section IV.C.3 of this rulemaking). Thus, the point raised by the commenter pertaining to data substitution no longer applies to our final action.

B. Modeling

1. General Comments

Comment: One commenter stated that EPA must re-evaluate its method for assessing visibility impacts from wildfires or states will never be able to achieve natural background goals. The commenter went on to say that EPA should (1) eliminate the impacts from fire from the annual contribution to the deciview analysis or (2) properly incorporate it into the natural background equation to establish a glide path states can achieve. The commenter provided graphical data from the Interagency Monitoring of Protected Visual Environments (IMPROVE) network to show the contributions to light extinction from organic carbon, elemental carbon, and nitrate.

Response: EPA disagrees that we must re-evaluate our methods in this action. However, EPA agrees that wildfires can be an important source of visibility impairment, especially in the western states during the summer wildfire season. EPA recognized that variability in natural sources of visibility impairment causes variability in natural haze levels as described in its ''Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule.'' [76] The preamble to the BART guidelines (70 FR 39124) describes an approach used to measure progress toward natural visibility in Mandatory Class I areas that includes a URP toward natural conditions for the 20 percent worst days and no degradation of visibility on the 20 percent best days. The use of the 20 percent worst natural conditions days in the calculation of the URP takes into consideration visibility impairment from wild fires, windblown dust and other natural sources of haze. The ''Guidance for Estimating Natural Visibility'' also discusses the use of the 20 percent best days and the 20 percent worst days estimates of natural visibility, provides for revisions to these estimates as better data becomes available, and discusses possible approaches for refining natural conditions estimates.[77] The commenter does not identify any way in which EPA's action was inconsistent with this guidance or the RHR.

Comment: At the hearing, Governor Mead and representatives of Wyoming, as well as industry representatives, argued that worsening haze has been caused by wildfires.

Response: We acknowledge the commenter's points on wildfires,[78] and that they can be an important source of visibility impairment, especially in the western states during the summer wildfire season. As discussed in more detail above and in our proposed notice, EPA recognizes that variability in natural sources of visibility impairment cause variability in natural haze levels and provided approaches to address this in the preamble to the BART guidelines (70 FR 39124). However, while we acknowledge that wildfires contribute to regional haze, the BART CALPUFF

[76] Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule, Document No. EPA–R09–OAR–2012–0345–0003–B9, U.S. Environmental Protection Agency, September 2003. *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf,* page 1–1: ''Natural visibility conditions represent the long-term degree of visibility that is estimated to exist in a given mandatory Federal Class I area in the absence of human-caused impairment. It is recognized that natural visibility conditions are not constant, but rather they vary with changing natural processes (e.g., windblown dust, fire, volcanic activity, biogenic emissions). Specific natural events can lead to high short-term concentrations of particulate matter and its precursors. However, for the purpose of this guidance and implementation of the regional haze program, natural visibility conditions represents a long-term average condition analogous to the 5-year average best- and worst-day conditions that are tracked under the regional haze program.''

[77] *Ibid.,* pages 3–1 to 3–4.

[78] 78 FR at 34767 (''Table 28 also shows that Wyoming is not meeting the URP to meet natural visibility conditions by 2064. In this case, 40 CFR 51.308(d)(1)(ii) requires the State to demonstrate, based on the four factors in 51.308(d)(1)(i)(A), that the RPGs established in this SIP are reasonable for this planning period and that achieving the URP in this planning period is not reasonable. In its demonstration, the State cited many reasons why meeting the URP was not reasonable, including the following. First, emissions from natural sources greatly affect the State's ability to meet the 2018 URP. As discussed earlier, WEP data shows that emissions of OC, EC, $PM_{2.5}$, and PM_{10} come mainly from natural or non-anthropogenic sources, such as natural wildfire and windblown dust.'')

modeling has demonstrated that Wyoming's BART sources are also significant contributors to regional haze.

Comment: Although the various BART application analyses conducted by Wyoming for PacifiCorp's BART units note that Wyoming conducted a ''comprehensive visibility analysis covering all three visibility impairing pollutants,'' the analyses also state: ''While visibility impacts were addressed in a cumulative analysis of all three pollutants, Post-Control Scenario B is directly comparable to Post-Control Scenario A as the only difference is directly attributable to the installation of SCR. Subtracting the modeled values from each other yield the incremental visibility improvement from SCR.'' In other words, Wyoming clearly considered—and made available to EPA—the very specific NO_X information that EPA claims it ''was not possible for EPA, or any other party, to ascertain.'' Simply claiming it ''was not possible for EPA'' to ascertain results from available information does not justify EPA in rejecting Wyoming's NO_X BART determinations. Wyoming had considered SCR-specific visibility information. EPA cannot use the alleged lack of this information to justify requiring SCR as BART.

Response: We disagree with all aspects of this comment. Although a state is not required by EPA's regulations to model the visibility impacts from all possible control alternatives if the state selects the most stringent controls available as BART that is not what happened here. Wyoming rejected SNCR and SCR as BART without adequately assessing the visibility benefits of these control strategies. Given the cost effectiveness of these controls, the State's failure to consider visibility impacts was not reasonable and was inconsistent with the CAA and regulations. EPA was compelled to perform additional CALPUFF modeling for NO_X BART determinations to allow for consideration of visibility impacts. For example, while Wyoming took into consideration the degree of visibility improvement for other BART NO_X control options for the PacifiCorp EGUs, such as SCR, the State did not do so for SNCR. The visibility improvement for SNCR was neither provided in the State's SIP nor made available to the EPA. Wyoming did not assess the visibility improvement of SNCR despite having found it to be a technically feasible control option, and having considered a number of the other statutory factors for SNCR, such as costs of compliance and energy impacts. Given that nothing in the State's analysis suggested that SNCR was inappropriate, Wyoming's failure to consider the visibility improvement of SNCR is clearly in conflict with the statutory requirements set forth in section 169A(g)(2) of the CAA, which require that states take into consideration ''the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.'' Since Wyoming did not do so, EPA conducted additional CALPUFF modeling to fill this gap in the State's visibility analysis.

In addition, as stated in our 2012 proposed rule and in our 2013 re-proposal, it was not possible for EPA, or any other party, to ascertain the visibility improvement from the NO_X control options as emission reductions for multiple pollutants were modeled together. That is, since the visibility improvement for each of the State's control scenarios was due to the combined emission reductions associated with SO_2, NO_X, and PM controls, it was not possible to isolate what portion of the improvement was attributable to the NO_X controls alone. For this reason, in the modeling conducted by EPA, we held SO_2 and PM emission rates constant (reflecting the ''committed controls'' for those pollutants identified by Wyoming), and varied only the NO_X emission rate. This allowed us to isolate the degree of visibility improvement attributable to the NO_X control option.

We do agree that Wyoming's analysis allows for the incremental comparison between two post-control options (Post-Control Scenario A and Post-Control Scenario B). However, the BART Guidelines require more than this, stating that you should ''[a]ssess the visibility improvement based on the modeled change in visibility impacts for the pre-control and post-control emission scenarios.'' [79] That is, it is not sufficient to assess only the incremental visibility between control options, you must also assess the visibility improvement of each control option relative to the pre-control scenario. Therefore, Wyoming clearly did not assess visibility improvement in a manner consistent with that explicitly prescribed by the BART Guidelines.

In summary, while States may have some discretion in how to determine visibility impacts, Wyoming did not fulfill the basic statutory requirement to consider the visibility improvement of each of the NO_X control options they identified as technically feasible. They also did not assess visibility improvement in a manner consistent with the approach prescribed by the BART Guidelines. As a result, EPA concluded it would be appropriate to conduct additional CALPUFF modeling.

Comment: The egregiousness of EPA's actions becomes even more apparent when comparing EPA's conclusions regarding cost and visibility impacts for certain of PacifiCorp's BART units against the cost and visibility impact conclusions reached by Wyoming for the same units. Table 2 in our comments provides a comparison between Wyoming's modeled delta deciview improvements and EPA's delta deciview improvements based on the ''new information'' EPA claims it has developed. Recognizing EPA's conclusion that one deciview is barely perceptible to the human eye and considering the inaccuracies and limitations of the model inputs and versions of the visibility models being used, there is no significant difference between Wyoming's results and EPA's results. Additionally, without any ''bright line'' test regarding the amount of visibility improvement that justifies a given control device, EPA cannot show that these insignificant differences would have any impact on the BART determinations for PacifiCorp's BART units.

Response: With respect to the ''bright line'' test, EPA's task in conducting modeling for developing our FIP is to conduct modeling in accordance with the CAA and RHR using our best scientific and technical judgment. We then consider the modeling results, along with the other BART factors, in making the BART determinations. While it is permissible to establish a ''bright line,'' we have not done so. Furthermore, as we discuss in detail in section IV of this final notice and elsewhere in response to comments, we disagree with commenter's assertions that there are no significant differences between Wyoming's results and EPA's results. We have addressed the issue of perceptibility elsewhere in our response to comments.

Comment: We received comments that by the year 2022, EPA's plan and Wyoming's plan achieve essentially identical results for visibility, and therefore, the proposed FIP would have no net visibility benefit over the SIP.

Response: We disagree. Our proposed FIP, by merit of requiring more stringent controls than those proposed in the SIP for some sources shown to cause or contribute to visibility impairment, results in greater visibility benefit. Although, based on our revised analyses for visibility impacts and costs of compliance and considering the five BART factors, we have revised some of

[79] 40 CFR 39170.

our proposed control determinations, this assessment remains true for today's final rule. In particular, our final rule results in greater visibility improvement than the SIP for PacifiCorp Dave Johnston Unit 3 and Wyodak and Basin Electric Laramie River Units 1–3. The improvement in visibility stemming from the FIP, as compared to the SIP, can easily be discerned by reviewing relevant control options as found in Tables 2 through 17 of section III.A of this action.

Comment: On average, the 2000 baseline level for Class I areas in Wyoming is 11 deciviews. The 2064 natural background goal is 6 deciviews. IMPROVE data suggests that there is not this amount of nitrate improvement to be obtained. It appears EPA is trying to achieve a greater reduction for nitrates than is required at this time to reach the 2064 natural background goal. For Bridger, the total amount of deciview reduction for controls (6.08) exceeds the entire deciview reduction (all pollutants) from baseline to 2064. The value (6.08 deciviews) is also 10 fold higher than Wyoming's contribution to nitrate levels (0.62 deciviews—see Table 23 of EPA's proposed rulemaking) at the Class I area for the 2000–2004 baseline year. This value was calculated by multiplying 6.2% times the Class I area's 2000 baseline deciview value of 11.1. The same discussion is valid for Yellowstone as well, where the modeled nitrate reductions equal 2.27 deciviews and Wyoming's total reduction potential is only 0.82 deciviews.

Response: EPA disagrees with this comment. The commenter appears to be referring to annual mean estimates of visibility impairment at Class I areas, and comparing these estimates with the original CALPUFF modeled visibility improvements in our 2012 proposal. The values referred to in Table 23 of EPA's proposed rulemaking are mean estimates for the 20% worst visibility days. The BART Guidelines recommend that visibility impairment be evaluated for the 98th percentile contribution for each BART source. It is likely that 98th percentile visibility impacts will differ significantly from annual mean impacts, so it is not possible to directly compare our modeled impacts on the 98th percentile day to seasonal mean or the mean of the worst 20% days. However, we also note that in the revised final modeling included in this action, the CALPUFF modeled visibility improvements are less than the values cited above by the commenter from the original proposal, and the commenter's comparisons are no longer relevant.

Comment: The measured visibility impairment at IMPROVE stations offers a more certain and reliable quantification of the actual cause of visibility impairment than the CALPUFF model approved by the EPA for BART visibility assessments. CALPUFF is an EPA-approved model for long-range transport, as described in the EPA's ''Guideline on Air Quality Models'' 40 CFR Part 51 Appendix W, but only for the modeling of PSD increments. The treatment of chemical transformation, which is a crucial aspect for any model that is used for visibility assessments, is considered to be inadequate within CALPUFF. In fact, the lead modelers at the EPA's Office of Air Quality Planning and Standards have initiated a formal regulatory process to more fully evaluate (and very possibly replace) CALPUFF as an EPA-preferred model for long-range transport.

Response: EPA disagrees that the use of monitoring data from the IMPROVE network would provide a more accurate assessment of the predicted degree of visibility from the use of controls at a source than does CALPUFF. The commenter has not explained how monitoring data could be used to assess the actual current contributions to visibility impairment, and in any case, models are needed to estimate the potential future visibility impacts from the use of a range of controls at a specific source. In recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded that ''[f]or purposes of the regional haze rule's BART provisions . . . CALPUFF is sufficiently reliable to inform the decision-making process.'' [80] EPA accordingly appropriately used CALPUFF in this action. We further note that the requirements of 40 CFR 51.112 and 40 CFR part 51, Appendix W, Guideline on Air Quality Models (GAQM) and the BART Guidelines which refers to GAQM as the authority for using CALPUFF, provide the framework for determining the appropriate model platforms and versions and inputs to be used. The use of CALPUFF is subject to GAQM requirements in section 3.0(b), 4, and 6.2.1(e) which includes an approved modeling protocol to use the current 5.8 version.[81]

In promulgating the BART guidelines, EPA addressed concerns with CALPUFF's treatment of chemical transformations by recommending that states use the 98th percentile of modeled visibility impacts,[82] an approach that EPA followed here, to address the possibility that the model could overestimate impacts. EPA's discussion of CALPUFF in this 2005 rulemaking addresses these issues at length.[83]

EPA's modeling in this action was consistent with the BART Guidelines and Appendix W. As explained in more detail above, in recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded that ''[f]or purposes of the regional haze rule's BART provisions . . . CALPUFF is sufficiently reliable to inform the decision-making process.'' [84] To the extent that the comment takes issue with the provisions in the BART Guidelines for use of CALPUFF as described above, the legal deadline for challenging the use of CALPUFF has passed. In addition we encourage the commenter to provide input in the event that EPA develops any new future visibility guidelines and predictive models.

With respect to the comment on the IMPROVE data, we have addressed this in the response to another comment.

Comment: Regional haze is affected by global geologic, atmospheric and anthropogenic sources. None of the sources are controllable to the extent of achieving ''natural visibility conditions'' at the targeted time frame. The quantification of ''natural visibility'' at any geographic point is irrational. Natural visibility is a temporal quantity and therefore any quantified value is subjective and not scientific. Regional haze is subject to global atmospheric conditions which provide dilutive action to the identified sources of haze (anthropogenic or otherwise). Atmospheric conditions are directly related to the baseline eleven year solar cycle. To have any form of validity, the collection period would necessarily encompass at least one full solar cycle, arguably two full cycles. Furthermore, the dilutive effects of atmospheric conditions (and therefore, the quantification of visibility) are directly related to the known periodic oceanic events commonly referred to as ''el Niño'' and ''la Niña''. These events have been monitored and quantified since 1950 and occurrences are sub-categorized as weak, moderate and strong. The periodicity of strong events

[80] 70 FR at 39123.

[81] Assessment of the ''VISTAS'' Version of the CALPUFF Modeling System, EPA–454/R–08–007, August 2008; also see CALPUFF Model Change Bulletins B (MCB–B), MCB–C and MCB–D.

[82] 70 FR at 39121

[83] 70 FR at 39121–29124.

[84] 70 FR at 39123.

for both ''el Niño'' and ''la Niña'' is every 9–11 years. The last strong ''el Niño'' occurred in 1997. The last two strong ''la Niña'' events occurred in 2010 and 1999. The baseline data collection for regional haze is ignorant of these significant atmospheric events, which makes the data collection period irrelevant and therefore the ''baseline visibility'' invalid.

Response: EPA disagrees with the characterizations in this comment. EPA recognizes that a variety of global scale, natural emissions sources affect natural visibility levels at Class I areas, and we described methods used to assess natural haze levels.[85] We disagree that it is necessary to model visibility impairment for one or two full solar cycles. The formation of fine particulate matter, and subsequent impacts on regional haze, depend on variations in local meteorological conditions. Variability in meteorological conditions is primarily determined by seasonal weather conditions, and the modeling period of calendar years 2001–2003 used in our analysis includes substantial variability in weather conditions. While phenomena such as el Niño and la Niña can affect the frequency of extreme events, our modeling analysis is based on the 98th percentile visibility impacts and is therefore designed to exclude extreme events. El Niño and la Niña events may also affect annual total precipitation, temperature and other meteorological parameters, however, the commenter has not provided any evidence that the 98th percentile visibility impacts would differ significantly during an el Niño and la Niña year. We believe that it is sufficient to model visibility impairment for a 3 year period. In the preamble to the BART Guidelines, we discussed meteorological variability and explained how use of the 98th percentile would minimize the likelihood that the highest modeled visibility impacts would be caused by unusual meteorological conditions. 70 FR 39121. As explained above, our use of the 98th percentile is consistent with the BART Guidelines and in recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded that ''[f]or purposes of the regional haze rule's BART provisions . . . CALPUFF is sufficiently reliable to inform the decision-making process.''[86] Thus to the extent that the comment suggests that the BART Guidelines should have used a different percentile to account for solar variability in solar cycles, the legal deadline for challenging the use of CALPUFF has passed. In addition we encourage the commenter to provide input in the event that EPA develops any new future visibility guidelines and predictive models.

2. EPA Modeling

a. Comments on EPA Modeling

Comment: Several commenters have argued that EPA should have used updated models and procedures for its revised modeling. In addition, several commenters have argued that the State's Protocol was overly conservative in its treatment of background ammonia concentrations, and that monitoring data show that background ammonia levels are significantly lower than the 2 ppb concentration specified in the Protocol. Commenters in particular directed EPA's attention to ambient monitoring data for ammonia and particulate ammonium at a monitoring site in Boulder in western Wyoming and at several Class I areas. Ambient monitoring at the Boulder site was performed from 2006 to 2011 and these data were recently published by Li et al.,[87] while the monitoring data at the Class I areas for an 8 month period from April 2011 to January 2012 and were presented at a conference in 2012.[88]

Response: We agree with the comments that we should perform new modeling using updated model versions and different background ammonia concentrations. In this response we explain why we originally used the same modeling approach used by Wyoming and why we have updated the modeling for this action. In 2006, the State adopted its ''BART Air Modeling Protocol'' (Protocol)[89] that specified the approach for using the CALPUFF modeling system to evaluate BART visibility impacts, and the State and several BART sources performed modeling studies that were consistent with that protocol. For our original proposal in 2012, EPA performed additional modeling using the State's Protocol to evaluate a limited number of emissions scenarios that the State had not evaluated in its modeling. EPA recognized that there had been updates to CALPUFF modeling guidance and model versions after 2006 when the State adopted the Protocol, however, in our original proposal in 2012, which included a limited, gap-filling analysis, we proposed that it was preferable to maintain consistency with the modeling approach that the State had adopted in its Protocol. In our re-proposal on June 10, 2013, EPA recognized that some of the options used from the State's Protocol were inconsistent with BART Guidelines, such as the approach for determining baseline emissions. As a result, for the re-proposal EPA performed new modeling using updated emissions data for the baseline period and for all emissions control technologies, however, EPA continued to use the State's Protocol for EPA's re-proposed modeling analysis.

After evaluating comments on the re-proposal, EPA determined that it was necessary to remodel all of the baseline and control technology scenarios using different background ammonia concentrations for the BART sources that we reconsidered for this action, including Naughton, Jim Bridger, Laramie River, Dave Johnston and Wyodak. Because this approach represents a significant change from State's original Protocol, we believed that it was appropriate to develop a new modeling protocol that also adopts the current model version approved for regulatory use, CALPUFF version 5.8, and current regulatory default options. In making this decision, we considered the merits of continuing to use the State's original protocol versus the benefits of using the updated CALPUFF model that became available after the State's Protocol was adopted, and different background ammonia concentrations based in part on data that have also become available since then, and we concluded that it was necessary to adopt an updated Protocol[90] to respond fully to a number of issues raised by various commenters. The new EPA Protocol for modeling of Wyoming BART uses the same CALPUFF model version 5.8 as did the protocol that we previously adopted for modeling BART sources visibility impacts in Montana.[91]

[85] ''Guidance for Estimating Natural Visibility Conditions under the Regional Haze Rule'' Document No. EPA–R09–OAR–2012–0345–0003–B9, U.S. Environmental Protection Agency, September, 2003.

[86] 70 FR at 39123.

[87] Li, Y., Schwandner, F.M., Sewell, H.J., Zivkovich, A., Tigges, M., Raja, S., Holcomb, S., Molenar, J.V., Sherman, L., Archuleta, C., Lee, T., Collett Jr., J.L., Observations of ammonia, nitric acid, and fine particles in a rural gas production region, Atmospheric Environment (2013), doi: 10.1016/j.atmosenv.2013.10.007.

[88] Chen et al., A Pilot Monitoring Study of Atmospheric NHx at Selected IMPROVE sites AWMA Aerosol and Atmospheric Optics, Visibility & Air Pollution Conference, September 24–28, 2012, Whitefish, MT.

[89] Wyoming's ''BART Air Modeling Protocol'' (Protocol) is included in the docket in the State's Technical Support Document.

[90] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan, U.S. EPA, January, 2014.

[91] Modeling Protocol: Montana Regional Haze Federal Implementation Plan (FIP) Support,

Continued

EPA evaluated the comments and the ambient ammonia monitoring data submitted by commenters. EPA understands that there is no single accepted method for estimating the background concentration of ammonia, and that any method will have advantages and disadvantages. The lack of consensus on a method was a factor in EPA's decision to set aside the 2 ppb concentration value specified in the State's Protocol and instead to rely in part on the default values in Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 report [92] and in part on monitoring data. Specifically, for BART sources in western Wyoming we performed two modeling runs, one relying on an IWAQM default value and the other relying only on monitoring data. As presented below, EPA's two sets of modeling results for this BART source support our final BART determinations, as they both show similar visibility benefits. As explained below, we relied only on an IWAQM default value for BART sources in eastern Wyoming.

The 1998 IWAQM report is the only guidance available for choosing ammonia background concentrations. The IWAQM Phase 2 report relied on a 1992 review of ambient monitoring data for ammonia by Langford et al.[93] and explains that: ''. . . the formation of particulate nitrate is dependent on the ambient concentration of ammonia, which preferentially reacts with sulfate. The ambient ammonia concentration is an input to the model. Accurate specification of this parameter is critical to the accurate estimation of particulate nitrate concentrations. Based on a review of available data, Langford et al. suggest that typical (within a factor of 2) background values of ammonia are: 10 ppb for grasslands, 0.5 ppb for forest, and 1 ppb for arid lands at 20 degrees Celsius. Langford et al. (1992) provide strong evidence that background levels of ammonia show strong dependence with ambient temperature (variations of a factor of 3 or 4) and a strong dependence on the soil pH. However, given all the uncertainties in ammonia data, IWAQM recommends use of the background levels provided above, unless specific data are available for the modeling domain that would discredit the values cited. It should be noted, however, that in areas where there are high ambient levels of sulfate, values such as 10 ppb might overestimate the formation of particulate nitrate from a given source, for these polluted conditions. Furthermore, areas in the vicinity of strong point sources of ammonia, such as feed lots or other agricultural areas may experience locally high levels of background ammonia.'' [94]

The IWAQM Phase 2 report also states that ''[i]n a refined analysis, ''the background concentrations of ozone and ammonia are allowed to vary in time and space.'' [95] In summary, given numerous uncertainties in ammonia data, the IWAQM Phase 2 report recommends use of the background values it provides for different land use categories, unless specific data is available in the modeling domain as a more accurate substitute for its recommended default values, and allows for the consideration of background ammonia concentrations that vary seasonally or spatially.

EPA has reviewed monitoring data for ammonia and ammonium that have been collected at one site in western Wyoming since 2006.[96] We have determined that the monitoring data from this site are the most representative monitoring data available for characterizing ammonia and ammonium background levels in the modeling domains used for western Wyoming as explained in detail below. Based on this analysis, EPA has concluded that the constant 2 ppb background concentration used by the State is substantially higher than the observed combined ammonia and particulate ammonium concentrations at this monitoring site in western Wyoming, especially during the winter season when the observed sum of ammonia and particulate ammonium concentration were typically much lower than 2 ppb.[97] Therefore, for two BART sources in western Wyoming (PacifiCorp's Naughton and Jim Bridger) in one of our modeling runs we modeled using monthly varying ammonia background concentrations based on the combined observed concentration of ammonia and particulate ammonium at this monitoring site in western Wyoming, as described in the EPA Protocol.[98] In a second modeling run for these two BART sources, we modeled using the default IWAQM ammonia concentration of 0.5 ppb for forested areas. Although western Wyoming includes a mixture of arid grasslands and forested areas, we used the IWAQM default value of 0.5 ppb for forested areas because the Class I areas in the modeling domain are primarily forested, and because the monitoring data more nearly matched the IWAQM recommendation for forests than the default for the other land types.

When Wyoming adopted its Protocol in 2006, the State explained that: ''A constant background ammonia concentration of 2.0 ppb is specified. This value is based upon monitoring data from nearby states and IWAQM guidance. Experience suggests that 2.0 ppb is conservative in that it is unlikely to significantly limit nitrate formation in the model computations.'' [99]

The Wyoming Protocol specified a constant 2 ppb background ammonia concentration, but the Protocol (addressing source owners performing their own BART analyses) states that: ''[i]f you believe that ammonia limiting is appropriate for a specific BART analysis, justification should be discussed with the Division prior to its use.'' [100] The Wyoming Protocol in the text quoted here refers to a method for correcting CALPUFF for ammonia limiting conditions, which indicates that the State recognized the possibility that its protocol could be overly conservative in its treatment of ammonia. Therefore, we believe it is appropriate and consistent with the IWAQM Phase 2 report and the intention of the State's Protocol to model a BART source in western Wyoming using both the newly available monitoring data, and the default concentration recommended in the IWAQM Phase 2 report, to represent background ammonia concentrations more accurately than would be the case if we retained the 2 ppb value specified in the State Protocol.

We describe here in more detail the ambient monitoring data from the site in western Wyoming and our use of those

prepared for EPA Region 8 by Alpine Geophysics, LLC, November 21, 2011.

[92] Interagency Workgroup On Air Quality Modeling (IWAQM) Phase 2 Summary Report And Recommendations For Modeling Long Range Transport Impacts (EPA–454/R–98–019), EPA OAQPS, December 1998, *http://www.epa.gov/scram001/7thconf/calpuff/phase2.pdf.*

[93] Langford, A.O., F.C. Fehsenfeld, J. Zachariassen, and D.S. Schimel (1992), Gaseous ammonia fluxes and background concentrations in terrestrial ecosystems of the United States, Global Biogeochemical Cycles, 6, 459–483.

[94] Interagency Workgroup On Air Quality Modeling (IWAQM) Phase 2 Summary Report And Recommendations For Modeling Long Range Transport Impacts, EPA–454/R–98–019, (December 1998) pages 14–15.

[95] *IWAQM, Ibid.,* page 6.

[96] Li, Y., Schwandner, F.M., Sewell, H.J., Zivkovich, A., Tigges, M., Raja, S., Holcomb, S., Molenar, J.V., Sherman, L., Archuleta, C., Lee, T., Collett Jr., J.L., Observations of ammonia, nitric acid, and fine particles in a rural gas production region, Atmospheric Environment (2013), doi: 10.1016/j.atmosenv.2013.10.007.

[97] Li et al. U.S. EPA, December, 2013.

[98] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan.

[99] Wyoming Protocol, p. 12.

[100] Wyoming Protocol, p. 15.

data. Li et al (2013) [101] report on an analysis of ambient monitoring data conducted from 2006 to 2011 at the Pinedale site in western Wyoming in an area with significant oil and gas production. The monitoring site included measurements of gaseous ammonia (NH_3) and particulate ammonium (NH_4) and a complete set of acidic species including gaseous nitric acid and particulate nitrate and sulfate. The complete set of measurements makes it possible to determine the total ammonia and ammonium concentration (NH_X=NH_3+NH_4) and to determine if ammonium nitrate formation is limited by the availability of excess NH_3. Li et al found significant seasonal variability in NH_3 and NH_4 concentrations at the site and concluded that excess nitric acid was present in winter, while NH_3 concentrations were close to zero in winter, indicating that formation of ammonium nitrate was limited by the availability of ammonia at this site in winter.[102] Because ammonia at this monitoring site may have been affected by nearby sources of sulfuric acid and nitric acid, which would deplete the gaseous ammonia concentration locally, we used the combined gaseous and particulate measurement of NH_X to estimate monthly average background ammonia concentrations, with a low concentration in January of 0.36 ppb and a peak concentration in 1.12 ppb in August.[103] The monitor is located in an area that includes nearby sources of ammonia emissions from livestock and other anthropogenic sources, including a nearby area of oil and gas production activity, which could result in locally elevated ammonia compared to the area more immediate to the BART source and to the nearest Class I areas. Moreover, some of the particulate ammonium observed at the site was irreversibly bound with sulfate and may have had a non-local origin due to long range transport of ammonium sulfate. These factors mean that this estimate of local background may tend to overestimate the regional background ammonia concentration and thus also overestimate the visibility benefit due to NO_X reductions at sources. There may be other unknown factors also working in the same direction or in the other direction. For example, monitoring methods for ammonia and quality systems for characterizing monitoring accuracy have not been standardized to the extent that methods for other ambient compounds have been, resulting in uncertainty as to whether there is bias in the measurements.

As discussed above, we also modeled the PacifiCorp Naughton and Jim Bridger BART sources in western Wyoming using a constant background ammonia concentration of 0.5 ppb, which is the IWAQM Phase 2 report default recommendation for forested areas. Model results using either approach to determine an ammonia background concentration support our final BART determinations, as they both show similar visibility benefits.

We also remodeled the BART sources in eastern Wyoming including Wyodak, Dave Johnston and Laramie River. The Class I areas most impacted by these BART sources are Badlands and Wind Cave National Parks in western South Dakota. The closest long-term ammonia monitoring site to these Class I areas is at site at Beulah, North Dakota operated by the State of North Dakota. This site is about 280 miles from Badlands National Park and about 300 miles away from Wind Cave NP. The area around Beaulah site includes a mix of agricultural lands and grassland. Measured monthly average gaseous ammonia concentrations at the Beulah site in central North Dakota vary from about 1 to 2 ppb throughout the year, with the lowest values in fall and winter.[104] Additionally, combined ammonia and particulate ammonium measurements have been reported at Wind Cave National Park for an 8 month period by Chen et al.[105] This study measured NH_X daily average concentrations in the range of about 0.05 to 4 ppb, with an annual average concentration of 0.75 ppb. We considered these monitoring data sufficient to put into serious doubt the 2 ppb concentration specified in the State's Protocol, but insufficient to support either a single or an alternative modeling run based on monitoring data. Therefore, we chose to rely on the IWAQM Phase 2 report for a single set of modeling runs for the BART sources in eastern Wyoming. The area around Wind Cave National Park includes forested areas, including Black Hills National Forest, while the area around Badlands National Park includes a mix of arid and grass lands. While there is uncertainty in the appropriate background ammonia level in this region, we used the IWAQM Phase 2 report recommended value of 1 ppb for arid lands because it falls within the range of the limited monitoring data available in nearby regions and because it is represents an intermediate level for the different land use types within the region.

For both the eastern and western Wyoming modeling domains and runs, we corrected for ammonia limiting conditions. The correction for ammonia limiting conditions is a post-processing step in POSTUTIL, one component of the CALPUFF modeling system. Because CALPUFF simulates each BART unit individually, the background ammonia concentration is assumed by the model to be fully available to react with emissions from each unit. In reality, the total emissions from the combined units compete for the available ammonia. Also, because CALPUFF simulates multiple parcels of air originating at each unit, there is the possibility that different parcels can overlap at a Class I area. The ammonia limiting correction in POSTUTIL is designed to repartition the available ammonia to react with emissions from all of the units and overlapping air parcels, thereby avoiding double counting of the background ammonia. We used the same ammonia limiting correction in our modeling for Montana BART [106] sources, and this is a standard configuration in the CALPUFF modeling system.

In summary, we concluded that it was more reasonable to model visibility impacts in western Wyoming using both the default IWAQM Phase 2 report recommendation for forested areas and using a seasonally varying NH_3 concentration in western Wyoming that was based on long term monitoring of NH_3 and NH_4 from one site, than to use the 2 ppb concentration specified in the State's Protocol. We found that the visibility impacts predicted for the various control levels at the PacifiCorp Naughton and Jim Bridger BART sources were very similar with these two approaches and that either set of results supports the same BART determination for these sources. Therefore, we did not have to make a

[101] Li, Y., Schwandner, F.M., Sewell, H.J., Zivkovich, A., Tigges, M., Raja, S., Holcomb, S., Molenar, J.V., Sherman, L., Archuleta, C., Lee, T., Collett Jr., J.L., Observations of ammonia, nitric acid, and fine particles in a rural gas production region, Atmospheric Environment (2013), doi: 10.1016/j.atmosenv.2013.10.007.

[102] Li et al., *Ibid.*

[103] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan,U.S. EPA, December, 2013, page 18, Table 7.

[104] Protocol for BART-Related Visibility Impairment Modeling Analyses in North Dakota, November, 2005, North Dakota Department of Health, Division of Air Quality, 1200 Missouri Avenue, Bismarck, ND 58506. Page 33.

[105] Chen et al., A Pilot Monitoring Study of Atmospheric NH_X at Selected IMPROVE sites AWMA Aerosol and Atmospheric Optics, Visibility & Air Pollution Conference, September 24–28, 2012, Whitefish, MT.

[106] Modeling Protocol: Montana Regional Haze Federal Implementation Plan (FIP) Support, prepared for EPA Region 8 by Alpine Geophysics, LLC, November 21, 2011.

determination that one approach was superior to the other, and we have not done so. We also determined that it was appropriate to use the default IWAQM Phase 2 report recommendation of 1 ppb for eastern Wyoming.

Comment: A commenter believes that the improvements from the addition of SCR technology are based on highly conservative models which overestimate the deciview reduction as compared to actual monitored data collected at the IMPROVE stations. Subsequently, the improvement in visibility provided by SCR is not supported by the escalated costs of $600 million above the cost to install Wyoming's proposed control technologies.

Response: EPA disagrees with this comment to the extent that it takes issue with EPA's modeling. As discussed in response to other commenters, EPA recognized that the State's original modeling protocol specified a fixed value of 2 ppb for background ammonia. EPA has performed new modeling using lower background concentrations and using a correction for ammonia limiting conditions when modeling multiple units from a single BART source.

EPA also used the most current regulatory approved versions of the models in the updated modeling. EPA has recognized that the CALPUFF model can be conservative in estimating visibility impairment, and therefore, EPA has used the 98th percentile model results instead of the maximum modeled visibility impairment to address the possibility of model overpredictions. In recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded that ''[f]or purposes of the RHR's BART provisions, CALPUFF is sufficiently reliable to inform the decision making process, e.g., see 77 FR 39123.[107] As discussed above, to the extent that the comment takes issue with the use of the 98th percentile, the legal deadline for challenging the use of CALPUFF has passed, but we encourage the commenter to provide input in the event that EPA develops any new future visibility guidelines and predictive models.

Comment: The commenter states that EPA made five errors in its visibility modeling, including (1) given the general inaccuracy in CALPUFF unit-specific modeling, not allowing Wyoming the deference accorded it under the CAA; (2) relying upon an outdated CALPUFF method of visibility modeling, contrary to EPA precedent; (3) violating the applicable modeling guidance, Appendix W, by not using the ''best'' science; (4) violating the Data Quality Act by not using the ''best'' science; and (5) failing to recognize the gross overestimations and internal inconsistencies in EPA's modeling approach.

Response: EPA disagrees with this comment. In response to item (1): In promulgating the BART guidelines we made the decision in the final BART Guideline to recommend that the model be used to estimate the 98th percentile visibility impairment rather than the highest daily impact value as proposed. We made the decision because ''there are other features of our recommended modeling approach that are likely to overstate the actual visibility effects of an individual source. Most important, the simplified chemistry in the model tends to magnify the actual visibility effects of that source. Because of these features and the uncertainties associated with the model, we believe it is appropriate to use the 98th percentile, a more robust approach that does not give undue weight to the extreme tail of the distribution.'' 77 FR 39121. In regard to deference to the state, as discussed in more detail elsewhere in this document, Congress crafted the CAA to provide for states to take the lead for implementing plans, but balanced that decision by requiring EPA to approve the plans or prescribe a federal plan should the state plan be inadequate to meet CAA and regulatory requirements. Our action today is consistent with the statute and regulations. In response to item (2): We initially relied on the State's modeling Protocol, adopted in 2006, that specified model versions available at that time, but that have since been updated. In our original proposal we performed limited gap filling modeling that was consistent with the State's Protocol and that used the same model versions as the State. In this final action, as presented in more detail in the Protocol in the docket, due to a number of other changes in the protocol, we also updated the protocol to use the current regulatory version of the CALPUFF modeling system. In response to items (3) and (4): In recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded that ''[f]or purposes of the regional haze rule's BART provisions . . . CALPUFF is sufficiently reliable to inform the decision-making process.'' [108] EPA accordingly appropriately used CALPUFF in this action. EPA recognized that there were uncertainties in the science of the CALPUFF modeling system, and therefore used the less conservative 98th percentile value to model results to address the possibility that the model was overly conservative. We address concerns about the Data Quality Act (also referred to as the Information Quality Act), elsewhere in this document. In response to item (5): EPA recognized that the State's original Protocol was inconsistent with the IWAQM report and monitoring data because of the use of a constant 2 ppb ammonia concentration, and our modeling in this action relied on ambient monitoring data and the default values consistent with IWAQM Phase 2 report, to specify two alternatives for more realistic background ammonia concentrations in western Wyoming. We also reduced the background ammonia concentration from 2 to 1 ppb in eastern Wyoming, as discussed previously. A seasonal ammonia concentration was not adopted due to the lack of high quality monitoring data in eastern Wyoming; however, as discussed previously, the 1 ppb background estimate is consistent with IWAQM Phase 2 report. As discussed elsewhere, we also used the ammonia limiting correction for modeling multiple units from a single BART source to address concerns with the model being overly conservative.

Comment: Contrary to its own guidance, EPA failed to use the most realistic model. 40 CFR part 51, Appendix W, EPA's modeling guidance, demands that the ''best'' model should always be used. EPA failed to use the ''best'' model in Wyoming, which is CALPUFF 6.4. Therefore, EPA failed to follow Appendix W's requirements.

Response: We disagree with this comment. As explained above, EPA followed the RHR. Specifically, in recommending the use of CALPUFF for assessing source specific visibility impacts, EPA recognized that the model had certain limitations but concluded

[107] 77 FR 39123: ''Because of the scale of the predicted impacts from these sources, CALPUFF is an appropriate or a reasonable application to determine whether such a facility can reasonably be anticipated to cause or contribute to any impairment of visibility. In other words, to find that a source with a predicted maximum impact greater than 2 or 3 deciviews meets the contribution threshold adopted by the States does not require the degree of certainty in the results of the model that might be required for other regulatory purposes. In the unlikely case that a State were to find that a 750 MW power plant's predicted contribution to visibility impairment is within a very narrow range between exemption from or being subject to BART, the State can work with EPA and the FLM to evaluate the CALPUFF results in combination with information derived from other appropriate techniques for estimating visibility impacts to inform the BART applicability determination. Similarly for other types of BART eligible sources, States can work with the EPA and FLM to determine appropriate methods for assessing a single source's impacts on visibility.''

[108] 70 FR at 39123.

that ''[f]or purposes of the regional haze rule's BART provisions . . . CALPUFF is sufficiently reliable to inform the decision-making process.'' [109] EPA accordingly appropriately used CALPUFF in this action. The use of CALPUFF is subject to GAQM requirements in section 3.0(b), 4, and 6.2.1(e) which includes an approved protocol to use the current 5.8 version, which is the version we used for EPA's final modeling analysis. We did not use CALPUFF Version 6.4 because this version of the model has not been approved by EPA for regulatory use.

We made the decision in the final BART Guidelines to use less than the highest daily impact value for assessment of visibility impacts. We made this decision in response to comments we received expressing concern that the chemistry modules in the CALPUFF model are less advanced and that use of the 1st High was conservative and the knowledge that CALPUFF's simplified chemistry could lead to model overpredictions and thus be conservative. We decided in the BART Guideline to use the 98 percentile for CALPUFF based modeling results. We also received comments opposed to using the day with the worst meteorology, but the primary reason we changed to using a less stringent metric than the day with the highest visibility impact was because of concerns about overestimations in CALPUFF's simplified chemistry. As a result, we determined that it was appropriate to use the 98th percentile or 8th High value when modeling all days of the year instead of the 1st High value, also described as the Highest Daily impact level for each year modeled: ''Most important, the simplified chemistry in the model tends to magnify the actual visibility effects of that source. Because of these features and the uncertainty associated with the model, we believe it is appropriate to use the 98th percentile—a more robust approach that does not give undue weight to the extreme tail of the distribution.'' [110]

Comment: EPA's modeling for its regional haze FIP action was inadequate and incomplete. (EPA failed to re-run WRAP regional modeling due to ''time and resource constraints''). Therefore, EPA's regional haze FIP action violates the ''Guideline on Air Quality Models,'' 40 CFR part 51 Appendix W, the Information Quality Act and the implementing guidelines issued, respectively, by the U.S. Office of Management and Budget (OMB) and the EPA which require information disseminated by EPA to be accurate, complete, reliable and unbiased. The Information Quality Act and EPA's ''Information Quality Guidelines'' place a heightened standard on ''influential'' information, including scientific information regarding health, safety, or environmental risk assessments. EPA's inaccurate and incomplete visibility modeling is by definition ''influential,'' because EPA could reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions, such as the BART NO_X determinations in EPA's regional haze FIP.

Therefore, this ''influential'' information must be based on best available science and data and supporting studies must be conducted in accordance with sound objective scientific practices and methods. EPA's Guidelines implementing the Information Quality Act expressly contemplate the correction of information disseminated by EPA that falls short of the ''basic standard of quality, including objectivity, utility, and integrity,'' established by either EPA's own Guidelines or those issued by OMB.

The commenter seeks correction to a number of errors and omissions in EPA's regional haze FIP with regard to CALPUFF modeling and EPA's failure to re-run the WRAP model. The commenter requests that EPA withdraw its regional haze FIP until these issues are resolved.

Response: As EPA explained in our Information Quality Guidelines, we believe ''that the thorough consideration provided by the public comment process serves the purposes of the Guidelines, provides an opportunity for correction of any information that does not comply with the Guidelines, and does not duplicate or interfere with the orderly conduct of the action.'' [111] Therefore, we are responding to the modeling comments and related comments regarding EPA's Guidelines and the Information Quality Act in this document.

WRAP performed regional photochemical modeling using both the Community Multi-Scale Air Quality modeling system (CMAQ) and Comprehensive Air Quality Model (CAMx) air quality models to evaluate progress toward attaining visibility goals using all projected emission changes from all source categories throughout the United States. WRAP did not perform regional photochemical modeling to evaluate the visibility impacts of individual BART sources. While WRAP did make assumptions regarding the level of emissions control that would be adopted by BART sources as part of its analyses, no state or EPA region has re-run the WRAP's regional photochemical models to assess individual BART source contributions to visibility impairment. Instead, the BART sources, the states, and EPA have used the CALPUFF model to evaluate contributions to visibility impairment from individual BART sources. This approach is consistent with the BART Guidelines that recommend that the CALPUFF model should be used to evaluate visibility impairment from individual BART sources. Additionally, while EPA supported development of WRAP CMAQ modeling in order to assist states in developing their RPGs and determining the cumulative benefit of an overall control strategy vis-à-vis the URP on the 20% worst days, our use of CALPUFF for evaluating visibility improvement from a single BART source is consistent with the BART Guidelines and also consistent with modeling performed by other states and EPA regional offices for individual BART sources.

We have responded to comments related to errors and omissions in the CALPUFF modeling in separate response to comments.

Comment: The commenter states that the revised EPA modeling, which used new information on emissions rates, did not significantly change the results identified in Wyoming's BART analyses. The commenter also states that there are small differences between EPA's and Wyoming's analyses which do not justify EPA rejecting Wyoming's BART determinations.

Response: We disagree that in all cases there are only small differences in EPA revised modeling and the State's modeling. Importantly, as described elsewhere in this document and in the docket for this action, EPA revised and corrected various inputs to the BART factors so that the analyses are consistent with the RHR and statutory requirements. While the difference at the most impacted Class I area from individual sources or units is some cases can be characterized as small, the cumulative differences from many small improvements can be significant. Whether such differences are significant will depend on the overall consideration of the BART factors. Because of the flaws in Wyoming's

[109] 70 FR at 39123.

[111] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R–02–008 October 2002, U.S. Environmental Protection Agency Office of Environmental Information (2810) 1200 Pennsylvania Avenue NW., Washington, DC 20460.

visibility and cost analyses for many of its BART sources, EPA could not be confident that Wyoming's BART determinations were reasonable without undertaking an appropriate analysis of the statutory factors.

Comment: The commenter states that Wyoming provided the required modeled visibility improvement information for SCR, and quotes from the State's analysis: ''Post-Control Scenario B is directly comparable to Post-Control Scenario A as the only difference is directly attributable to the installation of SCR.'' The commenter then concludes EPA did not lack the required information to evaluate visibility improvements.

Response: We have addressed this comment in a previous response, citing the requirement in the BART Guidelines that visibility must be assessed relative to the pre-control scenario (and not just incremental to other control scenarios). Moreover, there remain deficiencies, as presented elsewhere in this document and docket, with the State's BART modeling analyses that justify our rejection of the State's BART determinations for PacifiCorp. Most notably, as discussed in separate responses, the State did not assess the visibility improvement of SNCR as required by the CAA and BART Guidelines.

Comment: An older version of the CALPUFF modeling suite was used by EPA (CALPUFF model of March 2006 vintage and the CALPOST model of April 2006 vintage.) These older versions pre-date the latest Model Change Bulletin (MCB–D) of June 23, 2007. Since the analysis for the five Wyoming power plants was performed in February thru April 2012, we question why the older version was used and not the current CALPUFF 5.8 version, which was approved as the guideline version in June of 2007. We do not recommend use of the older versions of CALPUFF and CALPOST.

Response: As described in this action, our previous modeling continued to use the State's Protocol, including the older model versions, to maintain consistency with the State's modeling results. However, in this final action, we adopted a new modeling protocol that uses the current regulatory versions of the models, including the Model Change Bulletin suggested by the commenter. We determined that it was appropriate to adopt an updated modeling protocol because we made other significant changes in the State's modeling approach, and because we remodeled all emissions scenarios, there was no longer a need to use older model versions for consistency of comparison of our limited gap filling model results to the State's original modeling.

Comment: EPA should have used the most recent version of CALPUFF, or at a minimum, should have used the version that EPA requires for other regional haze SIPs. EPA has taken the position that CALPUFF Version 5.8 must be used for regional haze modeling. 77 FR 42834, 42854. However, EPA's unit-specific CALPUFF modeling in Wyoming, completed in April 2012, used CALPUFF Version 5.711a (originally released in 2004). Version 5.711a is eight years old, and several CALPUFF versions behind Version 5.8. While PacifiCorp believes the more modern and realistic CALPUFF Version 6.42 should be used, at a minimum EPA must abide by its own position and use Version 5.8 in evaluating the Wyoming regional haze SIP, which it failed to do. According to EPA's own statements, EPA's own modeling results should be discarded because EPA used an improper ''alternative model'' in Wyoming.

EPA should have used the most recent version of CALPUFF (Version 6.42) in Wyoming because it produces more realistic and accurate results. Version 6.42 contains needed refinements, such as a better ''chemistry'' module known as ISORROPIA (Version 2.1). CALPUFF Version 6.42 is more accurate because, as the FLMs have noted, Version 5.8 does not have the required settings to perform the new Method 8 visibility analysis. Additionally, CALPUFF Version 6.42 has been maintained by TRC, Inc., a private contractor, and has had many bug fixes and enhancements not included in CALPUFF Version 5.8. Most importantly, the previous chemistry modules used in Version 5.8 (and in the 5.711a Version EPA used here) also have been shown to overestimate nitrate concentrations in Wyoming by a factor of 3–4 and substantial improvements have been made to eliminate this over-prediction using the ISORROPIA module.

Despite all these advancements in modeling and modeling science, EPA conducted its modeling for its regional haze FIP in 2012 using the same (now outdated) CALPUFF version that PacifiCorp and Wyoming used five years ago, which has been shown to overestimate results by 300% to 400%. Rejecting Wyoming's modeling, and then using the same, outdated modeling approach, is arbitrary and capricious.

Response: As described in previous responses, we previously used the same modeling protocol adopted by the State for the purpose of our limited, gap filling modeling, so that we would have a consistent basis for comparison with the State's modeling. In this action we have updated the protocol to use the current regulatory versions of the models including CALPUFF version 5.8.

We did not use CALPUFF Version 6.42 because this version of the model has not been approved by EPA for regulatory use. EPA relied on version 5.8 of CALPUFF because it is EPA-approved version in accordance with the Guideline on Air Quality Models (''GAQM'', 40 CFR 51, Appendix W, section 6.2.1.e). EPA updated the specific version to be used for regulatory purposes on June 29, 2007, including minor revisions as of that date. The approved CALPUFF modeling system includes CALPUFF version 5.8, level 070623, and CALMET version 5.8 level 070623. CALPUFF version 5.8 has been thoroughly tested and evaluated, and has been shown to perform consistently with the initial 2003 version in the analytical situations for which CALPUFF has been approved. Any other version, and especially one with such fundamental differences in its handling of chemistry, would be considered an ''alternative model'', subject to the provisions of GAQM section 3.2.2(b), requiring full model documentation, peer-review, and performance evaluation. No such information for the later CALPUFF versions that meet the requirements of section 3.2.2(b) has been submitted to or approved by EPA. Experience has shown that when the full evaluation procedure is not followed, errors that are not immediately apparent can be introduced along with new model features. For example, changes introduced to CALMET to improve simulation of over-water convective mixing heights caused their periodic collapse to zero, even over land, so that CALPUFF concentration estimates were no longer reliable.[112]

The change from CALPUFF version 5.8 to CALPUFF 6.4 is not a simple model update to address minor issues, but a significant change in the model science that requires its own rulemaking with public notice and comment before it can be relied on for regulatory purposes.

Furthermore, it should be noted that the U.S. Forest Service and EPA review of CALPUFF version 6.4 results for a limited set of BART applications showed that differences in its results from those of version 5.8 are driven by two input assumptions not associated

[112] ''CALPUFF Regulatory Update'', Roger W. Brode, Presentation at Regional/State/Local Modelers Workshop, June 10–12, 2008; *http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2008/agenda.htm.*

with the chemistry changes in 6.4. Use of the so-called ''full'' ammonia limiting method and finer horizontal grid resolution are the primary drivers in the predicted differences in modeled visibility impacts between the model versions. These input assumptions have been previously reviewed by EPA and the FLMs and have been rejected based on lack of documentation, inadequate peer review, and lack of technical justification and validation.

Comment: The commenter states that EPA treats the results from the CALPUFF as being capable of accurately predicting visibility improvements down to the tenths or hundredths of a deciview, but that the model does not accurately predict visibility impacts at this level.

Response: As described in response to other comments, EPA recognized that there is uncertainty in the CALPUFF results, and EPA addressed this uncertainty by using the modeled 98th percentile visibility impairment rather than the maximum visibility impairment. EPA considers model changes on the order of tenths of a deciview to be useful for informing the BART decision process, consistent with BART modeling performed by other EPA regions and states.

Comment: PacifiCorp presented substantial information supporting the need to use improved and updated versions of the models and provided substantial information on the effects that the nitrogen oxides to nitrogen dioxide conversion rate and background ammonia concentrations have on modeled visibility impacts.

Response: We agree with the comment that the background ammonia concentration has a significant effect on model predicted visibility impacts. As described elsewhere in this action, we reviewed recent ambient monitoring data for ammonia and particulate ammonium, and concluded that the original background ammonia concentration of 2 ppb was inconsistent with the IWAQM Phase 2 report and monitoring data for estimating visibility impacts in Wyoming, especially in the western portion of the State. In the modeling results included in this action, we considered the default value of 0.5 ppb and also applied a seasonally varying background ammonia concentration in western Wyoming that was based on measurements from 2006 to 2011 of total ammonia and particulate ammonium at Pinedale, Wyoming.[113] We also reduced the background ammonia concentration to 1 ppb in the eastern portion of the State, and for both parts of the State we used an ammonia limiting correction for modeling multiple units from a single BART source to avoid double counting of the available ammonia. The use of more realistic ammonia background concentrations, the ammonia limiting correction, and the use of the 98th percentile modeled impact address the concern that the CALPUFF model could overestimate visibility impacts.

Comment: One commenter stated that we underestimated the background ammonia concentration in the CALPUFF modeling, and cited the IWAQM Phase 2 recommendations for default ammonia concentrations for grasslands, forest lands and arid lands, respectively, of 10, 0.5 and 1 ppb, at 20 degrees Celsius. The commenter stated that, because land use type can vary across the large domains used in the CALPUFF modeling, it would be appropriate to calculate a weighted average of the background ammonia based on the fractional land use type in the model domain.

Response: We disagree with this comment. The IWAQM Phase 2 report does not recommend calculating a weighted average of default ammonia concentration based on regional variation in land use types. The commenter provides no regulatory basis for use of a weighted average.

Comment: One commenter stated that the IWAQM recommended default background ammonia recommendations do not specifically account for strong point/area sources of ammonia, such as cattle feedlots, which are also scattered throughout the modeling domain and which generally add to the background ammonia levels. This commenter stated that some areas of the modeling domain, namely northeastern Colorado, are described as ''ammonia rich''. For BART source analyses in Colorado, the recommended background ammonia value from the Colorado Department of Public Health and Environment (CDPHE) is 44 ppb, based on measurements conducted during the Northern Front Range Air Quality Study (NFRAQS), and therefore the Wyoming DEQ/EPA background ammonia concentration of 2 ppb might not carry sufficient ammonia for an accurate modeling assessment of visibility impacts within certain Colorado Class I areas.

Response: We disagree with the comment that large point/area sources are not included in estimates of background ammonia concentrations. While concentrations of ammonia of several hundred ppb can be observed near a cattle feedlot, these concentrations are not typical of regional background concentrations. Additionally, dispersion and vertical mixing occur in plumes of air transported downwind of large emissions sources, and the resulting dilution of ammonia results in lower concentrations as the plume is transported downwind of the source area. Therefore, ambient ammonia concentrations are generally greatly reduced downwind from the source. Moreover, ammonia has a short atmospheric lifetime of a few hours to a few days,[114] and removal of ammonia by deposition further reduces the concentration downwind of the source area. Therefore, it would be inappropriate to estimate background ammonia levels by measuring ammonia concentrations close to a large ammonia emissions source. Background concentrations of air pollutants are generally estimated using ambient monitoring data at background sites that are specifically selected such that there is no direct influence by large nearby point or areas sources.[115] Therefore, background monitoring data do explicitly include the contributions of emissions from large point and area sources by providing a direct measurement of the ambient concentration after transport, dilution and removal processes operate on the emissions from the source.

The commenter also cites modeling performed by the CDPHE and ammonia measurements made during the NFRAQS studies. As discussed in another response, CDPHE performed a CALPUFF model sensitivity study to evaluate the effect of background ammonia on model predicted nitrate concentrations, and found that the CALPUFF model was insensitive to variations in background concentrations greater than 10 ppb and became progressively more sensitive to background NH3 as it was reduced from 10 to 0 ppb.[116] The NFRAQS study reported measured ammonia concentrations in the Denver metropolitan area, and these measurements are not representative of background ammonia concentrations in

[113] Li et al. 2013

[114] Langford et al.

[115] For example, see EPA guidance documents that discuss methods for estimating background NO2 concentrations: ''Additional Clarification Regarding Applicability of Appendix W Modeling Guidance for the 1-hour NO2 NAAQS''

[116] Supplemental BART Analysis CALPUFF Protocol for Class I Federal Area Visibility Improvement Modeling Analysis, DRAFT, revised Aug 19, 2010, Colorado Department of Public Health and Environment. (CDPHE) Air Pollution Control Division Technical Services Program, 4300 Cherry Creek Drive South, Denver, Colorado 80246, pages 26–33.

rural and remote areas of central Colorado or western Wyoming.

Comment: The commenter states that Wyoming has conducted its regional haze SIP based on the modeling protocols and versions available at the time its regional haze SIP was completed. Because of this, there are limitations associated with the results obtained. However, in proposing its regional haze SIP, Wyoming has evaluated the model output with an understanding of the model's limitations. Wyoming then applied its judgment, as encouraged and required by EPA's guidelines and the CAA, which helped to mitigate the issues associated with models that over-predict the visibility improvement associated with BART controls being added. In contrast, EPA gives no consideration to the limitations of the models it uses. In the absence of using good judgment to deal with over-predictive results, it is critical that EPA use the most up-to-date and scientifically accurate models available.

We also received related comments that states have significant modeling discretion to which EPA failed to grant the proper deference. One commenter pointed out that the BART Guidelines recognize that states can make judgments regarding the use of modeling results due to the very real problems with CALPUFF, including its overestimation of visibility improvement. As EPA itself has stated, Wyoming should be free to make its own judgment about which modeling approaches are valid and appropriate. 70 FR 39123. Another commenter pointed to the statement that ''we must permit States to take into account the degree of improvement in visibility that would result from imposition of BART on each individual source when deciding on particular controls.'' 70 FR 39107, 39129. Another commenter stated that EPA failed to allow Wyoming to account for CALPUFF's overestimation of NO_X impacts, and therefore, EPA is not affording Wyoming's BART decisions the proper deference when it comes to the modeling and applying the modeling results.

Response: As discussed elsewhere in this document in greater detail, Congress crafted the CAA to provide for states to take the lead for implementing plans, but balanced that decision by requiring EPA to approve the plans or prescribe a federal plan should the state plan be inadequate. Our action today is consistent with the statute. As also discussed elsewhere in this document, we agree that there are limitations in the original modeling performed by the state, and therefore, it was necessary to perform new modeling using more realistic background ammonia concentrations, default values, and updated model versions to provide a sound basis for evaluating BART source visibility impacts. Our revised modeling is consistent with the BART Guidelines and with visibility modeling guidance in the IWAQM Phase 2 report, and we believe that the revised modeling constitutes a sound basis for evaluating visibility impacts of BART sources and in fact is supportive of Wyoming's SIP with respect to sources where ammonia background makes a significant differences.

Comment: The commenter states that EPA should have used the most recent version of CALPUFF (Version 6.42) in Wyoming because it produces more realistic and accurate results and because Version 5.8 does not have the required settings to perform the new Method 8 visibility analysis.

Response: As described in response to another comment, we used CALPUFF version 5.8 because this is the approved regulatory version of the model, while CALPUFF version 6.42 has not been approved. CALPUFF version 5.8 does allow the option of using the Method 8 visibility analysis, and as described in our modeling protocol, we used Method 8 for our analysis. The availability of Method 8 in CALPUFF version 5.8 was one of the reasons that we determined it was important to perform new modeling using the current regulatory version of the model, rather than continuing to rely on the original protocol adopted by the State in 2006, as we had done in our previous proposal.

Comment: EPA used a different background ammonia number for modeling than it requires of the states, and ignored current science on background ammonia. Regional haze modeling, and the resulting predicted visibility improvement, is greatly influenced by the background ammonia number used in the model. EPA improperly used a constant 2 ppb background ammonia number for the Wyoming BART modeling. EPA has not provided any scientific proof showing the constant 2 ppb ammonia number is appropriate for Wyoming. The 2 ppb ammonia value overestimates visibility improvement, contrary to the approach used by Wyoming Land Use, IWAQM Guidance, WRAP protocols, and elsewhere.

Commenter suggests that the WRAP recommended the use of 1 ppb of ammonia year round for states in the region to account for seasonal variability. EPA has required states to use 1 ppb of background ammonia when conducting regional haze modeling. 76 FR 52434 (New Mexico criticized for not using 1 ppb background ammonia). At a minimum EPA should follow its own guidelines and use 1 ppb of background ammonia when conducting CALPUFF unit-specific modeling.

However, the ''best'' science requires the use of ''variable ammonia'' background numbers. IWAQM recommends ammonia background numbers of 0.5 ppb for forest, 1 ppb for dry/arid lands, and 10 ppb for agriculture/grassland. Given its geographic location and elevation levels, Wyoming undergoes seasonal swings of dry-hot summers and snow covered ground in the winter. Therefore, the use of a single ammonia concentration for the entire year in a state where the land use and land cover changes significantly between seasons results in overestimation of visibility improvements. This is particularly true in winter when agricultural activity is minimal and meteorological conditions make visibility calculations particularly sensitive to ambient ammonia concentrations. EPA has approved the use of variable gaseous ammonia concentrations before, including the ''Addendum to Modeling Protocol for the Proposed Desert Rock Generating Station'' and should have used them when conducting the CALPUFF modeling for Wyoming.

Sensitivity tests on ambient ammonia concentrations were performed by the CDPHE for an area in northwest Colorado. The analysis demonstrated that visibility calculations performed at Mount Zirkel Wilderness Area in northwest Colorado had limited impact when ambient ammonia concentrations were reduced from 100 to 1 ppb, but there was a significant reduction in visibility impacts when concentrations were further reduced to 0.1 ppb.

Given the evidence presented above, the use of the monthly varying ammonia would provide accurate estimates of visibility impacts from the PacifiCorp regional haze units. EPA's failure to use variable background ammonia in its modeling is arbitrary and capricious.

Response: We agree that the 2 ppb constant background ammonia concentration is inconsistent with the IWAQM Phase 2 report default values and monitored data. This value was adopted by the State in 2006 before more reliable ammonia and particulate ammonium measurements were available in Wyoming. As described in this action, we modeled using seasonally varying background ammonia concentrations in western Wyoming based on 5 years of

monitoring data,[117] and we also modeled using the IWAQM default value of 0.5 ppb for forests. In eastern Wyoming we adopted a constant 1 ppb ammonia concentration based on the IWAQM guidance. We used an ammonia limiting correction for BART sources with multiple units throughout the State. While robust, long term monitoring data of ammonia and particulate ammonium are not available in eastern Wyoming, the BART sources in eastern Wyoming, and the South Dakota Class I areas where they contribute the greatest visibility impairment, are located closer to areas of Nebraska and the Dakotas which have large agricultural sources of ammonia emissions. Moreover, the IMPROVE monitoring at the South Dakota Class I areas show much higher winter concentrations of ammonium nitrate than do Class I areas in western Wyoming. Therefore, we believe it is appropriate to adopt higher background ammonia concentrations in eastern Wyoming than in western Wyoming, and we used a constant 1 ppb ammonia concentration in eastern Wyoming, consistent with the IWAQM guidance [118] for arid lands and also consistent with the WRAP Protocol.[119]

Comment: EPA made a modeling error in Wyoming when it used CALPOST version 5 with Method 6. FLMs recommended in 2000 the use of Method 6 to determine visibility impacts from BART eligible sources. However, for any recent PSD application and BART modeling since 2010, EPA has requested that Method 8 be used for determining impacts on visibility at nearby Class I areas.

The previously preferred Method 6 simply computes background light extinction using monthly average relative humidity adjustment factors particular to each Class I area applied to background and modeled sulfate and nitrate. Six years after the development of Method 6 in 1999, EPA released enhancements to the background light extinction equations, which use the revised IMPROVE variable extinction efficiency formulation. These enhancements take into account the fact that sulfates, nitrates and organics and other types of particles have different light extinction coefficients. Also, the background concentrations at each Class I area have been updated by EPA to reflect natural background visibility condition estimates for each Class I area for each type of particle. Additionally, relative humidity adjustment factors have been tailored separately for small particles, large particles, and to account for sea salt background concentrations.

These new enhancements to the calculation method, called Method 8, greatly improve the accuracy of the estimated visibility impact. Method 8 was added to CALPOST in 2008 and was adopted as the preferred option for determining impacts on visibility by the FLMs in their ''Federal Land Managers Air Quality Related Values Work Group Guidance Document'' in 2010 (FLAG 2010). The applicable background concentrations and relative humidity adjustment factors using Method 8 for each Class I area are identified in the FLAG 2010 document.

Despite the update to Method 8 in 2008 and the stated preference by the FLMs in 2010 to use Method 8, EPA conducted the Wyoming BART modeling in 2012 using the long outdated and scientifically inferior Method 6. EPA's use of Method 6, and not Method 8, is arbitrary and capricious.

Response: We agree that it is preferable to use Method 8 rather than Method 6 for evaluating visibility impacts based on the recommendation of the FLMs in FLAG 2010.[120] The older CALPUFF version 5.711 that was adopted in the State's original modeling protocol in 2006 did not have the option of using Method 8. In our previous modeling we adopted the State's original protocol to maintain a consistent basis of comparison with the State's modeling results. In this final action, we adopted an updated modeling protocol using the current regulatory version of the model, which allows the use of Method 8, and we used Method 8 for the analysis of visibility impacts.

Comment: We received numerous comments that EPA incorrectly used the maximum annual visibility impacts occurring during any given year of the 2001–2003 baseline period over which the Wyoming visibility models are run. Commenters asserted that standard practice has been, and continues to be, to average the results over the three year period as the three year average is a more robust value than the single year value used by EPA, and thus EPA should use longer term data. One commenter pointed out that consistent with the principle of using longer-term averages, baseline visibility conditions under the RHR are determined by taking the average degree of visibility impairment for the most and least impaired days for each of calendar years 2000 through 2004, and averaging the five annual values.

Response: We disagree with this comment. In our review of the CALPUFF modeling results presented by Wyoming, we cited the change in the maximum 98th percentile impact over the modeled three year meteorological period (2001–2003). As the 98th percentile value is intended to reflect the 8th high value in any year, it already eliminates seven days per year from consideration in order to account for short-term events, unusual meteorological conditions, and any over-prediction bias in the model. We also note that our approach is consistent with the method used by Wyoming in identifying subject-to-BART sources, where a source is exempt from BART only if the modeled 98th percentile change is less than 0.5 deciview at all Class I areas for *each* year modeled.[121] That is, whether a source is subject to BART is dependent on the maximum 98th percentile over the three year modeled meteorological period, not the average across the three year period. We find that it is reasonable to use the same approach when considering the visibility improvements associated with control options. Finally, we note that this approach is consistent with our consideration of visibility improvement in other actions, such as our FIP for Montana.

Comment: EPA's use of the maximum values in its BART NO_X determinations for its regional haze FIP causes inflated visibility impacts and over-estimated improvements being used. For example, if EPA were to run its approved models, used its approved ammonia values for the western states, and used the average visibility impact over the three years rather than a maximum impact for a single year, the incremental visibility impact between installing LNB technology and SNCR at Wyodak and Dave Johnston Unit 3 drops to just 0.09 deciview. Instead, EPA has used an improper evaluation to create an inflated visibility improvement of 0.15 and 0.17 delta deciview to justify the installation of the SNCR. As a result, EPAs' BART NO_X evaluations are

[117] Li et al., 2013.

[118] Interagency Workgroup On Air Quality Modeling (IWAQM) Phase 2 Summary Report And Recommendations For Modeling Long Range Transport Impacts (EPA–454/R–98–019), EPA OAQPS, December 1998.

[119] Tonnesen, G., Wang, Z., Morris, R., Hoats, A., Jia, Y., Draft Final Modeling Protocol, CALMET/CALPUFF Protocol for BART Exemption Screening Analysis for Class I Areas in the Western United States, Submitted to the Western Regional Air Partnership, August 15, 2006.

[120] Federal Land Managers' Air Quality Related Values Work Group (FLAG) Phase I Report—Revised (2010).

Natural Resource Report NPS/NRPC/NRR—2010/232.

[121] Chapter 6, Section 9(d)(i)(C) of the Wyoming Air Quality Standards and Regulations.

invalid. The modeling results reported by Mr. Paine using the actual BART limits include values for each of the meteorological years 2001, 2002 and 2003, as well as the average values for the three years. All of the values signify a negligible visibility improvement from SNCR.

Response: We have addressed each aspect of this comment in separate responses to comments. In our previous proposal we performed CALPUFF model simulations consistent with the approach specified in the Wyoming protocol, but in this action we adopted updated model versions and used lower ammonia background concentrations that are consistent with monitoring data and IWAQM Phase 2 report. Regardless, as discussed in section IV, in consideration of our revised cost of compliance and visibility impact analyses, and of the remaining BART factors, we have changed our final NO_X BART determinations for both of the units in question. We are no longer requiring SNCR for either Wyodak or Dave Johnston Unit 4.

Comment: EPA's use of the cumulative deciview improvement from several Class I areas overestimates the visibility improvement which may reasonably be anticipated because visibility impacts from a BART source may occur on different days at each Class I area. Adding the numbers in Tables 47, 54, and 56 of EPA's proposed regional haze FIP leads to the impression that a perceptible visibility improvement will occur, when in reality none of the modeled visibility improvements would be perceptible to the human eye.

Response: We disagree with this comment. In evaluating the visibility improvement associated with various control options, EPA interprets the CAA to require consideration of visibility improvement at all impacted Class I areas. Consideration of improvement at multiple Class I areas, as opposed to just benefits at the most impacted Class I area, has often been described as ''cumulative visibility improvement.'' Despite this terminology, however, an analysis of cumulative visibility improvement does not necessarily require that the deciview improvement at each area be summed together. While states or EPA are free to take such a quantitative approach, they are also free to use a more qualitative approach. Here, we chose to rely primarily on the visibility improvement at the most impacted Class I area, while also considering the number of additional Class I areas that would see improvement, as well as the level of improvement at each area. We did not expressly rely on a summation of visibility benefits across Class I areas, as we have done in other regional haze actions, although, as the commenter points out, this metric was included in some tables. Contrary to the commenter's assertion, however, a summation of visibility benefits is not intended to suggest that individually imperceptible levels of improvement are somehow perceptible, but rather to provide a single metric that can simultaneously capture both the number of Class I areas affected and the magnitude of improvement at those areas for comparison purposes. Moreover, we note that visibility improvement does not need to be perceptible to be deemed significant for BART purposes. We have responded in more detail to concerns regarding perceptibility elsewhere in this document.

Comment: The commenter states that EPA's cumulative visibility analyses ignore the discretion given to states in 70 FR 39107; *Id.* at 39123 (emphasis added); see also 77 FR 24768, 24774 (Apr. 25, 2012)

Response: As stated above, EPA primarily relied on the benefits at the area with the greatest visibility improvement from controls, but we also considered impacts and benefits at nearby areas included in the modeling analysis. The consideration of visibility benefits over multiple Class I areas is a useful metric that can further inform a BART determination.

Comment: The BART rule provides no support for EPA's ''summation of cumulative impacts'' approach. Rather, the BART rule makes clear that the initial focus is expected to be on the ''nearest Class I area'' to the facility in question. 70 FR 39104, 39162 (Separt 6, 2005). The BART rules indicate that it is appropriate to take account impacts at not only the nearest Class I area but also impacts at other nearby Class I areas, not for the purposing of summing impacts at all of those areas, but rather for the purpose of ''determin(ing) whether effects at those (other) areas may be greater than at the nearest Class I area.'' *Id.* The BART rule states: ''If the highest modeled effects are observed at the nearest Class I area, you may choose not to analyze the other Class I areas any further as additional analyses might be unwarranted.'' *Id.*

Response: See our response to comments above. In addition, the BART Guidelines provide that states, or EPA in lieu of the state, have discretion on how to assess visibility impacts.

Comment: The commenter states that the BART rule does not preclude a state from taking into account, as part of a BART assessment for a given facility, visibility impacts projected to occur in two or more Class I areas that are attributable to that facility's emissions. However, nothing in the rules requires such an analysis, and such analyses are deceptive when used in a cumulative fashion. EPA did not have the authority to disapprove Wyoming's visibility improvement analyses on the grounds that EPA prefers a different approach than the lawful and permissible approach taken by Wyoming. See *Train* v. *Natural Res. Def. Council, Inc.,* 421 U.S. 60, 79 (1975).

Response: See our response to comments above and elsewhere in this document (e.g., Legal Issue section) regarding EPA's oversight authority.

Comment: EPA has improperly failed to account for the very few number of days of visibility impacts or the seasonal timing of when those few impacts occur.

Response: EPA recognizes that the BART Guidelines allow states to consider the timing of impacts in addition to other factors related to visibility impairment. However, states are not required to do so, and EPA is not required to substitute a source's desired exercise of discretion for that of the states. Furthermore, when promulgating a FIP, EPA stands in the shoes of the state. In that capacity, EPA is not required to consider the seasonality of impacts and has chosen not to do so here. Taking into account visitation contradicts the goal of the regional haze rule of improving visibility on the 20 percent best and worst days. Indeed, EPA believes that the experiences of visitors who come to Class I areas during periods other than the peak visitation season are important and should not be discounted.

Comment: A review of the unit-specific CALPUFF EPA modeling results developed for the Mount Zirkel Wilderness Area provides a vivid example of the over-estimation of visibility improvement that EPA is relying on to justify the installation of hundreds of millions of dollars in additional controls. The unit specific CALPUFF modeling would indicate that adding SCR to these units would improve visibility in Mount Zirkel by over seven deciviews.

However, the monitored data from 2001–2003 at Mount Zirkel tells a completely different story. This is the same time period used in the CALPUFF models to develop the deciview impacts for each Wyoming BART-eligible unit and to project the visibility improvements associated with the addition of control devices.

Looking at the three-year average monitored results, and assuming that

the nitrates associated with the emissions from all sources (not just the BART-eligible EGUs) are completely eliminated, only a 0.94 deciview improvement would be expected. EPA attempts to justify over a billion dollars in controls at eight PacifiCorp units by assuming more than seven deciviews of improvement could be obtained from these eight units when the actual monitored data indicates that only a 0.94 deciview improvement would be possible if all nitrate was removed from all sources. In essence, EPA's regional haze FIP fails to recognize that, given the monitored nitrate impacts, the modeled visibility impacts are obviously grossly exaggerated.

Response: We agree with some of these concerns—that the original modeling performed by the State and EPA used a high background ammonia concentration and did not correct for ammonia limiting conditions. This particularly affected the model results in the western part of Wyoming and Class I areas such as Bridger Wilderness Area.

We have addressed this concern by adopting a new modeling protocol that makes several improvements in the model results, including the use of the current regulatory version of the model, the use of Method 8 to assess visibility impacts, the use of lower background ammonia concentrations, and ammonia limiting correction for BART sources with multiple units. We note that the model overprediction in our re-proposed modeling analyses occurred at Class I areas affected by BART sources in western Wyoming, in the region in which monitoring data showed strong seasonal variability in ammonia concentrations. In contrast, modeled nitrate impacts from BART sources in eastern Wyoming were significantly lower than observed nitrate concentrations at IMPROVE sites at Wind Cave and Badlands in western South Dakota.

There are several factors that make it challenging to directly compare CALPUFF results to measured concentrations at IMPROVE monitoring sites at Class I areas. Most significantly, the monitor operates every third day, while the model predicts concentration each day. Moreover, modeled visibility impacts from multiple BART sources cannot be summed and directly compared to measured data as all BART sources are unlikely to have their largest impacts on the same Class I area on the same day. Additionally, the model 98th percentile impact should be compared to the maximum observed monitoring data because the highest 2% of model impacts are discarded to address concerns that the model can overpredict visibility impacts.

Comment: The commenter cites a study by Terhorst and Berkman which compared CALPUFF model predicted impacts of the Mojave Power Station at the Grand Canyon to observed impacts after the facility was closed in 2005. The study concluded that there was virtually no evidence that the (Mojave) closure improved visibility in the Grand Canyon, and the commenter cites this conclusion as evidence of the unreliability of the CALPUFF model.

Response: We disagree that the Mohave Power Plant study raises questions about CALPUFF's reliability. The Nevada Division of Environmental Protection performed CALPUFF modeling to estimate the contribution of the Mohave Power Plant to visibility impairment at Grand Canyon National Park. Consistent with the BART Guidelines, the State used the CALPUFF model to evaluate the Mohave Power Plant contribution to visibility impairment relative to natural visibility conditions. Subsequently, after the Mohave Power Plant ceased operating, Terhorst and Berkman analyzed changes in monitored sulfate concentrations at the Grand Canyon and calculated the visibility impacts of those changes relative to current degraded visibility conditions. Terhorst and Berkman incorrectly concluded that the State's previous CALPUFF modeling overpredicted the Mohave Power Plant visibility impacts because Terhorst and Berkman failed to compare their results to natural visibility conditions. EPA considered and rejected comments on the proposed BART Guidelines that visibility impacts should be evaluated to relative to current degraded visibility conditions and concluded that ''[u]sing existing conditions as the baseline for single source visibility impact determinations would create the following paradox: the dirtier the existing air, the less likely it would be that any control is required.'' (70 FR 39124). Because Terhorst and Berkman failed to compare observed changes in sulfate concentration to natural visibility conditions, their analysis does not support the commenter's statement that CALPUFF is unreliable. This flaw in their analysis has also been recognized in a paper that responded to their analysis.[122] Finally, as presented above, the use of the CALPUFF model for regional haze is a settled manner for which the time for judicial review has passed.

Comment: The commenter states that EPA's own studies document that CALPUFF overstates results and cites a May 2012 EPA sponsored study of CALPUFF that found ''the current and past CALPUFF model performance evaluations were consistent with CALPUFF tending to overestimate the plume maximum concentrations and underestimate plume horizontal dispersion.''

Response: In the BART Guidance, EPA recognized concerns that CALPUFF can overpredict visibility impacts in some cases, and therefore, as explained above, adopted the use of the 98th percentile modeled impact, rather than the maximum modeled impact, to address this concern.

Comment: EPA appears to take contrary positions in Oklahoma, where it modeled all visibility impairing pollutants together, and Wyoming, where EPA said that, based on the State's modeling, EPA ''could not ascertain what the visibility improvement would be from an individual NO_X or PM control option.''

Response: It appears that the commenter has confused (1) whether all pollutants were modeled together; and (2) whether all emission reductions were modeled together. All pollutants were modeled together both in modeling performed by Wyoming and by EPA for BART sources in Wyoming and Oklahoma, consistent with IWAQM Phase 2 report recommendations and with the State of Wyoming modeling protocol. The additional modeling performed by EPA was designed to evaluate visibility improvements from certain emissions reduction technologies; specifically, to compare the incremental benefits of SCR and SNCR. Each of these model simulations by EPA also included all other visibility impairing pollutants, so the approach used by EPA in Wyoming and Oklahoma is consistent.

Comment: EPA found that SCR provided only a 0.36 delta deciview incremental visibility improvement for Dave Johnston Unit 3, using EPA modeling, with an incremental cost of $7,163.00 per ton. 78 FR 34777–34778. EPA failed to justify in its proposed rule how a 0.36 delta deciview improvement, or approximately one-third that humanly detectible, justifies the tremendous cost of SCR. Likewise, EPA found that installing SNCR at Dave Johnston Unit 4 results in an incremental 0.11 delta deciview improvement over Wyoming's BART determination at an incremental cost of

[122] W.H. White, R.J. Farber, W.C. Malm, M. Nuttall, M.L. Pitchford, B.A. Schichtel, Comment on ''Effect of coal-fired power generation on visibility in a nearby National Park (Terhorst and Berkman, 2010)'', Atmospheric Environment 55 (2012) 173–178. doi:10.1016/j.atmosenv.2012.02.076.

$4,655. 78 FR 34781–34782. The alleged incremental visibility benefit of installing SNCR at Wyodak is 0.12 delta deciview at an incremental cost of $3,725 per ton. 78 FR 34784–34785. EPA provides no justification for requiring such tremendous costs for such an inconsequential visibility improvement that likely falls within CALPUFF's margin of error. EPA's modeling approaches are inconsistent because EPA has determined in other states that visibility improvements greater than those used to justify SNCR at Wyodak are too small or inconsequential to justify additional pollution controls. See 77 FR 24794 (0.27 deciview improvement termed ''small'' and did not justify additional pollution controls in New York); 77 FR 11879, 11891 (0.043 to 0.16 delta deciview improvements considered ''very small additional visibility improvements'' that did not justify NO_X controls in Mississippi); 77 FR 18052, 18066 (agreeing with Colorado's determination that ''low visibility improvement (under 0.2 delta deciview)'' did not justify SCR for Comanche units)). Tellingly, the ''low visibility improvements'' that Colorado found at the Comanche units not to justify post-combustion NO_X controls, as agreed to by EPA, were 0.17 and 0.14 delta deciview. 77 FR 18066. In Montana, where EPA issued a regional haze FIP directly, it found that a 0.18 delta deciview improvement to be a ''low visibility improvement'' that ''did not justify proposing additional controls'' for SO_2 on the source. 77 FR 23988, 24012. Here, EPA's actions requiring additional NO_X controls based on little to no additional visibility improvement are arbitrary and capricious, especially when EPA did not require additional NO_X controls in other states based on similar visibility improvements. This is particularly true in Montana where EPA had direct responsibility for the regional haze program.

Response: We disagree that visibility improvements at Dave Johnston Unit 3 and Wyodak are ''too small or inconsequential to justify additional pollution controls.'' While the visibility benefits at these units are less than what is generally considered perceptible (1.0 deciview), they are not so low as to preclude selection of the associated controls without any consideration of the remaining BART factors. The BART Guidelines are clear that states should consider visibility impacts that are less than perceptible: ''Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility. Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment.'' 70 FR 39129. When the visibility improvements are considered, we continue to find that this level of improvement, when considered along with the other statutory factors, justifies the selected BART controls.

Finally, regarding commenter's assertions that we are being inconsistent, because the commenter is only specific about visibility improvement, it is not possible for EPA to address in this response any specific concerns. As articulated in our proposed rulemakings and further explained in our responses to other comments, EPA's partial approval and partial disapproval of the Wyoming Regional Haze SIP is consistent with the CAA, the RHR, BART Rule, and EPA guidance. Our determinations considered all five factors, not just visibility improvement.

Comment: Although it is true that Wyoming did not model the visibility impact of SNCR, that fact is no justification for disapproving Wyoming's BART. Nothing in the BART Guidelines or Wyoming's BART Modeling Protocol demands modeling of SNCR, and EPA points to nothing in either document that requires modeling of SNCR.

Response: We disagree with this comment. The BART selection process requires a comparison between all technically feasible control options, not the evaluation of individual control technologies in isolation. While the BART Guidelines do not specify the order in which control options must be evaluated (e.g., beginning with the most stringent or beginning with least stringent control), they do specify that the CAA factors must be considered for all options: ''In the final guidelines, we have decided that States should retain the discretion to evaluate control options in whatever order they choose, so long as the State explains its analysis of the CAA factors.'' 70 FR 39130. The only exceptions are ''. . . if you find that a BART source has controls already in place which are the most stringent controls available . . .'', or ''. . . . if a source commits to a BART determination that consists of the most stringent controls available . . .'' 70 FR 39165. In these situations, it is not necessary to complete an analysis of all five BART factors. Therefore, because neither of these criteria was met, the State was required to perform an analysis of all five BART factors for all technically feasible control options. As such, the State's failure to consider the visibility impacts of SNCR did in fact serve as appropriate grounds for EPA's disapproval of Wyoming's BART determination.

Comment: EPA modeling shows no significant visibility improvement from SNCR and without a significant improvement there can be no justification for disapproving the State's BART for Laramie River Station, and, to the contrary, EPA's modeling supports Wyoming's rejection of SNCR and choice of LNB/OFA because SNCR provides negligible visibility improvement.

Response: We have required new LNBs with OFA and SCR for the Laramie River Station, not new LNBs with OFA and SNCR, which is the control option addressed by the commenter. Accordingly, we do not find that the comment is relevant to our action. Our revised modeling shows that the visibility benefit of new LNBs with OFA and SCR for Laramie River Units 1–3 is 0.57 deciviews, 0.53 deciviews, and 0.52 deciviews, respectively. We continue to find that the visibility benefit, when taking into consideration the remaining BART factors, justifies installation of new LNBs with OFA and SCR.

Comment: Basin Electric submitted results based on more accurate modeling than EPA, which show that actual visibility improvement from SNCR would be substantially lower than assumed by EPA. There is no justification for disapproving Wyoming's BART based on a modeled visibility improvement that is such a small fraction of what is humanly perceptible.

Response: As described in response to other comments, we agree that the original modeling protocol adopted by the State was inconsistent with the BART Guidelines, IWAQM Phase 2 report and newly available ambient monitoring data, and in our revised modeling we adopted several of the changes recommended by this commenter, including the use of lower background ammonia concentration, a correction for ammonia limiting conditions for multiple units located at a single BART source, and the use of Method 8 for the evaluation of visibility impairment. However, even using these model options, we still found significant visibility impacts for SCR control at

Laramie River. Our results are generally consistent with the modeling results submitted by the commenter which also show significant impacts. As described in another response, while the visibility benefits at each of these units individually are less than what is generally considered perceptible (1 deciview), they are not so low as to preclude selection of the associated controls without any consideration of the remaining BART factors. The BART Guidelines are clear that States should consider visibility impacts that are less than perceptible because these sources may still contribute to cumulative visibility impairment.

Comment: EPA did not assert a failure to model NO_X impacts separately was a flaw in the Laramie River Station modeling, although EPA did identify this as a flaw in PacifiCorp modeling.

Response: We agree that the State evaluated NO_X impacts separately for the control technologies that the State included in its modeling, however, the State did not evaluate SNCR. The other deficiencies in the State's visibility analysis, including the failure to consider the visibility impacts of SNCR, were appropriate grounds to disapprove the State's BART determination.

Comment: The Wyoming modeling did in fact isolate the impact on visibility for NO_X control alternatives. Wyoming held SO_2 and PM emissions constant at baseline levels while modeling varying NO_X emission rates for each of the NO_X control options.

Response: We agree with this comment. Nonetheless, as stated above, the other deficiencies in the State's visibility analysis, which were inconsistent with the BART Guidelines, including the failure to consider the visibility impacts of SNCR, were appropriate grounds to disapprove the State's BART determination.

Comment: EPA claims that Wyoming modeled the wrong emission rates. EPA notes that in its cost analysis it calculated a new removal efficiency for NO_X control options that was different than the removal efficiency calculated by Wyoming, and claims that visibility modeling should have used the EPA efficiencies. However, EPA does not explain how modeling with the different removal efficiencies conflicts with the BART Guidelines or the CAA. As to SNCR, EPA argues that the State assumed a higher removal efficiency and thus, paradoxically, modeling with the State's removal assumption would yield greater visibility improvement than modeling with EPA's values. No such modeling was done, however. The State did no modeling for SNCR, so the State's removal efficiency was never modeled. It is an enigma how EPA can disagree with modeling with the different SNCR removal values when such modeling was never performed.

Response: We disagree with this comment. The BART Guidelines are clear on how removal efficiencies should be considered in the visibility evaluation: ''Post-control emission rates are calculated as a percentage of pre-control emission rates. For example, if the 24-hr pre-control emission rate is 100 lb/hr of SO_2, then the post control rate is 5 lb/hr if the control efficiency being evaluated is 95 percent.'' 70 FR 39170. Therefore, because the control efficiencies assumed by the State differed from those found by the EPA, they affected the calculation of post-control emission rates for modeling purposes (and thereby the consideration of visibility impacts).

In regard to SNCR, as conceded by the commenter, the State did not provide the visibility impacts associated with the control option. As discussed elsewhere, failure to assess the visibility impacts of a technically feasible control option is in clear conflict with the requirements of the CAA and BART Guidelines. This failure alone, regardless of the control efficiency assumed for SNCR, was sufficient grounds for us to reject the State's BART determination. Moreover, the incorrect removal efficiency for SNCR assumed by the State adversely affected their analysis of cost of compliance, another statutorily required BART factor.

To put it simply, the State failed in the first instance by not considering the visibility improvement of SNCR as required by the CAA and BART Guidelines. When EPA corrected this deficiency by performing the modeling ourselves, it was necessary for us to correct the removal efficiency of SNCR (as discussed in response to other comments).

Comment: The State assumed that SCR would reduce NO_X emissions from 0.21 lb/MMBtu to 0.07 lb/MMBtu—a reduction of 0.14 lb/MMBtu. EPA assumes SCR would reduce NO_X emissions from 0.19 lb/MMBtu to 0.05 lb/MMBtu, a reduction of the same 0.14 lb/MMBtu. All other things being held constant, the 0.14 lb/MMBtu reduction will in both cases yield an identical reduction in the visibility impairing concentration of nitrate particulate in a Class I area.

Response: We disagree with this comment. The CALPUFF model simulations estimate the visibility impairment attributed to the emissions in each control scenario, not the relative reduction in different control scenarios. Therefore, an emissions rate of 0.07 lb/MMBtu will have 40% greater total emissions and a larger visibility impact than an emissions rate of 0.05 lb/MMBtu.

Comment: EPA argues that Wyoming should have used a baseline of the maximum 24-hour average NO_X emission rate during the baseline years of 2001–2003, and instead used an annual average baseline rate. The BART Guidelines do not mandate the use of the 24-hour maximum but, rather, ''recommend that the State use the highest 24-hour average actual emission rate'' and that the states should have flexibility when evaluating the fifth statutory factor. The BART Guidelines by their express terms authorize states to use baseline emissions other than the 24-hour maximum rate. Use of the 24-hour maximum baseline is not mandatory, and not using that baseline is not a failure to comply with any requirement in the Guidelines. EPA itself used annual average pre-control and post-control emission rates to model visibility impacts in its Nevada FIP rulemaking.

Response: We disagree with this comment. As stated in the preamble to the BART Guidelines, ''the emissions estimates used in the [visibility] models are intended to reflect steady-state operating conditions during periods of high capacity utilization.'' 70 FR 39120. As such, the BART Guidelines recommend excluding emissions during periods of start-up, shutdown, or malfunction or estimating visibility impacts based on a source's allowable emissions as this could inflate the visibility impacts of a source. Rather, for sources such as power plants where States have information on a source's daily emissions, the BART Guidelines explains that an emission rate based on a source's maximum actual emissions over a 24-hour period is an appropriate gauge of a source's potential impact as it ensures that peak emission conditions are reflected but would be unlikely to lead to an overestimation of a source's potential impacts. *Id.* The BART Guidelines state that in developing a modeling protocol, States should ''[u]se the 24-hour average actual emission rate from the highest emitting day of the meteorological period modeled (for the pre-control scenario).'' *Id. and* 70 FR 39170.

Wyoming did not do this. Instead, in assessing the improvement in visibility associated with the use of controls in its BART determinations, Wyoming used the visibility modeling performed by PacifiCorp and Basin Electric for their facilities. Although these companies used very different approaches to estimating the baseline emission rate—

neither of which used the 24-hour average actual emission rate—the State accepted the visibility modeling done by both and submitted the results in the Wyoming SIP. Even if the commenter were correct that the approach in the BART Guidelines is only recommended, the commenter has not provided any explanation as to why the disparate approaches used in the Wyoming SIP were appropriate for estimating the degree of visibility improvement associated with controls. Wyoming similarly provided no explanation as to why the varying approaches adopted by Basin Electric and PacifiCorp were appropriate for assessing visibility improvement. Moreover, the commenter has not established that the baseline emission rates used by Wyoming would accurately reflect visibility impacts associated with steady-state operating conditions during periods of high capacity utilization. Obviously, baseline emission rates reflecting periods of relatively lower capacity utilization would tend to underestimate peak visibility impacts. Consider for example the baseline emission rate used for Laramie River Unit 1. There, the State used a daily emission rate equating to 6,320 tons per year,[123] while, based on actual emissions data, the EPA used a daily rate equating to 8,786 tons per year.[124] Thus, the rate used by the State reflects a period of considerably lower capacity utilization that would therefore tend to underestimate peak impacts.

Regarding the emissions rates used in the Nevada regional haze SIP, the State did not use the 24-hour average of actual emissions from the highest emitting day in its BART determination for Reid Gardner Generating Station. 77 FR 50936, 50944 (Aug. 23, 2012). As part of its review of the Nevada SIP, EPA performed new visibility modeling. In that modeling exercise, EPA used Nevada's emission rates based on annual averages. Please refer to a related comment and response in the final action for that rule for a full discussion. See 77 FR 50944). Following our review of comments in that rulemaking—including comments that we should have used the Guidelines maximum 24-hour average of emissions in our visibility modeling—we scaled our estimates of the visibility impacts of controls based on the source's emissions using the Guidelines maximum 24-hour average. We took these scaled visibility impacts into account in our final action. Id. at 50945.

Comment: EPA did not use the 24-hour maximum rate for the modeling it performed in 2012. As noted in Section VIII.C, it used the same baseline emission rates used by the State. EPA–R08–OAR–2012–0026–0037. EPA did not find the State's approach was a violation of the BART Guidelines or was a reason to disapprove the State's modeling or BART determination. Having sanctioned the use of a different baseline then, EPA may not now claim it violates the BART Guidelines or a ground for disapproving the State's modeling or BART determination.

Response: We agree that we did not use the 24-hour maximum [actual] emission rates for modeling purposes in our original proposed rule published in 2012. However, we did not finalize that rule, at least in part, for the very reason that the baseline emission rates calculated by Wyoming, and subsequently used by EPA in the 2012 proposed rule, were inconsistent with the BART Guidelines. As we never finalized the original rule, we disagree with the commenter's suggestion that we somehow sanctioned Wyoming's approach. A proposed rule does not represent final agency action.

Comment: The maximum improvement modeled by EPA that would be achieved at any Class I area by adding SCR to the existing new LNB plus OFA is 0.5 delta deciview. This is below the 1.0 delta deciview level often cited as the lowest level of change that is humanly perceptible. For EPA to propose disapproval of the State's BART based on an imperceptible improvement is to propose disapproval based on a nonmaterial factor.

Response: We disagree that the visibility improvements for Laramie River or Jim Bridger are *de minimis* or too small to just justify the expense of requiring controls. As discussed in response to another comment, the BART Guidelines are clear that it is not necessary for the visibility improvement of a particular control option to be above the perceptible threshold. The regional haze program is premised on the fact that numerous sources are contributing to visibility impairment and numerous sources will need to reduce emissions in order to improve visibility. We continue to find that this level of improvement, when considered along with the other statutory factors, justifies the selected BART controls.

Comment: The commenter states that EPA's modeled visibility improvement overstates the improvement that would actually be achieved. The commenter submitted new modeling showing that the visibility improvement from further reductions of NO_X emissions would be much smaller than that predicted by EPA. AECOM corrected four of the flaws in EPA's modeling and re-ran CALPUFF. The commenter submitted refined modeling with four adjustments: 1. The use of seasonal background ammonia concentrations; 2. Modeling of all units together with correction for ammonia limited conditions; 3. Use of a post-control emission rate of 0.07 lb/MMBtu, consistent with EPA's proposed emission limit; and 4. The use of CALPOST Method 8. AECOM's revised modeling was identical to EPA's in all other respects. The refined modeling predicted that the incremental visibility benefit of SCR at each of Laramie River Units 1, 2 and 3 would range between 0.20–0.24 delta deciview at either Badlands or Wind Cave National Park. The actual visibility improvement of SCR would be even less than predicted by the refined modeling because CALPUFF is known to substantially overstate nitrate haze.

Response: We agree that our proposed modeling was inconsistent with the BART Guidelines, IWAQM Phase 2 report and monitored data, and in our revised final modeling we adopted several of the changes recommended by this commenter, including the use of lower background ammonia concentration, a correction for ammonia limiting conditions for multiple units located at a single BART source, and the use of Method 8 for the evaluation of visibility impairment. However, even using these less conservative model options, we still found significant visibility impacts for SCR control at the Basin Electric Laramie River EGUs. We did not use the seasonal background ammonia concentration proposed by the commenter because we did not have sufficient ambient monitoring data to determine the seasonal background concentrations in eastern Wyoming.

Comment: The commenter states that nitrate haze occurs primarily in the winter when few visitors are present in Class I areas. During the peak summer visitation period, the impact of wildfires would overwhelm any marginal visibility improvement that might be achieved by SCR. The commenter cites an EPA report that stated ''[A] all else being equal, impairment from anthropogenic sources is considerably more objectionable during times of the year with greatest visitor attendance (e.g., summer). Visibility objectives might, therefore, be stated in terms of acceptable frequency distributions of visibility (e.g., contrast) over the course of a year.'' Source: Report to Congress under CAA Section 169A(a)(3). The

[123] Wyoming Department of Environmental Quality Air Quality Division BART Application Analysis AP–6047, Table 16, May 28, 2009.

[124] Air Quality Modeling Protocol: Wyoming Regional Haze Federal Implementation Plan, U.S. EPA, Table B.9, January, 2014.

commenter states that these factors further support Wyoming's decision to reject SCR and SNCR as BART. These technologies would not improve visibility on the worst haze days because Laramie River doesn't contribute to haze on those days, and any slight visibility improvement would occur in the winter season when few visitors enter the Class I areas. Wyoming's decision to reject SCR as BART is therefore reasonable and complies with the CAA.

Response: As discussed in response to another comment, EPA agrees that nitrate impacts are more dominant in the winter. Nonetheless, daily nitrate impacts from April through October are not trivial. EPA also agrees that the BART Guidelines allow states to consider the timing of impacts in addition to other factors related to visibility impairment. However, states are not required to do so, and EPA is not required to substitute a source's desired exercise of discretion for that of the states. Furthermore, when promulgating a FIP, EPA stands in the shoes of the state. In that capacity, EPA is not required to consider the seasonality of impacts and has chosen not to do so here. Taking into account visitation contradicts the goal of the regional haze rule of improving visibility on the 20 percent best and worst days. Indeed, EPA believes that the experiences of visitors who come to Class I areas during periods other than the peak visitation season are important and should not be discounted.

Comment: We received comments that our FIP was not warranted because the cause of visibility impairment during the times of peak visitation was wildfires and thus does not justify the control of NO_X from stationary sources.

Response: See response above.

Comment: Ammonia levels at the altitude of the plume would be lower than the reported surface level ammonia concentrations, so less ammonia would be available to form visibility-impairing nitrate.

Response: We disagree that there is compelling evidence that background ammonia levels are significantly different at the altitude of the plume compared to the surface. While there are limited studies showing vertical gradients of ammonia in the troposphere,[125] these studies do not show a strong gradient within the planetary boundary layer where the plume is typically located. Moreover, as discussed in the response to another comment, it is necessary to evaluate the combined concentrations of gas ammonia and particulate ammonium to estimate the background ammonia level, so vertical gradients in measured ammonia alone are not sufficient to specify the vertical gradient in background ammonia. It is possible that decreasing temperature with altitude could affect the thermodynamic equilibrium between gas ammonia and particulate ammonium and that this could contribute to observed vertical gradients in ammonia. It is also possible that dry deposition of ammonia at the surface could create a negative vertical gradient in ammonia near the surface. We recognize that there are limited measurement studies available for total gas ammonia and particulate ammonium, and as a result there is uncertainty in the estimate of background ammonia. Given this uncertainty, we believe it is appropriate to rely on measurement studies of total gas ammonia and particulate ammonium when available and reliable as explained elsewhere in this document (along with the IWAQM Phase 2 report default values), and to rely on the IWAQM Phase 2 report where monitoring data are not available.

Comment: The commenter states that inventories show very low ammonia concentrations in the corridors between Laramie River Station and the relevant Class I areas.

Response: We disagree with the commenter's assertions. We note that there is large uncertainty in estimates of ammonia emissions inventories that are based on source activity data and emissions factors. Moreover, even when more certain estimates of ammonia emissions are available, it is not possible to estimate ambient ammonia concentrations based on emissions inventory data alone. An estimate of ambient ammonia levels would require an evaluation of modeled emissions data and the effects of transport, dispersion and removal of ambient ammonia. Direct measurements of ambient concentrations of gas ammonia and particulate ammonium provide a more reliable estimate of background ammonia than do model simulations of the emissions, transport, dispersion and removal of ammonia.

Comment: The commenter states that reliable ammonia measurements from the IMPROVE monitor located in the Wind Cave National Park were published in September 2012. Chen et al, available at AECOM Report. This monitor provides actual ground level ammonia data that is representative of the Class I areas that are relevant to Laramie River Station. AECOM Report at 4. EPA has given no explanation for its assumption of a constant 2.0 ppb background concentration in this case.

Response: We evaluated the ammonia and ammonium monitoring data submitted by the commenter in Exhibit 6, which is an extended abstract presented at the 2010 conference in Whitefish, MT.[126] The data are from a pilot study conducted from April 2011 to January 2012 designed to measure total NH_X as the sum of ammonia and particulate ammonium at 9 IMPROVE sites. The pilot study includes data for IMPROVE monitoring sites at Wind Cave and Rocky Mountain National Park, which are Class I areas for which we evaluated visibility impacts in this action. We note that the pilot study data are for less than one full year and are plotted in Figure 1 of the report as monthly average concentrations. The measured values of NH_X are not reported, but the plot does show seasonal variation in NH_X concentrations, as expected, with higher NH_X concentrations in summer and lower concentrations in winter. Annual average NH_X concentrations cannot be estimated from the plot itself, but they appear to be approximately consistent with the default IWAQM ammonia background concentration of 0.5 ppb for forested areas. Given that both the Rocky Mountain and Wind Cave Class I areas have significant forest cover, the measurements in the pilot study appear to be consistent with the IWAQM Phase 2 report.

Measurements of NH_x are not reported for Badlands National Park, which is a mix of bare rock and mixed-grass prairie ecosystems. Based on the IWAQM Phase 2 report, default background ammonia concentrations in the range of 1 to 10 ppb at 20 degrees Celsius would be appropriate for this region. We reviewed the ambient ammonia monitoring data on which the IWAQM Phase 2 report was based, and the data for grasslands were largely based on measurements at Pawnee National Grassland, where average ammonia levels in summer were 10 ppb. Because the Pawnee National Grassland is located close to large agricultural and livestock ammonia sources in eastern Colorado, it is uncertain if the same ammonia levels would be appropriate for the more Badlands area. Therefore, we selected a background ammonia concentration of 1 ppb for CALPUFF modeling of BART sources that impact the Wind Cave and Badlands Class I areas.

[125] Levine et al., (1980) The Vertical Distribution of Tropospheric Ammonia, *Geophys. Res. Letters,* vol. 7, No. 5, 17–32.

[126] Chen et al., A Pilot Monitoring Study of Atmospheric NH_X at Selected IMPROVE sites AWMA Aerosol and Atmospheric Optics, Visibility & Air Pollution Conference, September 24–28, 2012, Whitefish, MT.

Comment: The commenter states that if EPA uses the maximum 24-hour NO_X emissions rate when modeling baseline visibility impacts, it should also use the maximum 24-hour SO_2 and PM_{10} emissions rates for the baseline. NO_X competes with SO_2 for ammonia to make either ammonium nitrate or ammonium sulfate. Setting the SO_2 baseline rate at a low concentration relative to NO_X skews the model to predict the formation of more ammonium nitrate and less ammonium sulfate. This magnifies the modeled benefits of reducing NO_X emissions.

Response: We agree that we did not use the maximum [actual] 24-hour emission rates for SO_2 and PM_{10} as we did for NO_X. However, we have not found based on our analysis, and the commenter has not established, that doing so had any material impact on the modeled benefits associated with NO_X controls. The BART sources in Wyoming that are covered in this action are subject-to-BART only for NO_X and PM. In addition, we considered comments on, but did not question the validity of the State's BART analyses for PM. In fact, as explained in detail elsewhere in this document, with respect to the State's PM BART determinations, the State's SIP and existing information was adequate to find that the PM BART determinations were reasonable. Accordingly, the purpose of our modeling effort was to identify the visibility improvement associated with NO_X controls, not SO_2 or PM controls. And so, in evaluating the visibility of NO_X controls, we held the SO_2 and PM emissions constant at the rate associated with the ''committed controls'' identified by the State. Therefore, even if there was a discernible impact on the modeled visibility benefit of NO_X controls related to our treatment of modeled emission rates for SO_2 and PM, it would be common to all of the modeled NO_X control scenarios and would not have favored one control option over another.

Comment: The visibility improvement from SCR will be much less than EPA claims. The modeling preformed by AECOM and Wyoming produced similar results, and both predicted much less visibility improvement than EPA.

Response: The modeling performed by Wyoming used the 2 ppb background concentration that was established in the State's protocol, and this resulted in model visibility impacts that were significantly greater than those estimated by AECOM in its modeling using lower, seasonally varying background ammonia concentrations. The ammonia concentrations in ppb used in the AECOM modeling for the months of January December were as follows: 0.3, 0.9. 0.9, 1.0, 1.0, 2.0, 2.0, 1.0, 0.8, 0.8, 0.6, and 0.3. We note that our modeling results in our original proposal also used the State's protocol, and our model results were identical to the State's modeling results for the emissions scenarios that both the State and EPA evaluated. The EPA modeling results in our revised proposal showed larger visibility impacts because we corrected the baseline emissions rates to make the emissions consistent with the BART Guidance. In the new modeling results that we performed using our revised final EPA Protocol and included in this action, we used a model configuration that is generally consistent with modeling submitted by the commenter. The revisions to the protocol include reduced background ammonia, correction for ammonia limiting conditions, updated regulatory versions of the model, and the use of Method 8. The commenter did not submit model results for all emissions scenarios in a format that can be directly compared to our tabulated model results, but our revised model results in this action appear to be generally consistent with the commenter's model results, and these results do show that SCR at Basin Electric Laramie River has appreciable visibility benefit at the Wind Cave and Badlands Class I areas.

Comment: The commenter states that the version of CALPUFF used by Wyoming and EPA (version 5.711a) relies on simplified chemistry algorithms that overstate nitrate formation and overpredict visibility impacts, and that EPA acknowledges that ''the simplified chemistry in the [CALPUFF] model tends to magnify the actual visibility effects of [a] source.'' 70 FR 39121. Papers by Morris et al. and Karamchandani et al. show that CALPUFF chemistry overpredicts nitrates by a factor of 2-to-4 times in winter.

Response: As described in responses to other comments and in our modeling protocol, EPA used the currently approved CALPUFF version 5.8 for modeling used in this action. EPA has acknowledged in the BART Guidelines that there is uncertainty in the CALPUFF modeled visibility impacts. EPA recognized the uncertainty in the CALPUFF modeling results when EPA made the decision, in the final BART Guidelines, to recommend that the model be used to estimate the 98th percentile visibility impairment rather than the highest daily impact value. While recognizing the limitations of the CALPUFF model in the BART Guidelines Preamble, EPA concluded that, for the specific purposes of the Regional Haze Rule's BART provisions, CALPUFF is sufficiently reliable to inform the decision making process.

Comment: The commenter states that a study by the CDPHE showed model results for nitrates will be skewed high by assuming higher than actual background levels of ammonia.

Response: The CDPHE completed a CALPUFF model sensitivity study that evaluated the effect of the background ammonia concentration on model predictions for ammonium nitrate and sulfate. The CDPHE found that CALPUFF model predicted nitrate was insensitive to variations in background concentrations greater than 10 ppb and became progressively more sensitive to background ammonia as it was reduced from 10 to 0 ppb.[127] We note that CDPHE performed a sensitivity study but did not evaluate model performance and did not identify any particular case in which model performance was skewed by the use of inappropriate background ammonia concentrations. The conclusions of the CDPHE study are fully consistent with the IWAQM Phase 2 report, which also recognized that accurate specification of background ammonia ''is critical to the accurate estimation of particulate nitrate concentrations.'' [128]

Comment: The commenter cites several presentations and studies that document flaws in CALPUFF's sulfate and nitrate chemistry: (1) It is out of date, overly simplistic, and inaccurate; (2) CALPUFF greatly overstated sulfate and nitrate in winter, overestimating visibility impacts by 100–1000% in many cases; and (3) that the model understated sulfate in summer; and that nitrate predictions were particularly inaccurate, overstated, and unreliable.

Response: EPA recognized the uncertainty in the CALPUFF model when EPA made the decision, in the final BART Guidelines, to recommend that the model be used to estimate the 98th percentile visibility impairment rather than the highest daily impact value. While recognizing the limitations of the CALPUFF model in the BART Guidelines, EPA concluded that, for the specific purposes of the RHR's BART provisions, CALPUFF is sufficiently reliable to inform the decision making process.

Comment: NO_X emissions control has little visibility benefit during summer when visibility impairment is dominated by wildfires.

Response: EPA agrees that nitrate impacts are more dominant in the winter. The CALPUFF model results are

[127] CDPHE, *Ibid.*

[128] IWAQM, page 14 and page 21

consistent with these observations, with the largest modeled visibility improvements occurring from late fall to early spring. NO_X emissions are precursors to ammonium nitrate, and high concentrations of ammonium are typically observed from late fall to early spring when cold temperatures and high relative humidity results in thermodynamic conditions that favor the formation of ammonium nitrate. Observed ammonium nitrate concentrations are typically low during summer because warm temperatures result in thermodynamic conditions that are not favorable to the formation of ammonium nitrate. Nonetheless, there may be higher nitrate concentrations on colder days during this period.

Comment: EPA's visibility-benefits analysis still is constrained in the re-proposed Wyoming haze plan because EPA has not identified the visibility benefits from BART controls across all of the Class I areas affected by haze-causing pollutants from Wyoming sources. Wyoming EGUs impact visibility over at least 18 Class I areas. While EPA's own visibility modeling fully supports determinations that SCR is BART for all Wyoming EGUs, the visibility benefits of SCR across *all* affected Class I areas are cumulatively significant and, if the RHR's fundamental purpose is to be fulfilled, they must not be ignored.

Response: EPA disagrees with this comment. The commenter's number of ''at least 18 Class I areas'' is derived by including Class I areas that are more than 300 km from BART sources. EPA disagrees that these Class I areas should be included in the visibility analysis. The IWAQM Phase 2 report reviewed model performance evaluations of CALPUFF as a function of distance from the source and concluded that:''Based on the tracer comparison results presented in Section 4.6, it appears that CALPUFF provides reasonable correspondence with observations for transport distances of over 100 km. Most of these comparisons involved concentration values averaged over 5 to 12 hours. The CAPTEX comparisons, which involved comparisons at receptors that were 300 km to 1000 km from the release, suggest that CALPUFF can overestimate surface concentrations by a factor of 3 to 4. Use of the puff splitting option in CALPUFF might have improved these comparisons, but there are serious conceptual concerns with the use of puff dispersion for very long-range transport (300 km and beyond). As the puffs enlarge due to dispersion, it becomes problematic to characterize the transport by a single wind vector, as significant wind direction shear may well exist over the puff dimensions. With the above thoughts in mind, IWAQM recommends use of CALPUFF for transport distances of order 200 km and less. Use of CALPUFF for characterizing transport beyond 200 to 300 km should be done cautiously with an awareness of the likely problems involved.'' [129] We present additional discussion of this issue in our response to the following comment.

Comment: EPA arbitrarily failed to model visibility impacts of the various control options at all affected Class I areas, including those that are beyond 300 km from the source. EPA recently responded to a similar comment in its final action promulgating the Montana Regional Haze FIP, 77 FR 57864, for the first time supporting its truncated modeling by referencing a now-discredited 1998 report regarding CALPUFF performance. Because EPA raised this issue only after the close of the public comment period on its Wyoming regional haze action, EPA should consider the Conservation Organizations' response. See 42 U.S.C. 7607(d)(4)(B)(i).

In its response to public comments on the Montana FIP, EPA stated, ''The Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 report (EPA, 1998) reviewed model performance evaluations of CALPUFF as a function of distance from the source and concluded that: . . .[u]se of CALPUFF for characterizing transport beyond 200 to 300 km should be done cautiously with an awareness of the likely problems involved.'' 77 FR 57867–68. EPA then concludes, ''[t]herefore, given that the IWAQM guidance provides for the use of the CALPUFF model at receptor distances of up to 200 to 300 km, and given that EPA has already addressed uncertainty in the CALPUFF model, we believe it is reasonable to use CALPUFF to evaluate visibility impacts up to 300 km.'' Id. at 57868.

We agree that CALPUFF is reliable at distances of 300 km. However, EPA's use of the IWAQM Phase 2 report to support its decision to exclude modeling at distances beyond 300 km is arbitrary. First, changes to CALPUFF since 1998 may correct problems identified in the IWAQM Phase 2 report with modeling accuracy in the 200–1,000 km range. Second, a more recent study prepared for EPA called into question the conclusions of the IWAQM Phase 2 report upon which EPA relies. See *Long Range Transport Models Using Tracer Field Experiment Data* (May 2012) (EPA Contract No: EP–D–07–102, Work Assignment No: 4–06). The May 2012 study concluded that ''The inability of most (~90%) of the current study's CALPUFF sensitivity tests to reproduce the 1998 EPA study tracer test residence time on the 600 km receptor arc is a cause for concern.'' Not only were the authors of the May 2012 study unable to reproduce the 1998 study's findings that CALPUFF overestimated pollutant concentrations at distances of 600 km, the 2012 study concluded that CALPUFF actually underestimates average pollutant concentrations at 600 km. Accordingly, reliance on CALPUFF at long distances would result in conservative estimates of visibility impacts. It is not appropriate to assume, as EPA effectively did in its Wyoming proposal, that such impacts are non-existent. EPA's failure to model and consider visibility impacts at all affected Class I areas, including those beyond 300 km, is not supported.

Because the RHR, and SIPs and FIPs promulgated to implement it, are to fulfill CAA requirements to mitigate and ultimately eliminate anthropogenic sources of haze pollution at all Class I national parks and wilderness areas, it is imperative that states and EPA use models to completely and accurately depict the visibility impact of a source to the region's Class I areas as well as projected benefits from BART. In this regard, the conclusion of the May 2012 study that CALPUFF reliably (if conservatively) identifies visibility impacts to Class I areas beyond those previously evaluated are critical, and directs EPA to supplement the incomplete analysis presented in its proposed action on the Wyoming Regional Haze plan with additional modeling, or consider the more complete modeling submitted by the conservation organizations with their August 2, 2012 comments.

Response: EPA disagrees with the commenter's assertion that changes to CALPUFF now support modeling at distances greater than 300 km. The commenter cited a May 2012 technical evaluation (Documentation of the Evaluation of CALPUFF and Other Long Range Transport Models Using Tracer Field Experiment Data [130]) that evaluates several long range transport models based on several tracer studies. The report cited by the commenter does not refute the IWAQM Phase 2 report which states that ''IWAQM recommends use of CALPUFF for transport distances of order 200 km and less. Use of CALPUFF for characterizing transport

[129] IWAQM, p.18.

[130] *http://www.epa.gov/scram001/reports/EPA-454-R-12-003.pdf.*

beyond 200 to 300 km should be done cautiously with an awareness of the likely problems involved.'' [131] In fact, the May 2012 report further ''emphasizes the need for a standardized set of options for regulatory CALPUFF modeling.'' [132] Given these findings, EPA does not agree, as the commenter asserts, that it must consider CALPUFF modeling results from Federal Class I areas beyond 300 km. EPA therefore believes that the results of CALPUFF modeling beyond 300 km of the source should be evaluated in light of the limitations discussed in the two guidance documents cited above.

Finally, we disagree that there is any notice issue with respect to the commenter's allegations that EPA referenced the 1998 IWAQM study for the first time in our response to comments in our Montana FIP action. As quoted above, the BART guidelines specifically reference the 1998 IWAQM study with respect to CALPUFF settings.

Comment: EPA modeled visibility benefits at four Class I areas, and demonstrated visibility improvement due to SCR that approximately doubled the improvement afforded by SNCR at every Class I area modeled. 78 FR 34775–34776. EPA properly took account of the cumulative visibility improvement across all four modeled Class I areas for each unit, *id.* at 34776, but in fact, as the Conservation Organizations commented previously, *see* 8/2/2012 Conservation Organization Comments, SCR affords visibility benefits across at least six Class I areas. Thus, the cumulative visibility benefits are even greater than found by EPA, and further support a determination that SCR is BART for Laramie River Station Units 1–3.

Response: We disagree that we should have evaluated visibility impacts at all of the areas that the commenter considered in its analysis. The commenter provided CALPUFF model results at 18 areas, including areas that are not mandatory Class I areas, and at Class I areas at distances greater than 300 km from Laramie River Station. In our analysis of visibility impacts, we considered the visibility improvement at four Class I areas within 300 km of the Laramie River Station. Therefore, our modeling analyses did not ignore the visibility improvement that would be achieved at areas other than the most impacted Class I area, and we disagree with the assertion that we should have evaluated all of the areas that the commenter considered.

Comment: EPA's re-proposed Wyoming haze plan presents a unit-by-unit analysis of the visibility benefits of the installation of various BART control alternatives at Wyoming EGUs, and identifies benefits at only a subset of the affected Class I areas. However, EPA did not present evidence of the cumulative visibility benefits that would be enjoyed by Class I areas from implementation of all of the BART determinations in its 2013 re-proposal. To assess this shortcoming, the Conservation Organizations contracted with Howard Gebhart to conduct a cumulative visibility improvement modeling analysis that compared installation of the NO_X BART determinations found in EPA's 2013 re-proposal versus the State BART determinations found in the Wyoming Regional Haze SIP. *See* Gebhart Report, at 17–24. Mr. Gebhart's visibility modeling results show that installation of the BART determinations in EPA's 2013 re-proposal will result in significant visibility improvement at numerous Class I areas when compared to the Wyoming SIP. For example, installation of the BART determinations in EPA's 2013 re-proposal would consistently result a total deciview improvement of 1.0 deciview or greater over the Wyoming SIP at Badlands National Park, Savage Run Wilderness, and Wind Cave National Park. In addition, significant visibility improvements exceeding 0.5 deciviews were predicted at Badlands National Park, Bridger Wilderness, Mount Zirkel Wilderness, Rawah Wilderness, Rocky Mountain National Park, Savage Run Wilderness, and Wind Cave National Park. In summary, the Conservation Organizations' cumulative visibility improvement modeling analysis provides further support that significant visibility benefits can be achieved from the finalization of the BART determinations contained in EPA's 2013 re-proposal. EPA's 2013 re-proposed rule advances (without entirely fulfilling) the goals of the regional haze program to reduce visibility impairment using BART during the first regional haze five-year planning period. In contrast, the Wyoming Regional Haze SIP would fall far short of these goals.

Response: First, we note that the modeling performed by the Conservation Organizations' contractor used the 2 ppb background ammonia concentration, and did not correct the model results for ammonia limiting conditions, and therefore predicts greater visibility impairment than did EPA's revised modeling. EPA provided information about the visibility improvement modeled for different BART scenarios at multiple Class I areas within 300 km of each BART source. EPA primarily relied on the benefits at the area with the greatest visibility improvement from controls, but we also considered the cumulative impacts and benefits at multiple Class I areas. EPA agrees that considering cumulative visibility benefits by aggregating the expected improvement from over multiple Class I areas is a useful metric that can further inform a BART determination. Such an approach can be useful, for example, in simplifying a complex array of visibility impacts, especially where a source has significant impacts on multiple Class I areas.

Comment: EPA's proposed rule fails to present the cumulative visibility benefits of installation of SCR at Wyoming's EGUs. Instead, EPA only presents the visibility benefits for a single Class I area per source (Wind Cave National Park for all sources except the Jim Bridger plant (Mount Zirkel Wilderness Area)). The cumulative impact of a source's emissions on visibility as well as the cumulative benefit of emission reductions is a necessary consideration as part of the fifth-step in the BART analysis. The statutory direction and goal of the regional haze program is to remedy any existing impairment of visibility in mandatory Class I areas. 42 U.S.C. 7491(1). The implementing regulations plainly anticipate the need to reduce impacts in multiple Class I areas, including those outside a state's borders, and the obligation to assess what is necessary to do so. 40 CFR 51.308(d)(3). Further, states are required to establish reasonable progress goals for each Class I area, not just the one most impacted by a single source. *Id.* section 51.308(d)(1). EPA's own regional haze guidance document states that a cumulative visibility benefit analysis is generally consistent with the CAA. 70 FR 39105, 39107 (we believe that a State's decision to use a cumulative analysis at the eligibility stage is consistent with the CAA); 40 CFR Part 51, App Y. While the Guidelines also contemplate and even allow analysis of only the most impacted Class I area, such an analysis contradicts the regional approach towards the restoration of visibility. Moreover, given the number of Class I areas impacted by Wyoming sources, it is illogical and baseless to fictitiously limit the spectrum of source impact and emission control benefit. Based upon the guidance and the requirements of the CAA, the cumulative impact of a source's

[131] *http://www.epa.gov/scram001/7thconf/calpuff/phase2.pdf,* page 18.

[132] *http://www.epa.gov/scram001/reports/EPA-454-R-12-003.pdf,* page 10.

emissions on visibility, as well as the cumulative benefit of emission reductions, should be considered as part of the fifth-step in the BART analysis. The FLMs, too, have urged EPA Region 8 to consider the cumulative visibility benefits of requiring stricter controls on BART-eligible units in Montana. For example, at a public meeting in Billings, regarding the Montana Regional Haze SIP, Valerie Naylor, Superintendent of Theodore Roosevelt National Park stated, ''EPA placed too much emphasis on incremental costs and incremental benefits, while eliminating consideration of cumulative benefits that would be realized in the numerous Class I National Parks, National Wildlife Refuges, and Wilderness Areas impacted by Colstrip.'' The National Park Service (NPS) has consistently requested that cumulative visibility benefit analyses be conducted in other regional haze determinations. In addition, EPA must consider the cumulative visibility benefit of BART controls on multiple units of a single source. EPA's BART guidelines make clear that states must consider emissions from an entire source in determining whether a source is subject to BART, and further clarify that multiple units at a single utility constitute a single source. 40 CFR Part 51, App Y, sect. II.A.

The Conservation Organizations retained Air Resource Specialists, Inc. (ARS) to evaluate the cumulative visibility impact of NO_X BART controls, and found that the cumulative benefit of SCR at all Wyoming BART-subject EGUs is very significant. In conducting its supplementary modeling, ARS used an SCR-controlled NO_X emission rate to 0.05 lb/MMBtu to reflect the level of control achievable with SCR and recalculated baseline emissions to comply with the BART guidelines, as described in sections I.A.2 and I.C. Otherwise, ARS employed the same assumptions used by EPA in its analysis.

ARS's visibility modeling addresses impacts to 18 Class I areas, including Savage Run Wilderness Area (which is not a mandatory Class I area but is managed as such by Wyoming). The ARS report addresses the cumulative benefit of installation of SCR at multiple units at a single power plant location (ex. the cumulative benefits of installation of SCR at all four Bridger units). The ARS Report also calculates the cumulative visibility benefit of installation of SCR on all BART units in Wyoming. *Id.* It should not be assumed that ARS's results document the highest impacts. Rather, they are presented to demonstrate widespread and far-reaching visibility impacts and improvements that can be achieved through the use of SCR.

The cumulative visibility benefit from installation of SCR on all BART units in Wyoming is significant. The application of SCR control on Wyoming's subject-to-BART emission units is predicted to improve worst-case visibility impairment by up to 8 deciviews at the Savage Run Class I area, with 4 deciviews of improvement or better at six Class I areas. ARS Report, Table 3–13. For the 98th percentile day, the improvement after SCR emissions control at all Wyoming BART-subject EGUs is as high as 3.5 deciviews at Wind Cave National Park. *Id.* At least six different Class I areas show improvement of 3 deciviews or more based on the 98th percentile day after SCR emissions control at all Wyoming BART-subject EGUs. *Id.*

SCR controls at Wyoming's subject-to-BART units are also predicted to significantly reduce the number of days with visibility impacts above 0.5 deciview and 1.0 deciview compared to baseline emissions scenario. Over all 18 Class I areas modeled, the cumulative improvement from application of SCR on all Wyoming BART-subject EGUs is 721 fewer days with visibility impairment exceeding 0.5 deciview and 595 fewer days with visibility impairment exceeding 1.0 deciview. *Id.,* Table 3–14. These improvements are relatively uniformly distributed across the seven Class I areas most impacted by Wyoming's subject-to-BART EGUs: Badlands National Park, Bridger Wilderness Area, Mt. Zirkel Wilderness Area, Rawah Wilderness Area, Rocky Mountain National Park, Savage Run Wilderness Area, and Wind Cave National Park.

Response: As described in another response, EPA did not limit its analysis of visibility impairment to a single Class I area. We evaluated visibility impairment from each BART source at multiple Class I areas. We presented the results for each Class I area, and we considered the visibility impairment at multiple Class I areas in our BART determination. The estimates of visibility impairment presented by the commenter relied on an overly conservative estimates of background ammonia concentrations, and therefore are likely to overestimate cumulative visibility benefits.

In regard to the comment concerning the cumulative visibility benefit of BART controls on multiple units at a single source, see the response to a subsequent comment below.

Comment: It is appropriate to consider both the degree of visibility improvement in a given Class I area as well as the cumulative effects of improving visibility across all of the Class I areas affected. If reducing emissions from a BART source impacts multiple Class I areas, then a BART determination should incorporate those benefits. It is not justified to evaluate impacts at one Class I area, while ignoring others that are similarly significantly impaired by the BART source. If emissions from the BART source are reduced, the benefits will be spread well beyond only the most-impacted Class I area, and these benefits are an integral part of the BART determination. The BART Guidelines attempt to create a workable approach to estimating visibility impairment. The Guidelines do not attempt to address the geographic extent of the impairment, but in effect assume that all Class I areas are created equal, i.e., widespread impacts in a large Class I area and isolated impacts in a small Class I area are given equal weight for BART determination purposes. To address the problem of geographic extent, we look at the cumulative impacts of a source on all Class I areas affected, as well as the cumulative benefits from reducing emissions. While there may be more sophisticated approaches to this problem, we believe that this is the most practical, given current modeling techniques and information available.

Response: Contrary to the commenter's assertion, we did assess cumulative visibility impacts for multiple Class I areas. In our analysis of visibility impacts, we considered the visibility improvement at multiple Class I areas within the 300 kilometers of the modeling domain. For example, in our analysis of BART control options for Naughton, we considered the visibility improvement at seven Class I areas (Bridger Wilderness Area, Fitzpatrick Wilderness Area, Grand Teton National Park, North Absaroka Wilderness Area, Teton Wilderness Area, Washakie Wilderness Area, and Yellowstone National Park).

Therefore, our proposed rule did not ignore the visibility improvement that would be achieved at areas other than the most impacted Class I area, and we disagree with the assertions that we did not consider the impacts at multiple Class I areas. In the proposed rule, we did however focus on the visibility benefits at the most impacted Class I area.

Comment: EPA has incorrectly estimated visibility improvement from all NO_X control options at the Laramie River Station. Wyoming DEQ evaluated visibility improvements at the two nearest Class I areas and reported the

''The cumulative visibility improvement for SCR, as compared to LNB/OFA, across Wind Cave National Park and Badlands National Park (based on the 98th percentile modeled results) was 0.52–0.54 delta deciview for each of the three units.'' EPA R8 evaluated the five closest Class I areas but reported results for only the Wind Cave National Park.

Response: As described in a previous response, in our analysis of visibility impacts, we considered the visibility improvement at four Class I areas within 300 kilometers of Laramie River. Modeling results for all Class I areas considered for each BART source for the re-proposal were available to the public during the comment period upon request. (See ''Summary of EPA's Additional Visibility Improvement Modeling''). Therefore, our proposed rule did not ignore the visibility improvement that would be achieved at areas other than the most impacted Class I area, and we disagree with the assertions that we did not consider the impacts at multiple Class I areas. In the proposed rule, we did however focus on the visibility benefits at the most impacted Class I area.

Comment: EPA rejected Oklahoma's visibility analyses which ''relied upon pollutant specific modeling to evaluate the benefits from the use of available SO_2 emission controls.'' 76 FR 81728, 81740. Rather, EPA modeled in Oklahoma ''all visibility impairing pollutants to fully assess the visibility improvement anticipated from the use of controls.'' EPA argued this modeling took into account ''the complexity of atmospheric chemistry and chemical transformation among pollutants.'' In Wyoming, EPA noted that Wyoming provided ''visibility improvement modeling results that combine[d] the visibility improvement from NO_X, PM and SO_2 control options'' and that ''EPA could not ascertain what the visibility improvement would be from an individual NO_X or PM control option.'' 77 FR 33031. EPA appears to take contrary positions in Oklahoma and Wyoming. EPA's inconsistent positions are arbitrary and capricious.

Response: As described in a response to a previous comment, it appears that the commenter has confused (1) whether all pollutants were modeled together; and (2) whether all control technologies were modeled. All pollutants were modeled together both in modeling performed by Wyoming and by EPA for BART sources in Wyoming and Oklahoma, consistent with IWAQM Phase 2 report recommendations. The additional modeling performed by EPA was designed to evaluate visibility improvements from certain emissions reduction technologies. Each of these simulations also included all other visibility impairing pollutants, so the approach used by EPA in Wyoming and Oklahoma is consistent.

Comment: We are concerned about the emissions modeled by EPA as presented in the ''Summary of EPA's Additional Visibility Improvement Modeling.'' For example, sulfuric acid mist (H_2SO_4) emissions from each PacifiCorp unit are assumed to double from the baseline and control scenarios that do not include SCR versus scenarios with SCR. The only explanation provided by EPA is that ''the emission rate for . . . total sulfate rates were increased to account for the additional production that results from SCR controls.'' EPA's approach in Wyoming is not consistent with its approach elsewhere. For example, in its modeling analysis of addition of SCR at Colstrip Units 1 and 2 in Montana, EPA assumed no additional sulfate emissions from the addition of SCR.

Because H_2SO_4 must be reported as a hazardous air pollutant, the Electric Power Research Institute has developed a widely-accepted method for estimating those emissions. Our analyses indicate a two-orders-of-magnitude overestimation by EPA of these visibility-impairing emissions, which results in an underestimation of the visibility benefit of adding SCR.

Response: While the method established by the Electric Power Research Institute may yield more accurate H_2SO_4 emission rates, we have not found, and the commenter has not substantiated, that our treatment of H_2SO_4 led to meaningfully different modeled visibility improvement, or for that matter, influenced the BART determination in a material manner. In the modeling conducted by EPA, we set the sulfuric acid emission rates equal to those in the State's modeling analyses which typically doubled the H_2SO_4 emission rate between the baseline and SCR modeling scenarios. In comparison to the emission rates for SO_2 and NO_X, the emission rates for H_2SO_4 were trivial. For example, consider Dave Johnston Unit 3, where the modeled emission rates for SO_2 and NO_X in the baseline scenario were 420.0 lbs/hr and 1671.0 lbs/hr, respectively, while the modeled emission rate for H_2SO_4 was 2.6 lbs/hr. Here, in comparison to SO_2 and NO_X emissions, the emissions rate of H_2SO_4 is clearly insignificant and would have a limited impact on modeled visibility. The same can be said for the SCR scenario where the modeled emission rates for SO_2 and NO_X were 420.0 lbs/hr and 163.3 lbs/hr, respectively, while the modeled emission rate for H_2SO_4 was 5.1 lbs/hr. In short, the H_2SO_4 emission rates used in the modeling were so low that it is apparent that they have no more than a negligible impact on the modeled visibility improvement.

Comment: EPA must consider the cumulative visibility benefit of BART controls on multiple units of a single source. EPA's BART guidelines make clear that states must consider emissions from an entire source in determining whether a source is subject-to-BART, and further clarify that multiple units at a single utility constitute a single source. 40 CFR part 51, App Y, sect. II.A. This is not by accident or oversight. As EPA stated in its preamble to the BART Guidelines, ''[a]pplying de minimis levels on a unit by unit basis . . . could exempt hundreds of tons of emissions of a visibility-impairing pollutant from BART analysis. [I]t is possible that while emissions from each unit are relatively trivial, the costs of controlling emissions from multiple units might be cost-effective in light of the BART-eligible source's total emissions of the pollutant at issue.'' 70 FR 39104, 39117. With respect to the RHR requirement that states must project visibility impacts of BART controls, the BART Guidelines state: ''Once you have determined that your source or sources are subject to BART, you must conduct a visibility improvement determination for the source(s) as part of the BART determination.'' 40 CFR part 51, App Y, sect. IV.D.5. Thus, it is clear that both visibility impacts and visibility benefits are to be considered cumulatively for multiple units at a single source.

This is also consistent with EPA's practice in other states. For example, EPA found it appropriate to consider the combined visibility impact of pollution controls on multiple units at a single facility in determining that BART is SNCR for Units 1 and 2 of the Colstrip facility in Montana. Failure to consider cumulative visibility impacts discounts the very real effect of source-specific pollution on regional haze and likewise the cumulative benefits of potential retrofits. EPA cannot demonstrate that it has properly evaluated BART controls for affected sources without producing and presenting such a cumulative analysis.

Response: EPA notes that, in considering the visibility improvements reflected in our revised modeling, EPA interprets the BART Guidelines to require consideration of the visibility improvement from BART applied to the entire BART-eligible source. The BART Guidelines explain that, ''[i]f the

emissions from the list of emissions units at a stationary source exceed a potential to emit of 250 tons per year for any visibility-impairing pollutant, then that collection of emissions units is a BART-eligible source.'' In other words, the BART-eligible source (the list of BART emissions units at a source) is the collection of units for which one must make a BART determination. The BART Guidelines state ''you must conduct a visibility improvement determination for the source(s) as part of the BART determination.'' This requires consideration of the visibility improvement from BART applied to the BART-eligible source as a whole. We note, however, that while our regulations require states and EPA to assess visibility improvement on a source-wide basis, they provide flexibility to also consider unit-specific visibility improvement in order to more fully inform the reasonableness of a BART determination, but that does not replace the consideration of visibility benefit from the source (facility) as a whole.

In making the BART determinations in this final action we have considered visibility improvements at the source, and then also at the units that comprise the source. The approach that we used in our BART decisions for Wyoming is consistent with the approach that we used for Montana.

Comment: The commenter submitted results of back trajectory HYSPLIT modeling showing that pollutants reaching certain Class I areas on the high nitrate haze days did not originate from Laramie River Station. The commenter concludes that this analysis confirms that reducing NO_X emissions from Laramie River would not improve visibility at these Class I areas.

Response: We disagree with the comment that the HYSPLIT results submitted by the commenter can be used to evaluate the contribution of Laramie River to visibility impairment at Wind Cave National Park. The commenter performed HYSPLIT back-trajectory modeling for 10 days with high ammonium nitrate concentrations at Wind Cave National Park. The 10 days were selected from the period from 2001 to 2010, and only two of these days occurred during 2001 to 2003 baseline period used for the BART visibility modeling. These two days were February 24, 2001 and February 14, 2003, when the observed ammonium nitrate at the IMPROVE monitoring site at Wind Cave National Park was 41 and 33 inverse Megameters (Mm-1), respectively. We note that there were many days during the 2001 to 2003 period on which observed ammonium nitrate levels at Wind Cave National Park were in the range from 10 to 30 Mm-1,[133] but the commenter did not submit HYSPLIT results for these days.

HYSPLIT is a trajectory model similar to CALPUFF in that both models use modeled and observed wind field data to predict the trajectory of pollutants transported from a source area to a receptor location. There are differences in the formulation of the HYSPLIT and CALPUFF models and differences in the meteorological data used as input data for each model, so the predicted trajectory from each model may vary somewhat as a result of these differences. The most notable difference in the two models is that CALPUFF is designed to predict both the trajectory and the chemical conversion of precursor emissions to fine particulates and to estimate the concentrations of ammonium nitrate and other species at receptor sites, while HYSPLIT simply predicts the trajectory of the emissions but does not predict the chemical transformations nor the concentration of ammonium nitrate at receptor sites.

We evaluated the CALPUFF results for February 24, 2001 and February 14, 2003, and found that the HYSPLIT and CALPUFF results were consistent, i.e., the CALPUFF model did not attribute high levels of ammonium nitrate at Wind Cave National Park on these two days to Laramie River. The table of CALPUFF modeling results [134] shows that the model predicted a contribution of nitrate from Laramie River of 0.02 deciview on Feb 24, 2001, or 0.05% of the observed value, and on Feb 14, 2003, 1.697 deciview, or 5% of the observed. The small modeled contribution on these days is consistent with uncertainty in the HYSPLIT model. Because the HYSPLIT model does not estimate the formation of ammonium nitrate, and because HYSPLIT results were only submitted for two days during the 2001 to 2003 baseline modeling period, these HYSPLIT results are neither useful nor reliable for identifying emissions sources that contribute to visibility impairment at Wind Cave National Park. The HYSPLIT and CALPUFF results do indicate that sources other than Laramie River contribute to visibility impairment on the two days with the very highest ammonium nitrate levels at Wind Cave during the 2001 to 2003 baseline period. However, the CALPUFF results indicate that Laramie River contributes to visibility impairment at Wind Cave National Park.

Comment: EPA improperly considered ''cumulative visibility improvement'' when it rejected Wyoming's BART NO_X analyses and required SCR at Naughton Unit 1 and Naughton Unit 2. (78 FR 34782). Other comments asserted that EPA improperly considered ''cumulative visibility improvement'' when it rejected Wyoming's BART NO_X analyses and required SCR at Dave Johnston Unit 3 (78 FR 34778). Finally, a third set of comments asserted that EPA R8 has incorrectly estimated visibility improvement from all NO_X control options at Wyodak: Wyoming DEQ evaluated cumulative visibility improvements at the two nearest Class I areas (Wind Cave and Badlands National Parks) while EPA R8 reported results for only one Class I area.

Response: We disagree with these comments. In evaluating the visibility improvement associated with various control options, EPA interprets the CAA to require consideration of visibility improvement at all impacted Class I areas. Consideration of improvement at multiple Class I areas, as opposed to just benefits at the most impacted Class I area, has often been described as ''cumulative visibility improvement.'' Despite this terminology, however, an analysis of cumulative visibility improvement does not necessarily require that the deciview improvement at each area be summed together. While states or EPA are free to take such a quantitative approach, they are also free to use a more qualitative approach. Here, we chose to rely primarily on the visibility improvement at the most impacted Class I area, while also considering the number of additional Class I areas that would see improvement, as well as the level of improvement at each area. We did not expressly rely on a summation of visibility benefits across Class I areas, as we have done in other regional haze actions, although this metric was included in some tables. Finally, in our analysis of visibility impacts, we considered the visibility improvement at both Class I areas within 300 kilometers of Wyodak. The modeling results for the second proposal for all Class I areas considered for each BART source were available to the public during the comment period upon request. (See ''Summary of EPA's Additional Visibility Improvement Modeling'').

[133] Document with Wind Cave IMPROVE data, in the docket.

[134] EPA CALPUFF modeling results for Laramie Rivers Station, in docket: CALPUFF_WY_BART_bextNO3_BE_LR_Baseline_WindCave_12112013.

C. Overarching Comments on BART

1. BART-Eligible Sources

Comment: OCI Wyoming commented that it was listed as a BART-eligible source, but that the facility has an enforceable cumulative annual NO_X emission limit of 175.2 tons/year. Therefore, the facility is not a ''major stationary source'' and is not BART-eligible.

Response: We agree with this comment and acknowledge that OCI Wyoming is not a BART-eligible source.

2. Costs of Controls

Comment: One commenter stated that it supported EPA's use of the CCM and the Integrated Planning Model (IPM) to calculate costs.

Response: It is noted that EPA has revised the cost estimates found in the proposed rule based upon input from various commenters. The differences in cost for individual units may result from: (1) Accounting for site elevation in the SCR capital cost; (2) Change in SCR reagent to anhydrous ammonia from urea; (3) Change in urea SNCR chemical utilization for Laramie River units due to high furnace temperature; (4) Incorporation of some of the costs provided in comments; (4) Change in auxiliary electrical cost from market price to generating, or ''busbar,'' cost; (5) Correction of dilution water cost equation for SNCR; and (6) Consideration of shorter plant lifetimes in some instances.

More detailed descriptions of these changes and how they were addressed are discussed in a report (Andover Report) and spreadsheets [135] developed for EPA's responses to comments, as well as in our responses to the specific comments that are associated with these changes below.

Comment: Sargent & Lundy's analysis provides realistic information regarding what it likely would cost to install and operate an SCR system at Laramie River Station. They include a cost analysis by Sargent & Lundy that, unlike EPA's consultant's work, follows the BART Guidelines and EPA's CCM, and takes into account key site-specific conditions at Laramie River Station. This analysis is far more accurate and reliable than what was done by EPA's consultant—it is a site-specific, from-the-ground-up analysis done by an engineering firm that has done more NO_X control projects for EGUs than any other firm in the U.S. Sargent & Lundy's analysis provides realistic information regarding what it likely would cost to install and operate an SCR system at Laramie River. This analysis strongly supports Wyoming's decision to select new LNBs and OFA as BART for Laramie River Station, not SNCR or SCR.

Response: We do not agree with this comment. The BART Guidelines provide that: ''You should include documentation for any additional information used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, labor productivity and rates and any other element of the calculation that differs from the Control Cost Manual.'' 40 CFR part 51, app. Y, at IV.4.a.

Thus, detailed cost documentation is necessary to the extent that cost assumptions differ from the CCM. In this case, several of Sargent & Lundy's cost assumptions for control costs at Basin Electric's Laramie River Station differed from the CCM, but the necessary supporting documentation was not provided as part of their report. Detailed descriptions of the deficiencies in the cost assumptions are described in comments specific to the units. As explained elsewhere in this document, EPA has accepted some of the revised costs developed for Basin Electric, but not others.

Comment: We found that EPA's consultant had added 1.2% to the total capital investment of SCR to account for ''taxes and insurance.'' The CCM says: ''In many cases property taxes do not apply to capital improvements such as air pollution control equipment, therefore, for this analysis, taxes are assumed to be zero. The cost of overhead for an SCR system is also considered to be zero. An SCR system is not viewed as risk-increasing hardware (e.g., a high energy device such as a boiler or a turbine). Consequently, insurance on an SCR system is on the order of a few pennies per thousand dollars annually.'' The BART submittal by PacifiCorp included a 1.1% sales tax and Basin Electric included a 4% sales tax, both of which were applied to the purchased equipment costs. It is unclear if application of a sales tax is appropriate in Wyoming and, if so, what the correct tax rate is.

Response: To the extent that sales or property taxes are actually incurred and increase the cost of the project, they should be accounted for in the cost. *See* CCM at 2.5.4.1 and 2.5.5.8. However, air pollution control improvements often do not result in increased property taxes. When these taxes are not in fact applied, they should not be included in the estimate. The use of 1.2% as an estimate of property taxes and insurance is a conservative estimate that is consistent with EPA's assumptions in the IPM documentation. According to the IPM documentation (version 4.10, Chapter 8, page 8–11): ''U.S. state property taxes are approximately 0.9% based on a national average basis. This is based on extensive primary and secondary research conducted by ICF using property tax rates obtained from various state agencies. . . . Insurance costs are approximately 0.3%. This is based on estimates of insurance costs on a national average basis.'' [136]

As noted by the commenter, these costs may not in fact apply for environmental upgrades or may be much less than estimated. EPA did not have information on the applicability of property taxes at the time we conducted our cost estimates and conservatively assumed a reasonable amount. We also note that the commenter did not provide sufficient information to support a different property tax or insurance rate.

With regard to sales tax, the IPM algorithm for SCR cost is based upon historical projects and incorporates typical levels of sales tax. That is, the capital costs provided by the algorithm(s) are inclusive of sales tax. Accordingly, for the purpose of the BART cost estimates, and without additional data to determine what sales taxes would actually apply, EPA has relied on the assumptions in the IPM algorithm.

Comment: EPA states in its FIP Action (78 FR 34749): ''For all control technologies, EPA has identified instances in which Wyoming's source-based cost analyses did not follow the methods set forth in the EPA Control Cost Manual. For example, Wyoming included an allowance for funds used during construction and for owners costs and did not provide sufficient documentation such as vendor estimates or bids.''

With respect to AFUDC, another utility (Oklahoma Gas and Electric) argued in a similar regional haze setting that: ''AFUDC provides a way of measuring the real cost of interest over the construction period. AFUDC accounts for the time value of money associated with the distribution of construction cash flows over the construction period, which may be approximately 18 months for an SCR project.'' Total capital investment, as

[135] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013; Wyoming EGU BART and Reasonable Progress Costs for Jim Bridger—10/28/2013.

[136] *http://www.epa.gov/airmarkets/progsregs/epa-ipm/BaseCasev410.html#documentation.*

defined in the CCM, includes all costs required to purchase equipment needed for the control system (purchased equipment costs), the costs of labor and materials for installing that equipment (direct installation costs), costs for site preparation and building, working capital, and off-site facilities.

A cost breakdown of total capital investment (as defined above) is presented in several examples in the CCM. For example, Table 1.4 (page 1–32 of Section 4—NO_X Controls) and Table 2.5 (page 2–44 of Section 4—NO_X Controls) therein explicitly identify AFUDC as component ''E'' of the TCI, where TCI = D + E + F + G + H + I, where: D = Total Plant Cost; E = AFUDC; F = Royalty Allowance; G = Preproduction Cost; H = Inventory Capital; I = Initial Catalyst and Chemicals.

References 9 and 10 on page 2–38 of the CCM explicitly include AFUDC as a cost component and reference two reports, by Shattuck and Kaplan, in support of its use. The EPA built upon this knowledge base and costing methodology in its publication of the CCM in 2002. Thus, the CCM allows the time value of money, measured by the real discount rate, to be incorporated into the cost estimate.

Section 2.3.1 of the CCM (Elements of Total Capital Investment) describes the need for total capital investment to include all expenditures incurred during the construction phase of the project, including direct costs, indirect costs, fuel and consumables expended during start-up and testing, and other capitalized expenses. The only items explicitly mentioned to be excluded are common facilities that already exist at the site. AFUDC is part of the expense that will be incurred with the installation of a large air pollution control system, and the accepted practice in the utility industry and by financial institutions is to treat AFUDC as a capitalized expenditure. This approach is recognized in publications by the U.S. Department of Energy—Energy Information Administration, such as the *Annual Energy Outlook,* and in publications by the Electric Power Research Institute, such as the *Technical Assessment Guide* (EPRI TAG). As previously mentioned, the EPA clearly followed this approach in its studies of retrofit costs of SO_2 and NO_X in the years leading up to its publication of the CCM. Furthermore, AFUDC has been included in several other coal-fired boiler BART determinations, and AFUDC is included as a line item in EPA's Coal Quality Environmental Cost (CUECost) worksheets for flue gas desulfurization (FGD) control systems. In cases where the time value of money during the construction period would be significant (e.g., projects with longer construction periods such as the installation of SCR), the CCM clearly allows inclusion of AFUDC.

PacifiCorp supports and adopts by reference Oklahoma Gas and Electric's argument regarding including AFUDC in project cost estimates. Whether or not AFUDC is included in project cost estimates does not materially impact the results reached under the EPA CCM method, its inclusion should not constitute a basis for EPA to reject Wyoming's entire cost assessments. PacifiCorp has provided tables that provide comparisons of PacifiCorp's project specific EPA CCM method results where AFUDC is excluded in one set of costs and is included in the other to demonstrate this point.

Response: We disagree with commenters' assertions that AFUDC is a cost that should be incorporated into our cost analysis, as it is inconsistent with CCM methodology. The utility industry uses a method known as ''levelized costing'' to conduct its internal comparisons, which is different from the methods specified by the CCM. Utilities use ''levelized costing'' to allow them to recover project costs over a period of several years and, as a result, realize a reasonable return on their investment. The CCM uses an approach sometimes referred to as overnight costing, which treats the costs of a project as if the project were completed ''overnight'', with no construction period and no interest accrual. Since assets under construction do not provide service to current customers, utilities cannot charge the interest and allowed return on equity associated with these assets to customers while under construction. Under the ''levelized costing'' methodology, AFUDC capitalizes the interest and return on equity that would accrue over the construction period and adds them to the rate base when construction is completed and the assets are used. Although it is included in capital costs, AFUDC primarily represents a tool for utilities to capture their cost of borrowing and return on equity during construction periods. AFUDC is not allowed as a capitalized cost associated with a pollution control device under CCM's overnight costing methodology, and is specifically disallowed for SCRs (i.e., set to zero) in the CCM.[137] Therefore, in reviewing other BART determinations, EPA has consistently excluded AFUDC.[138] EPA's position regarding exclusion has been upheld in the United States Tenth Circuit Court of Appeals.[139]

The fact that CUECost, the EPRI TAG, and the Department of Energy cost estimates, and even cost estimates used as the basis for IPM typically include AFUDC is immaterial in this case because, for this purpose, overnight cost methodology is used and AFUDC is not included in that methodology.

Finally, we reject the commenter's assertion that Wyoming's inclusion of AFUDC did not provide a material basis for EPA to disapprove portions of the State's SIP. Inclusion of AFUDC increases total project costs of SCR by several million dollars. For example, Attachment 4 to PacifiCorp's comment letter shows that AFUDC for Dave Johnston Unit 4 would add more than $9.5 million dollars to the capital costs of SCR. We find that amounts of this magnitude are not trivial when assessing the costs of compliance.

Comment: Sargent & Lundy's cost estimate does include AFUDC, which accounts for the interest charges that would be incurred by Basin Electric during SCR construction. AFUDC is a real and a significant cost on capital intensive, long-term projects such as SCR installation, which require financing over a construction period of up to four years. Indeed, to exclude AFUDC would inappropriately bias the cost estimate in favor of high capital intensity projects. Therefore, consistent with industry practice, Sargent & Lundy included AFUDC, calculated based on a typical SCR construction project cash flow assuming a real interest rate of 7%.

The inclusion of AFUDC is not, as EPA asserts, inconsistent with either the BART Guidelines or the CCM. See 78 FR 34749. The CCM simply references ''Total Capital Investment,'' which includes ''all costs required to purchase equipment needed for the control system,'' as well as ''working capital.'' CCM 2.3.1, page 2–5 (emphasis added). This includes costs required to purchase equipment needed for the control system (purchased equipment costs), the costs of labor and materials for installing that equipment (direct installation costs), costs for site preparation and building, working

[137] CCM (Tables 1.4 and 2.5 show AFUDC value as zero).

[138] See, e.g., 77 FR 20894, 20916–17 (Apr. 6, 2012) (explaining in support of the North Dakota Regional Haze FIP, ''we maintain that following the overnight method ensures equitable BART determinations * * *.''); 76 FR 52388, 52399–52400 (August 22, 2011) (explaining in the New Mexico Regional Haze FIP that the Manual does not allow AFUDC)

[139] Oklahoma v. U.S. EPA, 723 F.3d 1201 (10th Cir. 2013).

capital, and off-site facilities. *Id.* Nowhere in the CCM does EPA state that AFUDC is not an appropriate cost, particularly with respect to long-term, capital intensive pollution control projects. And even if the CCM made such an assertion, inclusion of AFUDC in a cost estimate cannot be grounds for SIP disapproval because: (1) the CCM is not binding for purposes of making BART determinations, and (2) requiring states to exclude AFUDC is not consistent with Congress' general directive that states include ''costs of compliance'' in their BART determinations.

The CAA requires states to consider in their BART determinations the ''costs of compliance,'' but does not further define the term. *See* 42 U.S.C. 7491. EPA's regulations codify the BART factors, but neither the regulations nor the BART Guidelines in Appendix Y purport to restrict in any manner the categories of costs that states should consider when making a BART determination. *See* 70 FR 39166–39168. AFUDC is a ''cost of compliance.'' Basin Electric cannot fund large capital-intensive projects like SCR without financing, and the costs related to such financing are real and substantial. Consideration of AFUDC is therefore entirely consistent with the CAA's broad reference to ''costs of compliance,'' and excluding AFUDC would be inconsistent.

In this case, even if AFUDC is excluded from the total annual costs, the costs of installing SCR do not decrease substantially enough to justify SCR. Sargent & Lundy performed sensitivity analyses demonstrating that the cost-effectiveness of SCR at Laramie River remains at between $8,531 per ton of NO_X removed and $9,048 per ton of NO_X removed even if AFUDC is excluded. Furthermore, if the maintenance cost and labor rate of 1.5% also is factored into the analysis, consistent with the CCM, as opposed to the lower 0.25% used by Sargent & Lundy, the cost-effectiveness remains above $8,500 per ton of NO_X removed. Sargent & Lundy also performed a sensitivity analysis demonstrating that including property taxes and insurance as 1.2% of total capital investment, consistent with the approach taken by Andover but not with the CCM approach, more than offsets the exclusion of AFUDC. S&L Evaluation section 7.1.4, Table 10.

Response: EPA agrees that AFUDC can be a substantial overall cost on large capital projects that extend over a period of several years. However, as noted in the previous response, the CCM clearly excludes AFUDC in the overnight cost method. Furthermore, as we explain in more detail in responses to comments that pertain to specific sources, we disagree with the commenter's estimates for cost effectiveness for the Laramie River units.

Comment: Commenters assert that EPA's regional haze FIP is flawed because it failed to provide sufficient documentation, such as vendor estimates or bids to validate its estimates. EPA attempts to justify its approach by stating: ''In our revised cost analyses, we have followed the *structure* (emphasis added) of the EPA CCM, though we have largely used the Integrated Planning Model cost calculations to estimate direct capital costs and operating and maintenance costs.'' 78 FR 34749.

EPA did not explain what it meant by following the ''structure'' of the manual, versus simply following the manual. By contrast, PacifiCorp solicited and incorporated vendor estimates into these comments. This new information, which EPA must incorporate into new BART analyses to the extent EPA issues a final regional haze FIP, validates Wyoming's BART analyses cost of control estimates. In addition, it further quantifies the inaccuracies in EPA's development and use of purported new information that in no way qualifies as vendor estimates, bids, or any type of site-specific vendor information.

Response: We do not agree with this comment. By following the ''structure'' of the manual, EPA included all of the cost elements that the CCM indicates should be included, while excluding those that should not (such as AFUDC). In other words, EPA employed the overnight cost method as is required for BART analyses. The BART Guidelines require that the CCM be followed unless deviations from it are clearly documented and explained.

PacifiCorp received bids from vendors and EPA has incorporated information from these bids into its revised cost estimates. However, for reasons described elsewhere in response to comments, EPA has not accepted all of the costs. The BART Guidelines state: ''You should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the CCM.'' 70 FR 39166.

With regard to Basin Electric, vendor quotes for the Laramie River Station were not supplied. As Basin Electric indicated in its comments, ''[t]he LRS cost estimates are conceptual in nature; thus, S&L did not procure equipment quotes specifically for the LRS control systems. Rather, equipment costs for the LRS projects are based on conceptual designs developed for the control systems, preliminary equipment sizing developed for the major pieces of equipment, and recent pricing for similar equipment.''

In effect, like the IPM cost algorithms, the method that underlies Sargent & Lundy's estimate for Basin Electric is empirically based on past data, and not vendor quotes developed specific to Laramie River. We have, however, accepted some of the costs submitted by Basin Electric and not accepted others.

Comment: Even if EPA had the authority to require the use of the CCM, which it does not, EPA's insistence on Wyoming's strict compliance with the costing methodology set forth in the CCM, without adjusting the methodology to account for important site-specific factors, leads to an erroneous and arbitrary and capricious result. This is not required by the CCM. Indeed, the manual expressly discounts the usefulness of the costing methodology to power plants generally and to SCR control systems specifically, and it acknowledges that deviation from the methodology may be appropriate based on a user's engineering judgment.

The CCM provides general costing methodology for stationary source air pollution control technologies, applicable primarily to regulatory development where a rough order of magnitude estimate is appropriate. The introduction to the manual also caveats its usefulness when assessing control costs at power plants, which use different cost accounting. Cost Manual section 1.1, page 1–3. Specifically, it states that ''[e]lectrical utilities generally employ the EPRI Technical Assistance Guidance (TAG) as the basis for their cost estimation processes.'' *Id.* In a footnote, it explains that while power plants might still use the manual, ''comparisons between utilities and across the industry generally employ a process called 'levelized costing' that is different from the methodology used here.'' *Id.* section 1.1, page 1–3 n.1.

The CCM also generates rough estimates of costs that are less accurate than the site-specific cost factors that are more appropriate for BART determinations at a large power plant. The manual is used heavily in regulatory development, and the costing methodology is geared specifically to avoid the necessity of site-specific information and to enable estimates to be prepared at ''relatively low cost with

minimum data.'' *Id.* section 2.2, page 2–3 (internal quotations omitted). However, the level of accuracy is much lower than that for estimates using site-specific information. The cost estimating procedure can provide a ''rough order of magnitude,'' estimate that is ''nominally accurate to within ± 30%.'' *Id.* section 1.2, page 1–4. Indeed, ''EPA does not claim cost estimates for industry at a greater than study level accuracy for industrial users'' because ''the industrial user will necessarily have much more detailed information than the generic cost and sizing information.'' *Id.* section 2.2, page 2–3, 2–4.

Where the user has detailed site-specific information, the manual does not contemplate strict adherence to its costing methodology. Users may ''exercise 'engineering judgment' on those occasions when the procedures may need to be modified or disregarded.'' *Id.* section 1.3, page 1–7. With respect to estimating factors used in cost estimates, ''the application of an appropriate factor requires the subjective application of the analyst's best judgment.'' *Id.* section 2.5.4.1, page 2–28. The manual is designed to provide a tool box for estimating costs that can be helpful to the engineer, but ''[t]he bottom line is that there is no clear-cut 'cookbook' process through which the analyst will be able to make the right informed decision each time, and the formalized costing methodology employed by the Manual is only part of that process.'' *Id.* section 2.6, page 2–37.

With respect to SCR cost estimations, the CCM is no more than a ''tool to estimate study-level costs for high-dust SCR systems.'' *Id.* section 2.4, page 2–40. The ''[a]ctual selection of the most cost-effective option should be based on a detailed engineering study and cost quotations from the system suppliers.'' *Id.* This requirement for a more detailed study relying on site-specific factors is necessary because, as EPA acknowledges, the CCM's assumptions regarding capital investment for SCR are inaccurate. *Id.* section 2.5.4.1, page 2–27. For systems like SCR, ''the control in question is either so large or so site-specific in design that suppliers design, fabricate, and construct each control according to the specific needs of the facility.'' *Id.* section 2.5.4.1, page 2–27.

Thus, for these systems, ''the Manual deviates from its standard approach of providing study level costs and, instead, provides a detailed description of the factors that influence the TCI [total capital investment] for the analyst to consider when dealing with a vendor quotation.'' *Id.* Under these circumstances, EPA acknowledges that getting vendor quotes may be difficult because they cannot be done in an ''off-the-shelf'' fashion. *Id.* The engineering judgment of the manual's user is especially critical in estimating the costs of an SCR retrofit: ''Probably the most subjective part of the cost estimate occurs when the control system is to be installed on an existing facility.'' Unless the original designers had the foresight to include additional floor space and room between components for new equipment, the installation of retrofitted pollution control devices can impose an additional expense to ''shoe-horn'' the equipment into the right locations. For example, an SCR reactor can occupy tens of thousands of square feet and must be installed directly behind a boiler's combustion chamber to offer the best environment for NO_X removal. For these boilers, there is generally little room for the reactor to fit in the existing space and additional ductwork, fans, and flue gas heaters may be needed to make the system work properly.

To quantify the unanticipated additional costs of installation not directly related to the capital costs of the controls themselves, engineers and cost analysts typically multiply the cost of the system by a retrofit factor. The proper application of a retrofit factor is as much an art as it is a science, in that it requires a good deal of insight, experience, and intuition on the part of the analyst. The key behind a good cost estimate using a retrofit factor is to make the factor no larger than is necessary to cover the occurrence of unexpected (but reasonable) costs for demolition and installation. Such unexpected costs include, but are certainly not limited to, the unexpected magnitude of anticipated cost elements; the costs of unexpected delays; the cost of reengineering and re-fabrication; and the cost of correcting design errors. *Id.* section 2.5.4.2, page 2–28. The CCM cannot properly account for these uncertainties and thus provides that users can apply a ''retrofit factor'' of up to 50 percent to account for them. *Id.* EPA notes that ''[s]ince each retrofit installation is unique, no general factors can be developed.'' *Id.* 2.5.4.2, page 2–29.

In sum, the BART Guidelines and CCM were drafted and are to be applied as guidelines to assist the states in their decision making, not as inflexible mandates. Knowing this, states like Wyoming follow the BART Guidelines generally but make the necessary localized and individualized adjustments required to generate realistic, rather than formalistic, cost estimates. Accordingly, EPA should expect the states to deviate on occasion, not to slavishly follow the BART Guidelines and CCM to the point of generating artificial (and unrealistic) cost estimates. Yet that is now exactly what EPA contends the states must do. EPA's current approach to using the BART Guidelines and manual as grounds for disapproval without deference to the states' authority and local control is unreasonable, erroneous, and arbitrary and capricious.

Response: There are only very limited situations in which a state or EPA can depart from the CCM cost methodology. ''The basis for equipment cost estimates also should be documented, either with data supplied by an equipment vendor (i.e., budget estimates or bids) or by a referenced source (such as the OAQPS CCM, Fifth Edition, February 1996, EPA 453/B–96–001). In order to maintain and improve consistency, cost estimates should be based on the OAQPS CCM, where possible. The CCM addresses most control technologies in sufficient detail for a BART analysis. The cost analysis should also take into account any site-specific design or other conditions identified above that affect the cost.'' 70 FR 39166.

The guidelines for BART determinations make it clear that the CCM is the intended methodology for conducting a BART cost determination. It also states why: To maintain and improve consistency. However, the CCM does state that site-specific conditions should be incorporated. Site-specific conditions could include space constraints, or a design feature that could complicate installing a control. However, the BART Guidelines are clear that the analyst should document any deviations from the CCM: ''You should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the CCM.'' 70 FR 39166.

In fact, the record does not point to any unusual circumstances that explain why SCR costs in Wyoming should be so much higher than costs of SCR at other similar facilities. As will be demonstrated in responses to comments that are specific to the individual units, the commenters did not identify any unique features of their plants that would make of the installation of an SCR so difficult that the cost would be outside the range of what has been experienced elsewhere, even accounting for such things as elevation, which is discussed later in these responses to

comments. The BART Guidelines also provide the following explanation, which makes it clear that other cost methods are supplemental, not replacements for the CCM cost method: ''We believe that the CCM provides a good reference tool for cost calculations, but if there are elements or sources that are not addressed by the CCM or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information.'' 70 FR 39127.

Although the focus in the second quote is ensuring the remaining useful life is incorporated into the amortization schedule, this passage affirms that the CCM's annualized cost methodology should be followed. The following quote from the same page of the BART guidelines sheds light on the type of costing methodology employed by the CCM, ''capital and other construction costs incurred before controls are put in place can be rolled into the first year, as suggested in EPA's OAQPS CCM.'' Although this passage is again focused on the remaining useful life, the text we reproduce is a reference to the basic CCM cost methodology—the overnight method. That is what is meant with the reference of rolling future costs into the first year. The ''all in'' method that OG&E used does not do that—it projects costs to a future date. Although the CCM does not use the term, ''overnight cost,'' it is widely used in industry.

The U.S. Energy Information Administration defines ''overnight cost'' as ''an estimate of the cost at which a plant could be constructed assuming that the entire process from planning through completion could be accomplished in a single day. This concept is useful to avoid any impact of financing issues and assumptions on estimated costs.'' [140] In effect, the overnight cost is the present value cost that would have to be paid as a lump sum up front to completely pay for a construction project.

As will be described in EPA's other responses to comments regarding specific plants, commenters did not provide the documentation required under the RHR to demonstrate why their costs were so much higher than costs for other similar units. Such documentation would include any vendor quotes to include scope of supply, explanations of labor productivity issues with supporting documentation, and other concerns raised by commenters and addressed in more detail in other comments.

Comment: Sargent & Lundy is both a design and engineering firm and a system supplier, and it has provided exactly the type of detailed scoping-level engineering study for SCR contemplated by the CCM when selecting the most cost-effective NO_X control device. EPA acknowledges that with respect to SCR cost estimations, the CCM is no more than a ''tool to estimate study-level costs for high-dust SCR systems.'' CCM section 2.4, page 2–40. For systems such as SCR, ''the control in question is either so large or so site-specific in design that suppliers design, fabricate, and construct each control according to the specific needs of the facility.'' *Id.* section 2.5.4.1, page 2–27. *See also id.* at section 2.3, page 2–30 (''the design is highly site-specific.''). Importantly, the ''[a]ctual selection of the most cost-effective option should be based on a detailed engineering study and cost quotations from the system suppliers.'' *Id.* at section 2.6, page 2–43.

The Sargent & Lundy Evaluation provides a cost estimate not based on the general, broad brush assumptions set forth as examples in the CCM, but on a conceptual design of SCR at Laramie River based on site-specific variables and Sargent & Lundy's extensive knowledge of, and experience with, SCR installations on coal-fired utility boilers. Based on this conceptual design, Sargent & Lundy estimated equipment costs using example vendor quotes for similar projects, and used appropriate commodity pricing references, rates for labor based on industry publications and locality-specific data, and, where necessary, allowances.

Response: As EPA has noted in previous responses to comments, the CCM is a good reference tool for estimating costs. With regard to Sargent & Lundy's estimates at Laramie River Station, EPA has found deficiencies in the cost estimates or underlying assumptions that will be discussed in more detail in comments that are specific to units.

Comment: One commenter asserted that the EPA's cost evaluations overestimated the annualized capital costs of BART options by assuming an unrealistically high interest rate, which is particularly extreme in the cost estimates for SCR because of its relatively higher capital costs than the other control technologies evaluated. The commenter calculated and submitted documentation of what the commenter considers to be the real cost of capital interest to PacifiCorp, which was 5.66 percent, and to Basin Electric, which was around 2 percent. According to the commenter, the EPA continues to assume a much higher 7 percent interest rate, apparently based on the EPA's mistaken belief that this rate is supported by the CCM. The commenter stated that while the CCM states the social interest rate ''is currently set at seven percent'' by the Office of Management and Budget (OMB), it references the interest rate established by OMB in 1992, whereas the OMB updates interest rates yearly and the current social interest rate is 1.7 percent for a 20-year period (citing OMB Circular A–94, App. C (revised Dec. 2012)).[141] The commenter concluded that even if EPA were correct in applying the social interest rate, it should have used the current published OMB rate in accordance with the CCM's direction.

The commenter went on to contend that the CCM recommends a source-specific interest rate for BART and reasonable progress determinations, rather than the social interest rate applied in promulgation of regulations. According to the commenter, the 7-percent ''social interest rate'' is used to estimate the cost to society of taking an action. However, the CCM states that this social interest rate ''is probably not appropriate for industry.'' The commenter noted that the RHR requires the EPA to make case-by-case determinations of ''the costs of compliance'' for identified BART and reasonable progress options, which the commenter interprets as being the actual cost to the source of implementing the studied alternatives. The commenter indicated that where the EPA, the state, or industry is evaluating ''the economic impact that [air-pollution control] equipment would have upon the source,'' a source-specific interest rate is appropriate. The commenter concluded that the EPA erred in relying on a generic and outdated 7-percent social interest rate that resulted in a particularly inflated estimate of SCR costs, and asserted that in recalculating the annualized capital costs of control technologies, the EPA must either use the current social interest rate of 1.7 percent, or more appropriately, source-specific rates of 5.66 percent for PacifiCorp Units and 2 percent for Basin Electric Units.

Response: We have retained the use of a 7-percent interest rate in calculating the capital recovery factor. For cost analyses related to government regulations, an appropriate ''social'' interest (discount) rate should be used,

[140] EIA, ''Updated Capital Cost Estimates for Electricity Generation Plants,'' November 2010, footnote. 2. Available at: *http://www.eia.gov/oiaf/beck_plantcosts/?src=email.*

[141] *http://www.whitehouse.gov/sites/default/files/omb/assets/a94/dischist-2013.pdf.*

not the source's actual rate of borrowing. OMB Circular A–4, providing Federal agencies guidance on developing regulatory analyses, and dated September 17, 2003, reiterates the guidance found in the earlier Circular A–94: ''As a default position, OMB Circular A–94 states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis. The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy, based on historical data. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital. It approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector.'' [142]

In addition, EPA calculated capital recovery factors using 3-percent and 7-percent interest rates in determining cost-effectiveness for the Regulatory Impact Analysis for the BART Guidelines.[143] The 3-percent rate is mainly used when private consumption displacement is the main impact of a regulatory action. This cost of retrofitting power plants for this action displaces private capital far more than private consumption, so 3-percent is not an interest rate that is applicable here. We consider our use of an interest rate of 7-percent to calculate capital recovery to be a conservative approach.

Finally, the interest rate cited by the commenter from Appendix C to OMB Circular A–94, 1.7 percent, is for an altogether different purpose than the type of regulatory analysis supporting today's rule. According to the discount rate policy described in Circular A–94, interest rates contained in Appendix C, which reflect Treasury borrowing rates, are for the purpose of internal planning decisions of the Federal Government. This is in contrast to regulatory actions, for which as noted above, the circular prescribes use of a ''real discount rate of 7 percent.'' [144]

Comment: One commenter stated that the EPA used the IPM default cost for auxiliary power of $0.06/kWhr for all of the control scenarios evaluated, which is much higher than the auxiliary power cost commonly used in cost-effectiveness analyses. The commenter asserted that the appropriate cost of auxiliary power to use in a cost-effectiveness analysis is the busbar cost of power to run the plant, not the cost of power sold. According to the commenter, auxiliary power is the power required to run the plant, or power not sold, and cost-effectiveness analyses are based on the cost to the owner to generate electricity, or the busbar cost, not market retail rates. The commenter indicated that the site-specific data reported by PacifiCorp to the Federal Energy Regulatory Commission (FERC) in 2010 indicates that the busbar power cost for the Wyoming PacifiCorp plants is typically in the range of $0.02/kWhr to $0.03 lb/kWhr, and for Basin Electric's Laramie River Station, the company used a cost of $0.015/kWhr, which is consistent with the busbar power cost.

Response: In EPA's original analysis, we used the default values for electricity in the IPM model, although we agree that the cost of power used for auxiliary loads should be the cost of the owner to generate the electricity rather than the market price it could be sold at. EPA has reviewed FERC Form 1 for PacifiCorp [145] and has incorporated in our revised costs for each plant the stated cost of electricity per net kWh. For Laramie River Station, the costs in their July 2008 BART analysis [146] are used, as these are more consistent with PacifiCorp's reported cost of generation (as reported to FERC) than the values later used by Basin Electric or by EPA in our original cost analysis (that our proposed action was based on), which are more reflective of retail power prices rather than the cost to generate.

Comment: One commenter argued that the IPM model is not appropriate for generating site-specific cost estimates to evaluate the cost-effectiveness of BART projects because it does not account for those site-specific requirements that significantly impact overall project costs.

Response: As described in our proposal, the IPM is a multi-regional linear programming model of the U.S. electric power sector. IPM relies upon a very large number of data inputs and provides forecasts of least-cost capacity expansion, electricity dispatch, and emission control strategies for meeting energy demand and environmental, transmission, dispatch, and reliability constraints. EPA has used IPM to evaluate the cost and emissions impacts of proposed rules, such as the recent Mercury and Air Toxics Standard (MATS).[147]

We wish to clarify that, for our proposed action on Wyoming's Regional Haze SIP, we did not actually run IPM. Rather, we used information from one component of IPM, specifically, the component that develops the costs of air pollution control technologies. Broadly speaking, IPM relies upon numerous components and sub-components to specify constraints and variable values that feed into the model algorithms used during an actual IPM model run. The air pollution control cost development component is just one of these numerous components. We relied upon the cost information and equations contained in this component by manually placing them into a spreadsheet that calculated the capital, operating, and maintenance costs associated with pollution control options. While we relied upon the results of these spreadsheet calculations, we did not then use those results to run IPM, as the type of information generated by an actual IPM model run (e.g., generation dispatch decisions, capacity decisions) is not relevant to our action.

We documented our use of the equations from IPM's air pollution control technology cost component by placing the raw cost calculation spreadsheets in the docket for our proposal.[148] These spreadsheets contain the IPM equations, corresponding variable values, selected notes regarding assumptions and variable ranges, as well as selected tables from IPM Base Case v4.10 documentation. Because we did not perform an actual IPM model run, the spreadsheet and contractor's report in the docket for our proposal sufficiently document our use of the cost methodologies from the IPM air pollution control cost component.

We disagree with commenters' characterization of the cost-development methodology contained in IPM as generalized and inadequate for performing site-specific cost estimates. As noted in the documentation for IPM's cost-development methodology for SCR, the methodology is based upon

[142] Office of Management and Budget, Circular A–4, Regulatory Analysis, *http://www.whitehouse.gov/omb/circulars-a004_a_4/.*

[143] ''Regulatory Impact Analysis for the Final Clean Air Visibility Rule or the Guidelines for Best Available Retrofit Technology (BART) Determinations Under the Regional Haze Regulations,'' EPA–0452/R–05–004 (June 2005).

[144] *http://www.whitehouse.gov/omb/circulars_a094#8.*

[145] FERC Financial Report, FERC Form No. 1: ''Annual Report of Major Electric Utilities, Licensees and Others and Supplemental Form 3Q: Quarterly Financial Report, PacifiCorp, Year/Period of Report 2010/Q4,'' pgs 402.2, 403, 403.2, see line 35.

[146] Black & Veatch, ''Basin Electric Power Cooperative Laramie River Station Refined BART Visibility Modeling,'' July 24, 2008, pg 25 of 176.

[147] *http://www.epa.gov/airmarket/progsregs/epa-ipm/docs/SuppDoc410MATS.pdf.*

[148] Wyoming EGU BART and Reasonable Progress Costs—10/28/2013; Wyoming EGU BART and Reasonable Progress Costs for Jim Bridger—10/28/2013.

two databases of actual SCR projects.[149] These databases include 2004 and 2006 industry cost estimates prepared for the Midwestern Ozone Group, and a proprietary in-house database maintained by engineering firm Sargent & Lundy. The Midwestern Ozone Group information was cross-referenced with actual 2009 projects, and escalated accordingly. Sargent & Lundy then used the information in these databases to develop the equations described in the cost component, taking into account the pre-control NO_X emission level, degree of reduction, coal type, facility size, and numerous other unit-specific factors. While a costly engineering evaluation that included site visits in addition to use of satellite imagery might produce a more refined cost estimate, we disagree that our approach does not produce site-specific estimates. As noted by EPA in response to other comments, EPA's use of satellite imagery enabled us to evaluate each of the major site-specific issues raised by commenters.

Specifically, we input several site-specific factors, such as fuel type, baseline NO_X level, reagent cost and type, level of NO_X reduction, site-specific power and reagent costs, etc. into the algorithm. The algorithm also provides for adjustment of cost to account for retrofit difficulty. The CCM at section 2.5.4.2 (page 2–28 of Section 1 Chapter 2) calls for a retrofit difficulty factor to account for the site-specific costs associated with a retrofit, such as demolition or moving existing equipment, etc. A retrofit factor is also used in the IPM algorithm, making it consistent with the approach used in the CCM. Per the documentation for the IPM algorithms: ''The formulation of the SCR cost estimating model is based upon two databases of actual SCR projects. The comparison between the two sets of data was refined by fitting each data set with a least squares curve to obtain an average $/kW project cost as a function of unit size. The data set was then collectively used to generate an average least-squares curve fit. The least squares curve fit was based upon an average of the SCR retrofit projects. Retrofit difficulties associated with an SCR may result in capital cost increases of 30 to 50 percent over the base model. The least squares curve fits were based upon the following assumptions: Retrofit Factor =1; Gross Heat Rate = 9880; SO_2 Rate = < 3 lb/MMBtu; Type of Coal = Bituminous; Project Execution = Multiple lump sum contracts.'' [150]

Therefore, the IPM algorithm is based upon actual retrofit projects. As such, the average or typical retrofit found for the retrofit projects evaluated is assumed to use a retrofit factor of 1.0, and for more difficult than average retrofits, a retrofit factor greater than 1.0 would apply. On page 1 of the documentation of the IPM model for SCR, it states that ''Retrofit difficulties associated with an SCR may result in capital cost increases of 30 to 50% over the base model.'' Therefore, EPA expects that retrofit difficulty factors may apply up to around 1.50 at the maximum. In effect, project elements that are typically included in an SCR retrofit are accounted for in the cost estimated by the algorithm, and deviations from those typical costs can be addressed by a retrofit factor. In fact, the algorithm *expressly* calls for a retrofit factor that can be varied (see Table 1 of reference, variable ''B''), which makes it consistent with the retrofit difficulty factor method called for in the CCM. And, because the IPM algorithm is based upon actual projects, it already incorporates contingency. Finally, the IPM algorithm can be modified for other effects, such as elevation, and EPA has since examined this and modified its estimates in this final action to correct for the effects of altitude.

Comment: One commenter alleged that site elevation was not reasonably accounted for in EPA's cost estimates, particularly for PacifiCorp's Naughton Units 1 and 2 and Dave Johnston Unit 3. The commenter explained that algorithms in the IPM model were developed for a generic coal-fired power plant located at or near sea level. However, site elevation can have a significant impact on control system sizing and design. Thus, elevation of the site must be considered separately and factored into the unit capacity (i.e. megawatts) accordingly due to its effects on the flue gas volume. The commenter pointed out that PacifiCorp's Wyoming BART units are located at elevations ranging from approximately 5,000 to 7,000 feet above mean sea level. At this elevation, flue gas flows will be 20–30 percent higher than similarly sized units at mean sea level. The higher flue gas flow requires larger ductwork, larger reactors, and more robust support structures, and these items have a profound influence on the overall project cost. While Wyoming had this information available in its SIP, EPA failed to account for site elevation in its FIP.

Response: EPA agrees with commenter that higher altitudes will increase the volume of flue gas, making it necessary to increase the cross-sectional area of associated ductwork and the SCR reactor. Increased flue gas volume also impacts the fan design. Consequently, EPA has revised its cost calculations for SCR in this final action to address issues associated with plant altitude. While altitude has a significant impact on the cost of SCR, it does not make a significant difference in the cost of SNCR because altitude does not affect the urea flow rate or the associated urea storage system, urea circulation system, or metering/mixing/pumping systems. There may be a slight increase in the number of injectors due to increased furnace cross-section, but this is expected to be a small part of the total cost of an SNCR system.

Comment: The same commenter argued that site configurations were not reasonably accounted for in EPA's cost estimates, particularly for the Naughton Units 1 and 2 and Dave Johnston Unit 3. The IPM model applies a retrofit factor to account for the difficulty of fitting new BART equipment into the existing site configuration. The Andover Report states that site visits were not possible. Thus, retrofit factors for Naughton Units 1 and 2, and Dave Johnston Unit 3 were determined based on a review of Google Earth™ images of the station. Accordingly, the Andover Report applied retrofit factors for the units that are highly subjective based on minimal site information. The commenter argued that, when preparing site-specific cost estimates, site visits must be conducted to evaluate the true complexity associated with the retrofit and to assess specific modifications to the plant that would be required to overcome issues associated with congestion, as well as difficulties associated with construction. Neither Andover nor EPA sought permission from PacifiCorp to visit the sites of the BART units, nor did Andover explain why it ''wasn't possible'' to do so. Both Sargent & Lundy and Babcock and Wilcox have extensive experience with PacifiCorp's Naughton and Dave Johnston facilities. Just since 2005, Sargent & Lundy has been contracted by PacifiCorp to perform 14 projects at Dave Johnston station and over 25 projects at Naughton station. These projects range from site evaluations, studies, detailed engineering, or functioning as PacifiCorp's Owner's Engineer for major environmental retrofit engineer, procure, and construct projects. From having conducted many site visits at these stations, Sargent &

[149] *http://www.epa.gov/airmarkets/progsregs/epa-ipm/docs/v410/Appendix52A.pdf.*

[150] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies—SCR Cost Development Methodology, FINAL'', August 2010.

Lundy is very aware of site-specific congestion and construction challenges that would affect SCR installations at Naughton Units 1 and 2 and Dave Johnston Unit 3. Similar to Sargent & Lundy's site-specific experience, Babcock and Wilcox has recently completed major environmental retrofit projects on Naughton Units 1 and 2 (wet scrubber additions) and Dave Johnston Unit 3 (dry scrubber and baghouse addition), making Babcock and Wilcox uniquely positioned to offer budgetary cost estimates for further retrofits to those facilities with significant first-hand knowledge. While Wyoming had much of this information available in its SIP, EPA failed to account for this site-specific information in its FIP.

Response: EPA disagrees with the commenter. EPA did account for site-specific factors when performing its cost estimates. Because SCRs are built on or next to the boiler structure, they are often elevated, and there is usually equipment in one direction (the boiler) or the other (other air pollution control equipment, like an electrostatic precipitator (ESP), scrubber, or chimney) that limits access. This issue is complicated further with boilers that are located adjacent to one another—a common configuration. Due to the height of the SCR, large cranes play a vital role in their construction. The location of cranes next to where the SCR is going to be built can be difficult.

As noted in a paper by Babcock & Wilcox,[151] key issues for SCR constructability are site access and ability to locate a crane and the resulting erection sequence. The erection sequence is impacted by the crane that is available and whether it can fit on site because the crane and its location will limit the size of material that can be lifted into place. A larger crane allows for the lifting of larger pieces of ductwork, resulting in fewer lifts and less fabrication in the air. Without adequate access for a crane and proximity to a lay-down area for material, erection must be done with smaller pieces, which will require more labor and expense.

Access around and between the boilers will determine crane location and location of material receiving areas. In some cases, it may be necessary to demolish equipment or buildings in order to gain adequate access. In other cases, it may be necessary or preferable to erect cranes on the top of the boiler structure (as was performed for the SCR installed at Dominion's Brayton Point Unit 3).[152]

Because of its easy availability and it usefulness in providing a ''bird's eye'' view of the site congestion (how close equipment is located to each other, room for a crane, etc.), site access, local transportation options, availability of a lay-down area to locate material on site, and other limitations around the site, satellite imagery has become a very important tool in evaluating these site-specific factors. In fact, the major air pollution control original equipment manufacturers use satellite imagery to assist them in estimating site congestion issues, determining location of construction equipment and other limitations on and around the site in this way. Site visits are also useful, but are normally performed *in addition to* rather than *in lieu of* careful examination of satellite images. For example, in their comments to EPA in 2010, the Utility Air Regulatory Group used satellite photographs to demonstrate the relative difficulty of different SCR installations.[153]

While a site visit can be useful and provide additional information, assessing satellite imagery provides adequate information to determine access to the site, access around the boilers, availability of space for locating construction equipment and materials, and whether buildings or equipment must be demolished to make room for the equipment. Notably, the budgetary price provided to PacifiCorp from Babcock & Wilcox was not developed from a site visit. Per the cover page of the budgetary proposal, ''[g]iven the budgetary nature of this request, we have not made site visits to consider layout options: instead, we have used available drawings and made necessary assumptions to enable us to establish a basis to derive quantities of material and associated costs.''

For SCR installations, site visits and more detailed boiler drawings provide additional information regarding air preheater location and whether it must be relocated to make room for the SCR, or if ductwork limitations require demolition of other large pieces of equipment such as ESPs. Such costs will significantly increase the cost of retrofitting an SCR. However, relocation of the air preheater or ESP was not identified as a concern by any of the commenters. Instead, most commenters raised retrofit issues that are commonly encountered in SCR retrofits, including location of SCR support steel and possible interferences with other equipment on site; penetration of boiler building by SCR ductwork; location of cranes for units that are side-by-side; the need for increased fan capacity and associated electrical modifications; and stiffening of ductwork due to increased pressure drop from SCR. As a result, the retrofit costs in the IPM algorithms that were developed from actual SCR projects should capture these more common retrofit issues and to the extent that some situations seem more difficult, can be addressed with retrofit factors.

In its cost estimates, PacifiCorp provided a long comparative table (over 100 rows with 25 columns of data) for Dave Johnston 3 and Naughton 1 and 2 showing different cost estimating methods. The table showed vendor budgetary pricing for Direct Capital Costs based upon a proposal from Babcock & Wilcox. While EPA accepts the proposal from Babcock & Wilcox as part of our final action, we have a few general comments. The proposal, while providing a detailed total scope of supply, provides a total cost for the project without line items. In addition, the items included under the Owner's scope by Black and Veatch are limited to: Boiler modifications; air-preheater modifications; medium voltage power source; asbestos, lead, and polychlorinated biphenyls (PCB) remediation; commercial licenses and permits; and spare parts. Some of these costs, such as air-preheater modifications, will not be required, while others will have a small to modest impact on the overall cost. Notably, the cost estimate includes items like potable water systems, fire protection, service water, other assorted auxiliaries, as well as roads, fences, etc. Therefore, the proposal is close to being ''turnkey'' and includes nearly all costs for the project. It also includes some items that would fall into the category of General Facilities. The proposal assumes that other modifications to the Naughton plant will result in abandonment of existing chimneys and ESPs on Units 1 and 2. Currently, these chimneys are in service. Babcock & Wilcox also determined that the existing fans are likely to be sufficient for the additional draft loss from the SCR. As was noted in the Andover Report, we think that there may be some substantial conservatism built into the Babcock and Wilcox estimate. For example, the proposal states that the offset of Naughton Units 1 and 2 is just enough

[151] Hines, J.A., Kokkinos, A., Fedock, D., ''Benefits of SCR Design for Constructability'', Power Gen, International 2001, December 11–13, 2001, Las Vegas

[152] Wright, B., Erickson, C., Phillipo, M., ''Keys to Success: SCR Installations at Dominions Brayton Point Units 1 and 3'', Electric Power, May 2008.

[153] Cichanowicz, E., ''Current Capital Cost and Cost-Effectiveness of Power Plant Emissions Control Technologies'', Prepared for Utility Air Regulatory Group, January 2010.

to make it impractical to make a common structure for both SCR reactors. However, examination of the drawings in the proposal shows that Babcock & Wilcox has sized the ductwork to compensate for the offset so that the SCR reactors should be able to be supported with a common structure. Also, the proposal assumes that the abandoned stacks at both sites will be dismantled, although this does not appear to be necessary for Naughton Unit 2 and may not be necessary for Dave Johnston Unit 3 if shorter horizontal duct runs are used. Finally, comparison of the cost estimate provided by PacifiCorp for Naughton Unit 1 and 2, and Naughton 1 especially, to historical costs shows that the costs are well in excess of what other SCRs have cost. This is particularly perplexing because additional fan capacity is not needed, and it is not necessary to move the air preheater.

In light of the proposal and its fairly comprehensive scope of supply, PacifiCorp's capital cost estimate included a number of items that EPA is not including in our cost estimate, as noted below:

1. Process Contingency: Although the CCM permits a process contingency of 5%, in EPA's opinion this is not necessary today for SCR on coal-fired boilers firing the coals used in Wyoming. According to the Department of Energy's National Energy Technology Laboratory,[154] ''Process contingency is intended to compensate for uncertainty in cost estimates caused by performance uncertainties associated with the development status of a technology. Process contingencies are applied to each plant section based on its current technology status.'' According to the document, for commercially available technologies, process contingency could range from 0–10%.

When the CCM was issued in January 2002, SCR was commercially available but was only emerging in application on coal-fired utility boilers in the U.S. According to a study by Cichanowicz,[155] there was only about 13,000 MW of coal-fired capacity using SCR in the U.S. at the end of 2001, with nearly all SCRs installed in the prior two years, meaning that there was very limited long-term experience with SCR on coal-fired units. SCR usage on coal-fired boilers has since increased about ten-fold to about 130,000 MW of coal capacity (over 40% of all U.S. coal capacity), and is therefore a very well proven and well understood technology on a wide range of U.S. coals, including Powder River Basin coal. As a result, the process contingency for SCR on coal-fired utility boilers should be much lower today than what it was when the CCM was issued in January 2002, which was 5%. EPA believes that for SCR applications on utility boilers burning Powder River Basin coals (the Wyoming utility boilers), which are very well understood SCR applications, there should not be any need for process contingency.

2. Project Contingency: Because the cost estimates developed for PacifiCorp are already very conservative and based upon detailed estimates of the labor and materials to build the SCR, a 15% project contingency is excessive. According to the CCM at Section 1.1, Chapter 1, pages 1–4: ''The accuracy of the information in the Manual works at two distinct levels. From a regulatory standpoint, the Manual estimating procedure rests on the notion of the ''study'' (or rough order of magnitude—ROM) estimate, nominally accurate to within ± 30%. This type of estimate is well suited to estimating control system costs intended for use in regulatory development because they do not require detailed site-specific information necessary for industry level analyses.''

The methods and cost elements of the CCM were adapted from the American Association of Cost Engineers, or AACE (CCM Section 1, Chapter 2, pages 2–5). AACE 16R–90 [156] states that, ''Project Contingency is included to cover the costs that would result if a detailed-type costing was followed as in a definitive-type study.'' According to National Energy Technology Laboratory (NETL), ''AACE 16R–90 states that project contingency for a 'budget-type' estimate (AACE Class 4 or 5) should be 15% to 30% of the sum of [bare erected cost], [engineering, procurement, and construction] fees and process contingency.'' [157] AACE 18R–97 defines different classes of estimates, from Class 5 (least detailed) to Class 1 (most detailed).[158] The methodology used in the CCM falls into a Class 4 or Class 5, while the methodology used by PacifiCorp's contractor, Babcock and Wilcox, is clearly a far more detailed estimate that does not leave out any aspect of the project. Therefore, the project contingency factor is not applicable. The 15% project contingency factor in the CCM for SCR is based upon use of the cost-estimating method described in the CCM to develop the Total Direct Capital Costs. It is not intended to apply to a detailed estimate that:

- Includes many cost items not explicitly included in the estimating method described in the CCM to develop the Total Direct Capital Costs and meant to be included in the 15% project contingency; and
- Already has substantial contingency built into it through conservative assumptions.

In fact, the CCM discusses the importance of not double-counting contingency in multiple places, such as retrofit factor and contingency: ''Due to the uncertain nature of many estimates, analysts may want to add an additional contingency (i.e., uncertainty) factor to their estimate. However, the retrofit factor is a kind of contingency factor *and the cost analyst must be careful to not impose a double penalty on the system for the same unforeseen conditions*. Retrofit factors should be reserved for those items directly related to the demolition, fabrication, and installation of the control system. A contingency factor should be reserved (and applied to) only those items that could incur a reasonable but unanticipated increase but are not directly related to the demolition, fabrication, and installation of the system. For example, a hundred year flood may postpone delivery of materials, but their arrival at the job site is not a problem unique to a retrofit situation.'' (emphasis added). The CCM, therefore, explicitly anticipates that some analysts may, incorrectly, apply multiple contingencies for the same areas of uncertainty even when using the methods described in the CCM for estimating Total Direct Capital Costs.

Because the cost estimates developed for PacifiCorp are already very conservative and based upon detailed estimates of the labor and materials to build the SCR, rather than study-level estimates, they have double-counted both the costs that are intended by the CCM to be included in the project contingency when using the CCM method, plus they have added additional contingency in the form of conservative assumptions to address uncertainties in their estimate. For this reason, a 15% project contingency is

[154] U.S. Department of Energy, National Energy Technology Laboratory, ''Cost Estimating Methodology for NETL Assessments of Power Plant Performance'', DOE/NETL–2011/1455, April 2011, pg 4.

[155] From data in Cichanowicz, J., Muzio, L., Hein, M., ''The First 100 GW of SCR in the U.S.,—What Have We Learned?''—2006 Mega Symposium.

[156] AACE Recommended Practice, AACE 16R–90; *www.aacei.org/non/rps/18R-90.pdf.*

[157] U.S. Department of Energy, National Energy Technology Laboratory, ''Cost Estimating Methodology for NETL Assessments of Power Plant Performance'', DOE/NETL–2011/1455, April 2011, pg 5.

[158] AACE Recommended Practice, AACE 16R–87; *www.aacei.org/non/rps/18R-97.pdf.*

excessive, and we have not revised our cost estimates to include one.

3. General Facilities: The cost estimate from Babcock & Wilcox, submitted by PacifiCorp, includes several items that would fall into the category of General Facilities, and in order to avoid double-counting, EPA has not included an additional line item for General Facilities.

Comment: The same commenter suggested that the project-specific scopes were not reasonably accounted for in EPA's cost estimates, particularly for Naughton Units 1 and 2 and Dave Johnston Unit 3. Additional project-specific scope concerns (related to the addition of SCR on-site) include limited capacity of the existing induced-draft fans and auxiliary power system, as well as National Fire Protection Association-related equipment reinforcement requirements. Larger, more powerful, induced-draft fans may overload existing electrical systems, and the electrical systems may require significant modifications. Structural stiffening of the duct work, and equipment downstream of the boiler and upstream of the new fans may also be required by National Fire Protection Association regulations to operate at more negative pressures due to the installation of the SCR. These types of costs are not generally reflected in the base case IPM cost algorithms, but they must be taken into consideration in the development of a project-specific cost estimate. Wyoming had this information available in the Wyoming SIP, but EPA failed to account for this important cost information in its FIP.

Response: All SCR systems experience a pressure drop across the SCR, and therefore some consideration must be made to fan capacity for every SCR system. The algorithm used by EPA explicitly includes a ''balance of plant'' cost line item such as an allowance for additional fans and auxiliary electrical work.[159] As for the duct stiffening, this is frequently necessary when new fans are installed. However, as noted in the proposal by Babcock & Wilcox, additional fan capacity is not expected to be necessary at Naughton Units 1 and 2 or Dave Johnston Unit 3.

Comment: The same commenter alleged that Owner's costs were not reasonably accounted for in EPA's cost estimates, particularly for Naughton Units 1 and 2 and Dave Johnston Unit 3. Owner's Costs include a variety of non-financial costs incurred by the owner to support implementation of the air pollution control project. Owner's Costs are project-specific, but generally include costs incurred by the owner to manage the project, hire and retain staff to support the project, and costs associated with third party assistance associated with project development and financing. Owner's Costs are real costs that the owner will incur during the project and are typically included in cost estimates prepared for large air pollution control retrofit projects. In fact, EPA's Coal Quality Environmental Cost (CUECost) model includes Owner's Costs (or ''Home Office'' costs) in its air pollution control system cost estimating workbook and interrelated set of spreadsheets. *See* CUECost Workbook User's Manual Version 1.0, prepared by Raytheon Engineers & Contractors, Inc. and Eastern Research Group, Inc., EPA Contract No. 68–D7–0001, Appendix B, pages B–3 and B–6. Wyoming had this information available in its SIP, but EPA failed to account for this important cost information in its FIP.

Response: Home office fees are Owner's costs, and these are accounted for in the CCM in the 10% allowance for Engineering and Owner's Costs. *See* CCM at Section 4.2, Chapter 2, page 2–44). As described in Table 2.5 of the CCM, engineering and home office fees represent 10% of purchased equipment costs. In this respect, we agree with the commenter's assertions that the CCM does discuss some of the items that roll up into these line items. For example, the CCM does provide for ''Engineering and Home Office Fees'' that includes the home office and plant support costs described in the comments. We have included the portion of Owner's Costs/Surcharge in the total cost, up to the value specified for ''Engineering and Home Office Fees'' indicated by the CCM, which is 10%.

The cost factors used in the CCM include home office fees in the 10% that is applied to engineering fees; however, the line item for Owner's Cost in the IPM estimate was made zero. The reason Owners Cost was removed is that the CCM includes owner's cost with the 10% for engineering and home office fees. A 10% engineering charge was already applied and therefore an additional allowance for home office fees would be greater than the cost allowed under the CCM. Even if that cost were added at a 5% rate, it would increase capital cost by 5%. This difference would not change the determination.

Comment: The same commenter argued that regional labor concerns were not reasonably accounted for in EPA's cost estimates, particularly for Naughton Units 1 and 2 and Dave Johnston Unit 3. Regional labor concerns are not accounted for in the IPM model. Regional labor characteristics must be taken into consideration in a site-specific cost estimate to account for factors including labor availability, project complexity, local climate, and working conditions. Because the Naughton and Dave Johnston facilities are in relatively remote locations, higher labor rates must be paid to attract the kind of skilled workers required to construct an SCR project. In addition, the locations are subject to extreme cold and wind that can result in significant productivity and construction challenges and delays, adding to the overall project cost. Wyoming had this information available in its SIP, but EPA failed to account for this important cost information in its FIP.

EPA's flawed analyses of incomplete ''new'' cost information directly resulted in EPA's proposed requirements for PacifiCorp to install SCR on Naughton Units 1 and 2 and Dave Johnston Unit 3. In contrast, to be responsive to EPA's request for additional information, PacifiCorp has solicited budgetary project-specific cost information from Babcock and Wilcox, an active and uniquely positioned competitive market participant for SCR technology, for these same units. In conjunction with Sargent & Lundy's expertise, PacifiCorp has incorporated the site-specific budgetary cost information from Babcock and Wilcox into updated EPA CCM side-by-side comparisons with the Andover Report results to further demonstrate the inaccuracies in the new cost information developed by EPA. (The following included tables to summarize the results of these comparisons.) It is important to note that PacifiCorp has utilized a 20-year remaining equipment life and has excluded AFUDC from the results in the tables for comparison purposes.

As demonstrated by the results in the tables, EPA significantly understated costs per ton of pollutant removed. As such, EPA based its cost-effectiveness conclusions on significantly inaccurate information. Before taking any final action on the proposed FIP, EPA must consider in its final BART analyses the additional cost information being provided by PacifiCorp.

Response: EPA disagrees with this comment. The commenter claims that remote locations require offering higher wage rates and that conditions at the site, including inclement weather, reduce worker productivity. Because the commenter claims that these are important factors that impact cost, the

[159] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies—SCR Cost Development Methodology, FINAL'', August 2010, Table 1, pg. 5.

commenter should have provided data to support its assertions. The commenter did not provide any data to demonstrate that wage rates in the area near its facilities are higher than in more populated areas. The commenter also did not provide any specific productivity factors or other evidence to show how the commenter arrived at its man-hour estimates or explain how those estimates differ from a normal productivity. Without such information, EPA cannot review and validate the commenter's claims that labor productivity is low or that labor cost is high.

On the other hand, labor rates for union construction labor are available from the Construction Labor Research Council (CLRC),[160] and these rates are consistently well below what appears to have been assumed in the itemized estimate provided with Basin Electric's comments. The difference is too large to be explained by per diem. Because both Basin Electric and PacifiCorp used Sargent & Lundy to prepare their cost estimates, it is reasonable to assume that both companies have made similar assumptions. Moreover, in addition to the high labor rates assumed, there are additional line item costs for overtime and per diem. As a result, the estimates provided by commenters appears to incorporate additional costs or provisions well beyond the normal costs both in the labor rates and in the line item for additional labor costs.

While EPA welcomes the use of SCR vendor estimates, such as those used by PacifiCorp, or engineering estimates, such as those provided by Basin Electric, specific details supporting the estimates must be provided in order for them to be useful. Without details on the scope of supply, the estimates cannot be used as a reliable source of information because vendor scope could potentially be in error or could be duplicative of other costs included in the estimate elsewhere.

With regard to adjustment for regional labor concerns, neither PacifiCorp nor Basin Electric's submittals were satisfactory. Deficiencies in Basin Electric's submittal with regard to regional labor concerns are addressed elsewhere in these responses to comments. The proposal from Babcock & Wilcox, while showing a total lump sum price, did not demonstrate how they factored in regional labor concerns.

Comment: The IPM methodology relied upon in the Andover Report is inconsistent with the assumptions set forth in the CCM. While EPA states that its revised cost analyses ''followed the structure of the EPA CCM,'' EPA acknowledges that ''we have largely used the Integrated Planning Model cost calculations to estimate direct capital costs and operating and maintenance costs.'' 78 FR 34749. *See also* Andover Update (''In estimating the costs of controls, the following were considered: IPM Cost Models, US EPA Air Pollution CCM.''). The IPM model is a regulatory model that uses cost algorithms developed by Sargent & Lundy to estimate system-wide costs of air pollution technology for adoption of national regulations. The inputs in the IPM model do not conform to the methodology set forth in the CCM, and neither Andover nor EPA offers any explanation for the discrepancies. This failure epitomizes the arbitrary and capricious nature of EPA's decision making.

A careful reading of the Andover Report evidences that Andover only followed the CCM on a limited basis, and in doing so, read into the CCM requirements that are non-existent, while ignoring wholesale many of the CCM's recommendations. The following language from the report illustrates the concern: ''The BART Guidelines recommend use of the EPA Air Pollution CCM, and the methodology used here for estimating costs is consistent with the recommendations in the manual, such as inclusion of taxes, insurance and administrative costs, and the use of overnight cost for capital cost.''

As an initial matter, the CCM does not anywhere recommend the use of ''overnight cost'' for estimating capital costs. *See* Section XI.B.3. The overnight approach assumes construction of a project ''overnight,'' which means a party would not incur any interest charges, including AFUDC, or experience any cost escalations. While a ''constant dollar approach'' may be read to exclude escalation, the CCM does not recommend that users assume that the interest costs related to constructing a capital-intensive, multi-year project will cost the same as an off-the-shelf control technology that can be installed in a day. Furthermore, based on the acknowledgment in its report, Andover appears only to have followed the methodology set forth in the CCM in these three limited respects. In all other respects, Andover relied on the IPM cost algorithms for its SCR estimate, without regard to the CCM. For SNCR capital costs, Andover relied on an assumed $20/kW cost rather than using the IPM algorithms or the methodology set forth in the CCM.

The high-level cost algorithms in the IPM model and the assumed $20/kW capital cost for SNCR resulted in a substantial underestimate of the costs of designing and constructing both the SCR and SNCR systems. For example, the only inputs to the IPM cost modules are unit size, heat input, fuel type, and NO_X removal efficiency. The CCM uses these inputs, but also provides for using SCR design parameters, such as flue gas flow rate, actual stoichiometric ratio (the amount of reagent needed to achieve target NO_X emissions), space velocity and area velocity (a measure of flue gas resident time in the SCR reactor), catalyst volume, SCR reactor dimensions, and reagent consumption. The CCM methodology includes similar design parameters specific to SNCR, which the IPM model does not include and which Andover did not consider in its cost estimate.

Andover also used the IPM model to calculate indirect capital costs in the SCR cost estimate. The IPM model includes in its indirect capital cost algorithm factors for Engineering and Construction Management, Labor, and Contractor Profit/Fees. Andover removed from the IPM capital cost calculation both Owner's Costs and AFUDC. Moreover, the IPM Model does not include a number of other inputs that are included in the CCM, including preproduction costs, inventory capital, and initial catalyst costs, and Andover did not adjust the model to incorporate these additional costs. Andover's selection of certain IPM model inputs and exclusion of inputs in the CCM resulted in the substantial underestimation of the indirect capital costs necessary to design and install an SCR system.

For SNCR, Andover arbitrarily assigned a capital cost of $20/kW, without using the IPM algorithms or performing an analysis of direct and indirect costs consistent with the CCM. Andover relied on the IPM model to calculate operating and maintenance costs except for urea reagent costs for SNCR, which uses factors that differ from those recommended in the CCM and costs utilized by Sargent & Lundy. The model's simplistic treatment of catalyst costs, for example, is inconsistent with the recommendations in the CCM and underestimates annual catalyst replacement costs for SCR and for SNCR. For SNCR, Andover adjusted the urea utilization rate from the IPM model without explanation, which cut in half estimated annual urea costs. Andover also assumed urea would be used as the reagent for SCR, which

[160] Construction Labor Research Council Union Wages and Supplements, available from the National Construction Boilermaker Employers Web site, *www.nacbe.com.*

increased reagent costs above those calculated by Sargent & Lundy based on the use of anhydrous ammonia.

Neither Andover nor EPA explains why the cost estimate uses only limited portions of the CCM, or why Andover believes use of the IPM cost methodology is somehow more representative of the costs of control that would be incurred by Basin Electric for installation of SCR and SNCR systems. It is inherently contradictory, and therefore arbitrary and capricious, for EPA to base its proposed disapproval of Laramie River BART on the alleged failures of Wyoming to follow the CCM, while at the same time relying on a consultant's report that does not comply with those same standards.

Response: EPA disagrees with the commenter. The methodology used by EPA is consistent with the CCM for the following reasons: (1) EPA used the overnight cost method, which excludes certain cost elements such as AFUDC; (2) The comparative nature of BART costs makes use of the IPM algorithms a reasonable approach; and (3) as demonstrated in the Exhibit 14 of Basin Electric's comments, use of the cost equations in the CCM would have actually resulted in lower costs than predicted by the IPM algorithms.

Moreover, both the IPM algorithms and Sargent & Lundy's estimates for Basin Electric are empirically based from data collected at other projects. According to page 21 of Exhibit 14 to Basin Electric's comments: ''. . . Cost estimates prepared for LRS are based on equipment costs and budgetary quotes available from similar projects and Sargent & Lundy's experience with the design and installation of retrofit SNCR and SCR control systems. The LRS cost estimates are conceptual in nature; thus, Sargent & Lundy did not procure equipment quotes specifically for the LRS control systems. Rather, equipment costs for the LRS projects are based on conceptual designs developed for the control systems, preliminary equipment sizing developed for the major pieces of equipment, and recent pricing for similar equipment . . .'' As a result, the estimates provided by Basin Electric are not more valid than those developed by EPA.

Commenter claims that AFUDC should be included in the cost analysis. As described in our responses to other comments, the CCM explicitly excludes AFUDC from control costs, and EPA's estimates were correct in excluding AFUDC. This is central to the overnight cost methodology.

Commenter is critical of EPA's method for estimating SNCR capital cost. With regard to SNCR cost methodology, the cost of SNCR is driven primarily by the operating cost. Capital cost has a small effect on total cost of SNCR. Therefore, a simplifying assumption that yields a reasonable estimate of capital cost will result in an annualized cost accurate to within ± 30%. Based upon input from technology vendors on cost for other units [161] and based upon the fact that EPA's contractor Andover has over 25 years of direct experience designing, specifying and optimizing SNCR systems, $20/kW was a very reasonable estimate. EPA's contractor also reviewed the SNCR algorithms developed by Sargent & Lundy for EPA and is of the opinion that in most cases $20/kW provides a better estimate than the IPM algorithm because the IPM algorithm assumes greater economies of scale than generally exist in SNCR applications.

On the other hand, as will be described later in this response, the high reported furnace temperature at Basin Electric's Laramie River Station means that SNCR will require a more complex injection system and will have a higher urea injection rate than what is typical for most SNCR systems. For this reason EPA has accepted the capital cost of SNCR estimate provided by Basin Electric. In any event, SNCR capital cost generally has a small effect on cost compared to operating cost.

Commenter is critical of EPA's use of the IPM algorithm as not utilizing the same input design parameters. As described in other responses to comments, the IPM algorithm for SCR incorporates either directly or by inference all of the inputs the commenter has raised. But, commenter is incorrect about some of the claimed inputs. Stoichiometric ratio, space velocity, area velocity, catalyst volume, SCR reactor volume, and reagent consumption are not inputs to an SCR design, but are all direct results of design calculations using the inputs of initial NO_X level, final NO_X level (and by inference percent reduction), unit size, heat rate, and fuel characteristics—all inputs to the IPM model. Gas flow rate is also normally calculated based upon fuel type, unit size and heat rate—again, IPM inputs. The IPM model therefore directly develops SCR reactor cost based upon all of the same inputs, but using algorithms based upon a database of the cost of actually constructed units. Other costs, such as preproduction costs and initial inventory of ammonia are incorporated into the capital costs. In any event, these are very small portions of total cost. Initial catalyst cost is incorporated into the direct capital costs of the project in the IPM estimate, and in any event, initial catalyst cost is typically a very small portion of total capital cost.

Commenter is critical of EPA's treatment of the associated costs for replacement catalyst. Regarding treatment of catalyst cost, EPA's approach is reasonable, factoring in the NO_X reduction, coal, facility size, capacity factor, and catalyst cost—all of the same factors that impact catalyst replacement cost. PacifiCorp, on the other hand, uses excessive catalyst replacement costs. PacifiCorp's use of $290/ft^3$ for replacement catalyst cost equates to $10,422/m^3$. This is nearly double the current cost of new catalyst. The difference cannot be accounted for in the labor to install catalyst, which is a very small fraction of the catalyst cost.[162] Moreover, replacement catalyst is frequently regenerated catalyst which costs roughly half the cost of new catalyst. EPA conservatively assumed new catalyst at roughly $5,500/m^3$,[163] when in fact most catalyst replenishments will likely be at a much lower cost due to the extensive availability of regenerated catalyst. As a result, EPA's catalyst costs are much more reasonable and are in fact, conservative in light of the availability of regenerated catalyst.

Commenters are critical of EPA's estimates of SNCR reagent consumption. Because of the importance of reagent consumption on SNCR system capital and operating cost, chemical utilization is an important factor. Utilization is a measure of how efficiently the SNCR reagent reduces NO_X. With SNCR, NO_X reduction does not occur on a one-for-one basis as reagent is added because a portion of the chemical introduced does not contribute to NO_X reduction. The utilization of reagent (normally urea) declines as temperature (or carbon monoxide concentration) increases because more of the urea becomes oxidized (forming NO_X), which reduces the amount of reagent available for the NO_X reduction reaction. The net difference between the amount of NO_X reduced and the amount of NO_X formed equals the overall reduction in NO_X, and at a sufficiently high temperature, NO_X can actually increase as urea is injected. Hence, furnace temperature is

[161] Email from Alex Dainoff, Fuel Tech, to James Staudt, Andover Technology Partners, Wednesday, June 27, 2012.

[162] From data in Cichanowicz, J., Muzio, L., Hein, M., ''The First 100 GW of SCR in the U.S.,—What Have We Learned?''—2006 Mega Symposium, page 4.

[163] Cichanowicz, J.E., ''Current Capital Cost and Cost-Effectiveness of Power Plant Emissions Control Technologies'' Prepared for, Utility Air Regulatory Group, January 2010.

a critical parameter in determining utilization.

Chemical utilization is equal to the percent NO_X reduction divided by the treatment rate, expressed in terms of Normalized Stoichiometric Ratio. The IPM model assumes a default chemical utilization rate of 15%. Commenter states that Andover adjusted the urea utilization rate in the IPM model without explanation. On the contrary, on page 3 of its memo, Andover provided actual utility data and explained why 25% was a more common utilization rate for utility boilers. Chemical utilization is a strong function of furnace temperature, and because chemical consumption is the single largest expense associated with SNCR, using an incorrect chemical utilization will lead to large discrepancies in cost.

Commenter states that the furnace exit gas temperature is 2710 °F. While EPA suspects that this may be in error (high), it is the data provided by the company. If this temperature is correct, SNCR may only be marginally effective. Sargent & Lundy estimated a chemical utilization of 12%, which is possibly optimistic. Information from Fuel Tech, the leading supplier of SNCR technology, stated that at the unusually high furnace exit temperature of 2500 °F, well below 2710 °F assumed by Sargent & Lundy, a 25% reduction was possible at a particular facility from a similar NO_X baseline with a Normalized Stoichiometric Ratio of 1.75 (utilization of 14.3%). Hence, EPA will accept the 12% utilization and 20% NO_X reduction assumed by Sargent & Lundy for Laramie River Station.[164]

The model in the IPM, which was developed by Sargent & Lundy, assumes a utilization rate of 15%, which Andover's data, as well as Fuel Tech's input, demonstrates is too low for most facilities. It is therefore a very conservative estimate of chemical utilization. In fact, Andover reviewed Sargent & Lundy's model when it was developed for EPA and Sargent & Lundy did not provide any supporting data regarding the assumed utilization rate at that time. However, in light of the high assumed furnace temperature at Laramie River Station, EPA is assuming a 12% chemical utilization at a 20% NO_X removal rate for those units.[165]

On the other hand, in the October 28, 2013 memo by Andover for EPA, test data for utility boilers was provided showing that 25% is a more reasonable utilization rate for most units. Moreover, Andover's principal has conducted numerous electric utility SNCR optimization programs, among them are programs described in referenced papers, which makes him qualified to make this determination.[166] [167] [168] So, in applications where more typical furnace temperatures are expected, a chemical utilization rate closer to 25% can be reasonably assumed.

It is also likely that, in light of the higher furnace exit temperature at Laramie River Station, it will be necessary to utilize a more complex and costly injection system that requires injection of urea into convective regions of the furnace using multiple-nozzle lances in addition to the more typical wall injectors. For this reason, EPA is accepting the capital cost developed by Sargent & Lundy for Basin Electric of $16.9 million per unit.

Regarding the reagent used for SCR, as the commenter points out, EPA's initial estimates assumed that urea would be used as the feed reagent for SCR, which results in a higher reagent cost than for anhydrous ammonia. Because commenters have indicated that anhydrous ammonia will be used as a reagent rather than urea, EPA's revised estimates assume ammonia as a reagent. This will result in lower reagent costs. EPA is also using anhydrous ammonia costs provided by Potash Corporation instead of the value provided by the utility.[169] The cost used by EPA represents the actual delivered cost of anhydrous ammonia, as quoted by a major reagent supplier.

Basin Electric provided a site-specific estimate. EPA generally supports the use of vendor quotes and site-specific estimates but only as used within the parameters of the overnight cost methodology and the CCM. The BART Guidelines, are clear that ''[y]ou should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the CCM.'' [170] When supporting documentation to site estimates are not provided, assumptions based upon these cannot be considered.

Much of the documentation owners cite to support additional costs were not provided to us. For instance, although Basin Electric provided a table that listed their cost line items, this spreadsheet (in pdf format), over 600 lines in length (and including line items such as 4″ gravel surfacing and chain link fence), was stripped of all cell calculations, preventing any meaningful review.

There was also inadequate explanation for how man-hour rates were developed. For example, current union boilermaker rates for Lodge 101 (Denver) range from $57.62 per hour for a Journeyman to $60.12 per hour for a Foreman, with apprentices at lower rates.[171] The CLRC reports similar union boilermaker rates in the Mountain-Northern Plains area at $56.59/hr for July 2013.[172] For non-union boilermakers, the cost is expected to be less. Yet, for tasks that appear to be for boilermakers (ductwork) rates of $90.79 per man-hour are used.[173] This is a large unexplained difference in cost. It may be that part of it is per diem ($55/day for over 70 miles and $70/day for over 120 miles per Lodge 101 information), but per diem does not explain the full difference. Per diem, however, is also provided as a separate cost later in the estimate, making the high labor rate more difficult to explain. Some portion may be for overtime, but there is no explanation provided (overtime is also added as a separate line item later in the estimate). Without an explanation it is not possible to evaluate these costs, which clearly deviate from publicly available costs for labor. In addition to not providing the necessary required supporting documentation, Basin Electric did not follow the overnight cost methodology. Thus, Basin Electric has failed to meet the test that is required to support deviations from the CCM.

[164] Email from Alexander Dainoff to Jim Staudt, June 27, 2012.

[165] Exhibit 16 to Basin Electric comment, page 25.

[166] Staudt, J., Casill, R., Tsai, T., Ariagno, L., ''Commercial Application of Urea SNCR for NO_X RACT Compliance on a 112 MWe Pulverized Coal Boiler'', 1995 EPRI/EPA Joint Symposium on Stationary Combustion NO_X Control, Kansas City, May 16–19, 1995.

[167] Staudt, J, Hoover, B., Trautner, P., McCool, S., Frey, J., ''Optimization of Constellation Energy's SNCR System at Crane Units 1 and 2 Using Continuous Ammonia Measurement'', The MEGA Symposium, Baltimore, MD, August 31–September 2, 2010.

[168] Staudt, J.E., Kehrer, K., Poczynec, J., Cote, R., Pierce, R., Afonso, R., and Sload, A., ''Optimizing Selective Non-Catalytic Reduction Systems for Cost-Effective Operation on Coal-Fired Electric Utility Boilers'', presented at ICAC Forum '98, Durham, March 1998.

[169] Email from Potash Corporation to Andover Technology Partners, September 27, 2013.

[170] 70 FR 39166, footnote 15.

[171] Wage & Benefit Information, Western States Field Constructions Bargaining Agreement, Effective January 1, 2013 through September 31, 2013.

[172] Construction Labor Research Council Union Wages and Supplements for the Period 07/01/2008–07/01/2013. Available from the National Association of Construction Boilermaker Employers Web site: *www.nacbe.org.*

[173] Appendices to Exhibit 14. Page 6 of SCR estimate (pdf page 43).

Comment: The IPM methodology relied upon in the Andover Report is inconsistent with the BART Guidelines. The Guidelines require that to conduct a cost analysis, a state must ''[i]dentify parameters'' for emission control and then ''[d]evelop cost estimates based upon those design parameters.'' 70 FR 39166. The cost analysis includes development of ''estimates of capital and annual costs,'' based on the CCM ''where possible,'' but ''tak[ing] into account any site-specific design or other conditions identified above that affect the cost of a particular BART technology option.'' *Id.* Andover failed to adhere to the methodology set forth in the CCM ''where possible.'' More importantly, however, Andover neither followed the three-step process in the BART Guidelines for estimating costs of compliance nor appropriately considered the critical site- and project-specific variables that affect the cost of both SCR and SNCR at Laramie River. EPA's failure to comply with its own Guidelines results in an inaccurate cost estimate that should not form the basis of a BART determination.

Response: EPA disagrees with the commenter. The three step process was followed for all cost estimates for affected Wyoming units. The three-step process requires that states (or EPA): (1) Identify the emissions units being controlled; (2) Identify design parameters for emission controls; and (3) Develop cost estimates based upon those design parameters. The BART affected units were already identified by the State and confirmed by EPA, which addresses step one.

Andover clearly identified design parameters that are included in the spreadsheets associated with the memo under the tab ''Plant Data Summary''. This includes plant data such as fuel, capacity, capacity factor, heat rate, baseline and controlled NO_X level, retrofit factor and firing configuration. These parameters are directly used in the cost analysis that developed capital and annual costs. Andover performed the cost estimates as described in the spreadsheet. Andover considered site and project-specific parameters as described in other responses to comments.

Commenters may disagree with the cost methodology used by EPA, and our response to comments regarding the cost methodology used is in other responses; however, there is no question that EPA followed the three-step process.

Comment: The IPM methodology relied upon in the Andover Report is inconsistent with the three-step process in the BART Guidelines for estimating costs of compliance. The three-step process in the BART Guidelines requires: (1) Identification of emission units being controlled; (2) identification of design parameters for emission controls; and (3) development of cost estimates based on those design parameters. 70 FR 39166. The Andover Report did not adequately define the emission units being controlled, failed to identify appropriate site-specific design parameters that affect cost and performance of these controls; and developed cost estimates that are neither technically indefensible nor representative of the costs of SCR and SNCR systems at Laramie River.

Andover's reliance on the overly simplistic IPM model precluded an appropriate BART analysis. First, because the IPM cost algorithms are designed to provide high-level system cost, Andover used generalized information regarding design and baseline operating conditions at the Laramie River boilers to identify the emission units to be controlled. Second, because the IPM model includes only four inputs, Andover's cost analysis could not account for unit-specific operating parameters that affect both design of the control system and the attendant costs of installing the controls.

As a result, the Andover Report failed to comply with the requirement in the BART Guidelines that cost estimates account for site-specific variables. 70 FR 39166. The site-specific design and operational variables have an important effect on the costs of NO_X control technologies at Laramie River, particularly the installation of SCR. Finally, because Andover used generic inputs to an overly simplistic model, the resulting cost estimate is not technically defensible. As Sargent & Lundy opined ''[b]ased on our evaluation of the Andover cost estimates, it is our opinion that cost estimates prepared by Andover are not reflective of the costs BEPC would incur to install air pollution control systems on LRS Units 1, 2, & 3, and that control technology costs included in the February 7, 2013 Andover Report should not be used to determine BART for the Laramie River generating units.''

Response: EPA disagrees with the commenter. The three step process requires that states (or EPA): (1) Identify the emissions units being controlled; (2) Identify design parameters for emission controls; and (3) Develop cost estimates based upon those design parameters.

Commenter states that ''The Andover Report did not adequately define the emission units being controlled, failed to identify appropriate site-specific design parameters that affect cost and performance of these controls; and developed cost estimates that are neither technically indefensible nor representative of the costs of SCR and SNCR systems at LRS.'' However, the BART affected units were clearly identified and defined in the analysis. The units are identified and described in the memo and the associated spreadsheets.

EPA's contractor clearly identified design parameters that are included in the spreadsheet associated with the memo under the tab ''Plant Data Summary''. This includes plant data such as fuel, capacity, capacity factor, heat rate, baseline and controlled NO_X level, retrofit factor and firing configuration. These parameters are directly used in the cost analysis that developed capital and annual costs. This is the very same data as used by Sargent & Lundy in their analysis, except that EPA did not correct for elevation, which EPA is correcting in this response to comments and calculations.

Andover then performed the cost estimates as described in the spreadsheet using algorithms developed by Sargent & Lundy that utilize the same inputs as used by Sargent & Lundy in their analysis for commenters. Other than a site visit and an adjustment for elevation, commenters have not identified any other inputs that they used that are different or not the direct result of the inputs utilized by EPA. With this response to comments EPA is correcting cost estimates for elevation and EPA has provided detailed comments regarding how site characteristics were addressed using available satellite imagery and why this is a valid approach for providing estimates that are acceptable for BART analysis.

We disagree with commenter's characterization of the cost development methodology contained in IPM as generalized. As noted in the documentation for IPM's cost development methodology for SCR,[174] the cost estimate methodology is based upon two databases of actual SCR projects. These databases include 2004 and 2006 industry cost estimates prepared for the Midwestern Ozone Group, and a proprietary in-house database maintained by Sargent & Lundy. The Midwestern Ozone Group information was cross-referenced with actual 2009 projects, and escalated accordingly. Sargent & Lundy then used the information in these databases to develop the equations described in the cost component taking into account the

[174] *http://www.epa.gov/airmarkets/progsregs/epa-ipm/docs/v410/Appendix52A.pdf.*

pre-control NO_X emission level, degree of reduction, coal type, facility size, and numerous other unit-specific factors. While a costly engineering evaluation that included site visits in addition to our use of satellite imagery would potentially produce a more refined cost estimate, we disagree that our approach has produced cost estimates that do not adequately address site-specific issues. As noted by EPA in our responses related to satellite imagery, EPA's use of satellite imagery enabled us to evaluate each of the major site-specific issues raised by commenters.

Comment: The Andover Report fails to consider site-specific conditions as required by the BART Guidelines. The BART Guidelines and the CCM emphasize the importance of taking into account site-specific conditions in developing a cost estimate, particularly with respect to construction of SCR. 70 FR 39166 (cost estimates should ''into account any site-specific design or other conditions . . .''). See also CCM section 2.4, page 2–40 (with respect to SCR, ''[a]ctual selection of the most cost-effective option should be based on a detailed engineering study and cost quotations from system suppliers.''); *id.* section 2.5.4.1, page 2–27 (''Manual deviates from its standard approach of providing study level costs [for SCR] and, instead, provides a detailed description of the factors'' influencing costs). Yet as Andover acknowledges in its report, its engineers did not visit Laramie River and had no engineering plans, process flow diagrams, or other site-specific information regarding Laramie River when it developed EPA's cost estimate. The only information Andover collected regarding the site was the generating capacity of the station, annual heat input for a baseline period, NO_X emission rates for certain years, and the type of coal burned. As a result, Andover's cost estimation methodology fails to comply with the BART Guidelines or follow the methodology recommended by the CCM, and the final estimate radically underestimates the cost for SCR and SNCR at Laramie River Station.

Moreover, Andover's use of the IPM model compounded its failure to review site-specific considerations relevant to costing SCR or SNCR at Laramie River Station. Indeed, the fact that the model has only four input parameters, and does not take into account other site-specific parameters that are required by the BART Guidelines and recommended by the CCM, renders any resulting cost estimate both technically and legally deficient. As noted by Sargent & Lundy, which developed the IPM algorithms for SCR and SNCR, ''[b]ecause of the limited number of site-specific inputs, the IPM cost algorithms provide only order-of-magnitude control system costs, and do not provide case-by-case project-specific cost estimates meeting the requirements of the BART Guidelines.''

By relying on the IPM model, Andover deliberately skirted the issue of site-specific conditions, other than the most generic inputs of unit size, heat rate, coal type, and a retrofit factor. The Andover Report describes the retrofit factor in such a way as to emphasize its site-specific nature, and yet makes no attempt to carefully analyze the site-specific variables inherent in the application of the retrofit factor: ''The retrofit factor is a subjective factor used to account for estimated difficulty of the retrofit that is unique to the facility. Because site visits were not possible, the retrofit factor was estimated from satellite images that provide some insight to the configuration of the units and degree of congestion around the site and in the vicinity of where the SCR would be installed. These factors impact the ability to locate large cranes on the site—that impact how the SCR is assembled (are large sections lifted into place or is the SCR ''stick built''), how much duct work is needed, if the SCR must be built onto a large, elevated steel structure or can be built near the ground, and if other equipment must be relocated to accommodate the space of the SCR.''

The Andover Report never provides any analysis of these site-specific factors in determining the appropriate retrofit factor for Laramie River. Andover merely notes that the difficulties of retrofitting an SCR unit at Units 1 and 3 is ''average,'' and applies a retrofit factor of 1.0 to Units 1 and 3. Andover does note that retrofit at Unit 2 will be more difficult and added an adjustment for retrofit difficulties at Unit 2, but with no explanation of what unique site-specific conditions contributed to the factor. Instead, the report notes ''a modestly higher SCR retrofit difficulty factor is assumed for Unit 2 because access will be poorer than for Units 1 or 3.'' In sum, Andover makes no adjustments for Units 1 or 3 and accords a 20% cost retrofit factor to Unit 2, though it had previously noted that ''when using the IPM Capital Cost Model, retrofit difficulties associated with an SCR may result in capital cost increases of 30% to 50% over the base model.'' Thus, even when it accords a retrofit factor, as it did for Unit 2, Andover inexplicably low balls that retrofit factor and the attendant cost increase for the SCR system. When Andover's retrofit factors are compared across units and across facilities, it appears that Andover arbitrarily assigned the retrofit factors without adequately accounting for site congestion and constructability issues. Subjective retrofit factors, especially factors randomly chosen without knowledge of site conditions, cannot account for site-specific circumstances as provided in the BART Guidelines.

A comparison of the broad brush approach taken by Andover with the detailed, site specific, scoping-level study taken in the Sargent & Lundy evaluation illustrates the inadequacies with Andover's methodology. As an initial matter, Andover made a fundamental error by failing to account for the effect of site elevation on the project costs. Laramie River Station is situated at 4,750 feet above sea level, resulting in flue gas volumes approximately 20% greater than a similarly sized unit at sea level. These larger flue gas volumes will require larger SCR reactors, larger duct work, and increased structural support. None of these additional costs are accounted for in Andover's estimate because the IPM model assumes the plant is located at sea level. Indeed, IPM model guidance provides that ''elevation of the site must be considered separately and factored into the MW size accordingly due to its effects on the flue gas volume.'' *Id.* (citing the IPM SCR Cost Development Document (August 2010)).

Andover's reliance on the IPM model also resulted in failure to account for a regional labor productivity factor. Regional productivity must be taken into consideration in a site-specific cost estimate to account for local workforce characteristics, labor availability, project location, project complexity, local climate and working conditions. This is a key factor for Laramie River Station, because experienced, knowledgeable labor is difficult to acquire and requires premium pay, further adding to the cost of an SCR system.

The most substantial failing of the Andover Report, however, is its reliance on an aerial photograph of the plant from Google Earth™ to account for site-specific conditions at Laramie River Station. There are numerous important elements that cannot be discerned from an aerial photograph. Specifically, a Google Earth™ photograph cannot identify: (1) The site constraints posed by the location of the coal conveyor rooms; (2) the location of the existing fan buildings and the space constraints between the existing fan buildings and the existing electrostatic precipitators; (3) the necessary information to determine duct work routing and SCR tie-ins to the existing economizers and

air heaters; and (4) information regarding plant subsystems such as the fan capacity, equipment reinforcement, auxiliary power systems, electrical plant system capacity, and other plant subsystems that would be affected by installation and operation of the SCR systems. Further, the aerial photograph provides no information about where the ammonia handling system could be located and necessary pipe routing and other support systems for the ammonia handling system. Nor does it show the need to penetrate the 20-story boiler wall and provide related structural support to install duct work, to provide structural support columns for the SCR reactors in very tight spaces, and the need for special cranes to lift heavy equipment into place in a congested space.

While Andover indicated that some of these site-specific issues are addressed by the retrofit factor, the fact that Andover accorded no retrofit factor to Laramie River Station Units 1 and 3, and low balled the retrofit factor for Unit 2, resulted in a failure to include site-specific costs in its estimate for the Laramie River, in direct contravention of the requirements of the BART Guidelines and suggestions of the CCM. Site-specific conditions are illustrated in Section 5.1.1.1 of the Sargent & Lundy Critique. Finally, Andover failed to include costs for the balance of plant systems required for the SCR. Sargent & Lundy Critique section 5.1.1.3. These items, which require enlarging existing plant systems to provide for the additional power and airflow and other systems necessary to operate the SCRs, include the following: (1) Replacement of induced draft fans by larger fans to support the SCR units; (2) Upgrading of the existing electrical system to support the SCR units; (3) Structural stiffening of the duct work downstream of the SCRs; and (4) Expand existing control system to accommodate six new SCRs (two for each generating unit).

Wyoming used actual, site-specific data regarding the BART-eligible sources in development of its plan. In contrast, EPA did not use site-specific data; instead, it relied on nothing more than aerial photographs available in the public domain.

Response: EPA disagrees with the commenter. First, as discussed elsewhere in responses, we are no longer relying on the IPM cost algorithms, including the application of retrofit factors, to estimate capital costs for the Laramie River Station units. Instead, we have evaluated the cost information provided by Basin Electric in comments and incorporated it as appropriate. Therefore, the arguments made by the commenter related to our use of the IPM algorithm are no longer relevant. Nonetheless, below we discuss how our use of the IPM algorithm in the proposed rule was based on reason and evidence and addressed the site-specific concerns raised by the commenter.

As noted in responses to other comments, EPA adequately addressed site-specific issues in using the IPM SCR cost model. The SCR cost model for IPM, being developed from actual SCR retrofit data, incorporate all of the costs that would normally be associated with an SCR retrofit. As such, retrofit issues that are common to all SCR retrofits are incorporated into the cost. To the extent that there are additional costs, as described in other comments, these can be addressed with the retrofit difficulty factor.

Basin Electric did not follow the BART guidelines in developing their cost analyses, and importantly, did not provide adequate documentation when they deviated from it. There are only very limited situations under which an analyst can depart from the CCM methodology under the BART Guidelines: ''The basis for equipment cost estimates also should be documented, either with data supplied by an equipment vendor (i.e., budget estimates or bids) or by a referenced source (such as the OAQPS CCM, Fifth Edition, February 1996, EPA 453/B–96–001). In order to maintain and improve consistency, cost estimates should be based on the OAQPS CCM, where possible. The CCM addresses most control technologies in sufficient detail for a BART analysis. The cost analysis should also take into account any site-specific design or other conditions identified above that affect the cost.'' 70 FR 39166.

This section of the BART Guidelines makes it clear that the CCM is the intended methodology for conducting a BART cost determination. It also states why: To maintain and improve consistency. However, the CCM does state that site-specific conditions should be incorporated. Site-specific conditions could include space constraints, or a design feature that could complicate installing a control. Importantly, a footnote at the bottom of the same page of the BART Guidelines makes it clear that the analyses should document any deviations from the CCM: ''You should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the CCM.''

The record does not point to any ''unusual circumstance'' that explains why Basin Electric's SCR costs are higher than costs of SCRs at other similar facilities, other than the use of a different cost methodology. In fact, there is nothing in the record to support claims that the cost of SCR was in fact based on detailed site-specific vendor bids, or is in any manner more site-specific than the costs relied upon by EPA in our proposed rule. As an example, the BART application submitted by Basin Electric, and relied upon by Wyoming, shows that only the cost of catalyst is based on a vendor quote.[175] There is no documentation to substantiate that the remaining costs are based on vendor quotes or any other site-specific data. The mere fact that the cost analysis was submitted by Basin Electric is not a basis to conclude that it is somehow highly site-specific. Indeed, even the updated cost information recently submitted by Basin Electric during the comment period is conceptual in nature and not based on vendor quotes. As stated on page 21 of Exhibit 14 to their comments: ''The LRS cost estimates are conceptual in nature; thus, S&L did not procure equipment quotes specifically for the LRS control systems. Rather, equipment costs for the LRS projects are based on conceptual designs developed for the control systems, preliminary equipment sizing developed for the major pieces of equipment, and recent pricing for similar equipment.''

Commenter correctly notes that EPA did not account for elevation. EPA acknowledges that it did not account for elevation in the estimate when using the IPM algorithm and EPA's revised estimate does account for elevation. Commenter states that the regional labor productivity was not factored into EPA's estimate. EPA's estimate did provide an allowance for overtime which is a line item in the estimate labeled ''Labor Adjustment.'' However, commenter did not provide sufficient information to evaluate commenter's estimate and how productivity factors were developed or applied in their estimate to produce their estimate. Labor costs comprise roughly half of the total cost of Basin Electric's estimate of what SCR would cost to install at Laramie River Station, and the significance of this cost makes the lack of information very important.

[175] Wyoming Regional Haze SIP, Attachment A, ''Basin Electric Power Cooperative Laramie River Station Refined BART Visibility Modeling'', prepared for Basin Electric Power Cooperative by Black & Veatch Corporation, July 24, 2008, Attachment 1, page 7 of 7.

Moreover, if this is an important element of commenter's critique of EPA's method, they should have provided sufficient data and supporting justifications for EPA to evaluate commenter's estimate. Notably, this is an important deviation from the CCM and more detailed supporting data should have been provided. As noted in EPA's responses to other comments, the commenter has not provided any data to explain the high labor charge rates or claimed low productivity, as required under the BART Guidelines.

Commenter claims that ''a Google Earth™ photograph cannot identify: (1) The site constraints posed by the location of the coal conveyor rooms''. On the contrary, the coal conveyors are prominent features in the images [176] and it is clear from the coal conveyors where the coal conveyor rooms are located. This location for coal conveyor rooms is not unusual. In general, coal conveyor rooms are located either to one side of the boiler or the other, depending upon the location of the coal pile to the boiler. Moreover, the resulting need to route ductwork through the boiler building wall is commonly performed in SCR retrofits. As such, this is not an unusual issue and should not significantly impact retrofit cost versus a typical retrofit.

Commenter claims that EPA did not account for ''(2) the location of the existing FD fan buildings and the space constraints between the existing FD fan buildings and the existing electrostatic precipitators . . .'' It is clear from the images that there is a building located immediately below where the SCR reactor would be located, and this is not an unusual situation. The location of the ESP is also very clearly shown on the images. The space between the ESP and the fan rooms is also visible from the photo in Figure 6a of the Andover memo. Nevertheless, having to install SCR support structure in close proximity to existing buildings or equipment, as may be necessary at Laramie River, is not unusual because SCRs are commonly erected in that location and buildings or other equipment are normally in the area below. It is also possible that SCR support structure could be built to largely avoid the forced draft fan buildings by extending beyond them with a common support structure for all three, or at least more than one, SCR reactor. The space between the ESP and the fan buildings is only significant with regard to location of a crane for erection of Unit 2, and this is why a higher retrofit difficulty is assumed for Unit 2. Middle unit crane access issues are not unusual either and have been addressed numerous ways, including assembling a temporary crane above the boiler building, as was performed at the Brayton Point plant for their Unit 3.

Commenter claims that EPA did not adequately account for ''(3) the necessary information to determine duct work routing and SCR tie-ins to the existing economizers and air heaters . . .'' EPA disagrees with the commenter. The general routing can be estimated from the images, and there was nothing in the images to suggest any problems with routing ductwork. It was apparent that a penetration was necessary in the boiler building, which is routinely necessary because boilers are typically housed in boiler buildings and the SCRs are not, making penetration of a boiler building wall necessary in any SCR retrofits where the boiler is in a boiler building. This is the case with most SCR retrofits. In fact, Figures 2 and 3 of Exhibit 16 to Basin Electric's comments demonstrate that the ductwork tie in to the boiler and associated modifications are similar to what is done routinely and ductwork length is reasonable. For an SCR cost estimate, the most critical cost issues that require closer examination than possible with a satellite photo is if it is necessary to move major pieces of equipment, such as an air preheater, in order to accommodate the ductwork. Had it been determined that relocating the air preheater was necessary, this would entail some significant additional cost over what would be considered a ''typical'' retrofit. Basin Electric did not indicate any such need and therefore their costs for ductwork are expected to be within the normal cost for a retrofit.

Commenter claims that EPA did not properly account for ''(4) information regarding plant subsystems such as the FD fan capacity, equipment reinforcement, auxiliary power systems, electrical plant system capacity, and other plant subsystems that would be affected by installation and operation of the SCR systems. Sargent & Lundy Critique section 5.1.1.2.–5.1.1.3.'' The IPM algorithm explicitly assumes that it will be necessary to replace the forced draft (FD) fan [177] and make modifications to auxiliary electrical systems and associated boiler structure and has a line item cost for this. As such this was addressed in the cost.

Commenter claims that ''Further, the aerial photograph provides no information about where the ammonia handling system could be located, and necessary pipe routing and other support systems for the ammonia handling system. Nor does it show the need to penetrate the 20-story boiler wall and provide related structural support to install duct work, to provide structural support columns for the SCR reactors in very tight spaces, and the need for special cranes to lift heavy equipment into place in a congested space.'' EPA disagrees. It is apparent from the image, and the open spaces on the images that have no structures, that there are any of a number of places at the Laramie River site that the ammonia storage system could be located. Selecting the ideal location does require closer examination of the site than possible with an aerial photograph. However, the impact on total capital cost is relatively small. With regard to modifications to the boiler building, this has already been discussed along with the installation of structural support columns for the SCR and need for cranes. These modifications are routinely necessary for SCR retrofits and would be factored into the historical SCR projects that the IPM algorithms are based upon.

Expansion of the controls is another cost identified by commenters as not adequately addressed by EPA. EPA disagrees with commenter. Every SCR retrofit requires expansion of controls. So, this is incorporated into the IPM model. There may be specific issues that may be associated with tailoring the controls to the existing site that make this portion of the cost slightly more or slightly less expensive than normal. But, controls are generally a small contributor to total SCR cost and these differences would have a minor effect.

Comment: When all of the site-specific and balance of plant conditions are included, Sargent & Lundy estimated that the capital cost of installing SCR at Laramie River Station is $746,906,000. This is twice as much as Andover's flawed cost estimate of $330,000,000. The discrepancy in the cost estimates is not surprising in light of Andover's failure to comply with the BART Guidelines and to follow the CCM where appropriate. For example, the site congestion and balance-of-plant upgrades alone total approximately $290 million—costs which accurately reflect site-specific constraints to installing SCR, but which were not accounted for in the Andover Report. While the costs estimated in the Sargent

[176] *Review of Estimated Compliance Costs for Wyoming Electric Generating (EGUs)—Revision of Previous Memo,* memo from Jim Staudt, Andover Technology Partners, to Doug Grano, EC/R, Inc., February 7, 2013, Figures 6a and 6b.

[177] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies—SCR Cost Development Methodology, FINAL'', August 2010.

& Lundy Evaluation are significantly greater than those set forth in the Andover Report, they are a far more accurate and representative assessment of the costs of installing SCR and SNCR at Laramie River Station.

Response: EPA disagrees with the commenter, having found the following discrepancies in the commenter's estimates for cost of SCR and SNCR at Laramie River Station:

1. Apparently Double-Counts General Facilities

The itemized cost estimate in the Appendices to Exhibit 14 includes items that are normally incorporated into the General Facilities cost, while Sargent & Lundy took an additional provision for General Facilities (Exhibit 14 at page 31). General Facilities are costs that are not directly associated with the process equipment, and include such things as access roads, access platforms, safety equipment (such as eye-wash stations), etc. On the other hand, ductwork, piping, structural steel to support process equipment are direct capital cost and do not fall into the category of General Facilities. The itemized cost estimate by Sargent & Lundy in the Appendices to Exhibit 14, however, includes the cost of many items that would normally fall under the category of General Facilities. This includes the cost of roads and a parking area ($930,226 at page 2 of SCR estimate), eye wash stations (page 3), a pre-engineered building for the construction warehouse ($780,000 page 8), fire protection systems (page 16), gratings, handrails, ladders (page 22). As a result, Sargent & Lundy double counts for General Facilities by having these costs accounted for in the itemized direct capital cost as well as in its Indirect Capital costs.

2. Labor Rates in Sargent & Lundy's Itemized Capital Cost in the Appendices to Exhibit 14 Appear To Already Have a Significant Contingency Built in and Additional Costs for Overtime and Per Diem—Already Incorporating Contingency in Apparent Double-Counting of Contingency

According to Basin Electric's comments, their labor rates were taken from the publication RS Means.[178] However, examples of how the labor rates from RS Means were used to develop what was ultimately used in their estimate were not provided. RS Means is a subscription service that can cost up to $1,100, depending upon the package.

However, there are publicly available labor rates for the major construction trades from the CLRC that are available for download at the National Association of Construction Boilermaker Employers' Web site.[179] The Laramie River Station estimate assumes boilermaker labor tasks with a labor rate of $90.79/hr while according to the CLRC boilermaker rates in the Mountain and Northwest Plains as of July 2013 were $56.79/hour, which is close to the values for Lodge 101 of the boilermakers union, ranging from $57.62 for a Journeyman to $60.12 for a Foreman, and lower rates for apprentices.

The Laramie River estimate assumes pipefitter labor tasks with a labor rate of $81.72/hour, while according to the CLRC pipefitter rates in the Mountain and Northwest Plains as of July 2013 were $43.57/hour. Plumber rates are only slightly higher are $47.47/hour. In fact, there are several areas where the Laramie River itemized estimated rates in the Appendices far exceed Mountain-Northern Plains reported rates for union craft labor for July 2013. The ratio of assumed rate versus reported is as high as 187%. It is only for the installation of an architectural door that the reported rate for carpenters is even close to the assumed rate for Laramie River Station. Carpenters also build concrete forms.[180] For carpenters doing concrete forms, the paid rate ($65.02—see page 2 of estimate) is more than double the union rate. For most of these crafts, these rates cannot be explained by per diem. For example, if *all* of the boilermakers lived 120 miles from the location and were eligible for $70/day per diem and also drove 120 miles each way every day of an eight-hour shift receiving $0.565/mile, that would only increase the hourly rate by $25.70, which does not explain the $34+ difference.

It may be that Sargent & Lundy applied an escalation to the labor charges for future expected rates. If so, this is inconsistent with the CCM, which does not allow for this. In light of the fact that labor comprises the single largest expense and is nearly half of the total direct cost of the project—per Basin Electric's estimate in the Appendices to Exhibit 14—the high labor rates assumed by Sargent & Lundy are critical cost items that require much more complete explanation than was provided.

3. Additional Labor Costs

In addition to the high labor rates incorporated into Sargent & Lundy's itemized estimate, roughly $47 million in additional labor costs are included for five ten-hour days and six ten-hour days and per diem.[181] This schedule (which results in overtime) is stated to be necessary to attract necessary labor.[182] No further explanation is provided for these costs. It is unclear why it is necessary to offer these in light of the fact that power plant construction labor demand is well off of its peak and is especially low in the Western States. As a key power plant construction trade, boilermaker man-hours are a good indication of general power plant construction activity. Boilermaker man-hours demonstrate that labor demand is well off of past peaks, and for the first two quarters of 2013, boilermaker employment in the Western States is 18.6% below 2012 levels for the same period. Boilermaker man-hours in 2012 nationally totaled 27 million, well off the years of 2006 through 2009 that were all above 30 million, and peaked in 2008 at over 40 million. 2012 levels were still below 2010's rate of 28 million.[183]

It is also unclear why such high expenses are needed for overtime and per diem, particularly in light of the high assumed wage rates discussed earlier. Moreover, the need for overtime needs to be incorporated into a discussion of schedule, which was not provided. The time available for installing the SCRs may allow for spreading of activities over longer periods of time than in past retrofit efforts that may have allowed less time than the RHR, which allows for five years. However, there is no discussion of the need for overtime in the context of schedule.

4. Quantity and Cost of Materials and Impact on Labor Hours

Throughout the spreadsheets provided as Attachments to Exhibit 14 to Basin Electric's comments, no information was provided on how the quantities of materials were estimated, such as tons of steel for ductwork, etc. This makes it impossible to evaluate if Sargent & Lundy estimated the correct quantities of materials, associated material costs, or the associated hours

[178] Exhibit 14, page 25.

[179] Construction Labor Research Council Union Wages and Supplements, available from the National Construction Boilermaker Employers Web site, *www.nacbe.com.*

[180] Bureau of Labor Statistics, 47–2031 Carpenters, *www.bls.gov/oes/current/oes472031.htm.*

[181] Appendices to Exhibit 14 of Basin Electric comments, page 4 of SCR estimate.

[182] Exhibit 14, page 25.

[183] *http://nacbe.com/manhour-reports/.* Also see: Staudt, J.E., ''Engineering and Economic Factors Affecting the Installation of Control Technologies—An update'', Developed for U.S. EPA Clean Air Markets Division, December 15, 2011, figure 2–2 on page 12.

associated with erecting the materials. The spreadsheet was provided as a pdf document, and therefore any underlying equations could not be examined. As noted in our comments to other questions, it is necessary to include documentation for any additional information used for the cost calculations that differs from the CCM. Since the quantities of materials also relate to the labor needed to install the materials, this also impacts the labor costs estimated by Sargent & Lundy.

5. AFUDC

Sargent and Lundy includes AFUDC in its SCR cost. This cost of about $22–$23 million cost per unit, for a total of $68 million, is not permissible under the CCM as discussed in response to other comments.

6. Process Contingency

Although the CCM shows an allowable process contingency of 5% for SCR, in EPA's opinion, this is not necessary today for SCR on coal-fired boilers firing the coals used in Wyoming. According to the Department of Energy's NETL: [184] ''Process contingency is intended to compensate for uncertainty in cost estimates caused by performance uncertainties associated with the development status of a technology. Process contingencies are applied to each plant section based on its current technology status.'' According to this document, for commercially available technologies process contingency could range from 0–10%. When the CCM was issued in January 2002, SCR was commercially available but was only emerging in application on coal-fired utility boilers in the U.S. According to a study by Cichanowicz,[185] at the end of 2001, there was only about 13,000 MW of coal SCR capacity in the U.S., with nearly all installed in the prior two years, meaning that there was very limited long-term experience with SCR on U.S. coals. SCR usage on coal-fired boilers has since increased about ten times to about 130,000 MW of coal capacity (over 40% of all coal capacity) and is therefore a very well proven and well understood technology on a wide range of U.S. coals. As a result, the process contingency for SCR on coal-fired utility boilers should be much lower today than what it was when the CCM was issued in January 2002—5%. EPA believes that for SCR applications on utility boilers burning Powder River Basin coals, which are very well understood SCR applications, there should not be a need for process contingency.

7. Sulfur Trioxide (SO_3) Mitigation Measures Are Not Needed

Sargent & Lundy assumed that a SO_3 mitigation system is necessary for the Laramie River SCR. We disagree as this adds unnecessary capital and operating cost. An SO_3 mitigation system is unnecessary because of the relatively low sulfur content of the coal and the fact that the coal fly ash is high in free calcium oxide. The available free lime will neutralize the SO_3 making SO_3 mitigation unnecessary. In fact, in the model they developed for the IPM, Sargent & Lundy assumed that SO_3 mitigation was unnecessary for boilers using coals with SO_2 levels below 3 lb/MMBtu, making it unnecessary for Laramie River, which fires a much lower sulfur coal from the Dry Fork Mine, with an uncontrolled SO_2 rate of roughly 0.50 to 1.0 lb/MMBtu.[186] [187] [188] In fact, Sargent & Lundy uses the same rationale for arguing (correctly) that air preheater modifications are not necessary to address potential ammonium bisulfate formation from an SNCR system.[189] Moreover, even if SO_3 formation were a legitimate concern, low oxidation SCR catalysts are available and any additional cost impact would be very small. SO_3 mitigation is not a large capital cost compared to the other costs that contribute to the SCR, but it is illustrative of the manner in which Sargent & Lundy has taken efforts to overdesign the system while adding unnecessary costs.

8. Labor Productivity Factor Apparently Not Site-Specific

Basin Electric has commented that local labor productivity is a major factor that impacts cost. However, it appears that the labor productivity factor being selected at the site may have been broadly applied by Sargent & Lundy at multiple sites in an inconsistent manner. According to Basin Electric, ''Labor productivity accounts for things such as labor availability, site access and working conditions, climate, season changes, and project size and complexity'' and it is a common practice on large construction projects to apply a productivity factor to account for local worker productivity and construction site conditions. A labor productivity factor of 1.15 was selected to account for labor productivity in the southeastern Wyoming region as compared to the benchmark of 1.00 for Texas, cited in Basin Electric's comments. Although the comments refer to the Compass International Global Construction Cost and Reference Yearbook, the value in that document for the southeastern Wyoming region is not expressly stated, and it is unclear if 1.15 is, in fact, the value in that document as we were not able to confirm the number in the document referenced.[190]

In another Sargent & Lundy BART analysis, performed for Oklahoma Gas & Electric Sooner Units 1 & 2 and Muskogee Units 4 & 5, Sargent & Lundy also used a Labor Productivity factor of 1.15.[191] Since the Oklahoma Gas & Electric units are in a climate far more similar to Texas (only about 150 miles from Texas) than Wyoming, and the Oklahoma plant likely draws from similar construction labor pools as Texas, it seems that they should have a similar productivity factor as Texas. It is also unusual that Sargent & Lundy would select the exact same productivity factor for the Oklahoma BART analysis as Laramie River Station's BART analysis, although these facilities are roughly six hundred to seven hundred miles away, with very different climates and draw on different labor pools. In this case, it appears that Sargent & Lundy has used the same productivity factor for Laramie River Station as for other BART analyses. In summary, there is no evidence that the labor productivity factors suggested by the commenter are site-specific.

9. Contractor's Fees and Profit Are Excessive

Commenter's estimate for contractor's fees Expense and Profit total nearly $51 million, or 14% of the estimated total Labor, Material, Subcontract, and Process Equipment.[192] By contrast, Sargent & Lundy estimated for the IPM algorithm total contractor fees and profits of 10% of the estimated Labor,

[184] U.S. Department of Energy, National Energy Technology Laboratory, ''Cost Estimating Methodology for NETL Assessments of Power Plant Performance'', DOE/NETL–2011/1455, April 2011, pg 4.

[185] From data in Cichanowicz, J., Muzio, L., Hein, M., ''The First 100 GW of SCR in the U.S.,—What Have We Learned?''—2006 Mega Symposium.

[186] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies—SCR Cost Development Methodology, FINAL'', August 2010, page 5.

[187] *http://www.westernfuels.org/member-services/mining-operations*

[188] BNSF Mine Guide, at *www.bnsf.com/customers/pdf/mineguide.pdf.* SO_2 calculated by multiplying sulfur content (expressed as a decimal) times 2 million and dividing by the heating value in Btu/lb.

[189] Exhibit 14, page 17.

[190] Exhibit 14, page 25.

[191] Oklahoma Gas & Electric, ''Sooner Units 1 & 2, Muskogee Units 4 & 5 Dry FGD BART Analysis Follow-Up Report'', December 28, 2009, see pdf pages 28 and 43.

[192] Attachments to Exhibit 14 to Basin Electric Comments, page 4 of SCR estimate.

Material, Subcontract, and Process Equipment cost. When this higher percentage is combined with a high direct cost, the contractor's fees become excessive. The high contractor fees and profits assumed in the Laramie River Station estimate also seem inconsistent with a weak power plant construction market, as demonstrated by the boilermaker man-hour data discussed earlier.

10. Labor, Material, Subcontract, and Process Equipment Costs in Excess of Historical Norms, With Substantial Additional and Unnecessary Costs Added

It is not unusual for owners to report excessive costs because owners are most interested in a cost estimate that has a very low risk of an overrun rather than a ±30% cost estimate, which has a higher risk of overrun (about 50%), but is likely to be a better estimate of actual project cost. Commenter's estimate for total Labor, Material, Subcontract, and Process Equipment is $361 million. Adding Sargent & Lundy's estimated cost of scaffolding, freight, and consumables that is in the Appendices to Basin Electric's Exhibit 14 to their estimated Labor and Material, Subcontract, and Process Equipment raises the cost to $383 million (Sargent & Lundy provides no supporting documentation for this $22 million in additional cost). This is 27% above the expected cost of $301 million (with elevation accounted for) developed from the IPM SCR model, which is developed from actual project data. This suggests that Sargent & Lundy made a fairly conservative estimate of these costs for Basin Electric. But, in addition to the cost of Labor, Material, Subcontract, and Process Equipment, scaffolding, consumables and freight, in their estimate for Basin Electric, Sargent & Lundy added very high costs for overtime, per diem (that were not explained as required) and high costs for contractor's fees and profits, and then added *additional* project and process contingencies, unnecessary costs such as SO_3 mitigation and un-allowed costs such as AFUDC that increased total project cost to nearly $750 million—about double what they had estimated in 2008.[193] The combined effect of the conservative cost estimates with additional contingencies or unnecessary cost adders, results in what appears to be an unrealistically high cost.

11. Project Contingency of 15% Is Too High in Light of the Method Used and Very Conservative Underlying Assumptions

Because the cost estimates developed for Basin Electric are already very conservative, and based upon detailed estimates of the labor and materials to build the SCR, a 15% project contingency is excessive. According to the CCM, Section 1.1 Chapter 1, page 1–4: ''The accuracy of the information in the Manual works at two distinct levels. From a regulatory standpoint, the Manual estimating procedure rests on the notion of the ''study'' (or rough order of magnitude—ROM) estimate, nominally accurate to within ± 30%. This type of estimate is well suited to estimating control system costs intended for use in regulatory development because they do not require detailed site-specific information necessary for industry level analyses.''

The methods and cost elements of the CCM were adapted from the American Association of Cost Engineers (AACE) (CCM Section 1, Chapter 2, p 2–5). AACE 16R–90 [194] states that, ''Project Contingency is included to cover the costs that would result if a detailed-type costing was followed as in a definitive-type study.'' According to NETL,[195] ''AACE 16R–90 states that project contingency for a ''budget-type'' estimate (AACE Class 4 or 5) should be 15% to 30% of the sum of BEC, EPC fees and process contingency.'' AACE 18R–97 [196] defines different classes of estimates, from 5 (least detailed) to 1 (most detailed). The methodology used in the CCM falls into a Class 4 or Class 5, while the methodology used by Basin Electric in their comments, with hundreds of line items and thousands of input parameters, is clearly a far more detailed estimate that does not leave out any aspect of the project.

The 15% project contingency factor in the CCM for SCR shown in Table 2.5 on page 2–44 of Section 4.2 Chapter 2 is based upon use of the cost estimating method described in the CCM to develop the Total Direct Capital Costs. It is not intended to apply to a detailed estimate that: (1) Includes many cost items not explicitly included in the estimating method described in the CCM to develop the Total Direct Capital Costs and meant to be included in the 15% project contingency, and (2) Already has substantial contingency built into it through conservative assumptions.

In fact, the CCM discusses the importance of not double-counting contingency in multiple places such as retrofit factor and contingency at page 2–30 of Chapter 2—Cost Estimation: Concepts and Methodology: ''Due to the uncertain nature of many estimates, analysts may want to add an additional contingency (i.e., uncertainty) factor to their estimate. However, the retrofit factor is a kind of contingency factor *and the cost analyst must be careful to not impose a double penalty on the system for the same unforeseen conditions.* Retrofit factors should be reserved for those items directly related to the demolition, fabrication, and installation of the control system. A contingency factor should be reserved (and applied to) only those items that could incur a reasonable but unanticipated increase but are not directly related to the demolition, fabrication, and installation of the system. For example, a hundred year flood may postpone delivery of materials, but their arrival at the job site is not a problem unique to a retrofit situation.'' (emphasis added). The CCM, therefore, explicitly anticipates that some analysts may, incorrectly, apply multiple contingencies for the same areas of uncertainty even when using the methods described in the CCM for estimating Total Direct Capital Costs.

Because the cost estimates developed for Basin Electric are already very conservative and based upon detailed estimates of the labor and materials to build the SCR, rather than study-level estimates, they have double-counted both the costs that are intended by the CCM to be included in the project contingency when using the CCM method, plus they have added additional contingency in the form of conservative assumptions to address uncertainties in their estimate. For this reason a 15% project contingency is excessive for their estimate.

12. The Cost Information in Exhibit 14 Does Not Appear To Be Consistent With the Cost Information in the Appendices to Exhibit 14

The table on page 4 of the SCR cost estimate for Units 1–3 shows a total cost of $481 million. This is inconsistent with the Total Direct Capital Costs shown on page 31 of Exhibit 14, which total $465 million. It is unclear what the cause of the $16 million difference is. In either case, EPA believes that the cost is not adequately explained.

[193] Attachments to Exhibit 14 to Basin Electric Comments, page 4 of SCR estimate and Exhibit 14 page 31.

[194] AACE Recommended Practice, AACE 16R–90; *www.aacei.org/non/rps/18R-90.pdf.*

[195] U.S. Department of Energy, National Energy Technology Laboratory, ''Cost Estimating Methodology for NETL Assessments of Power Plant Performance'', DOE/NETL–2011/1455, April 2011, pg 5.

[196] AACE Recommended Practice, AACE 16R–87; *www.aacei.org/non/rps/18R-97.pdf.*

13. Laramie River Station Does Not Require an SNCR System With Four Injection Zones

The Laramie River Station is a base loaded unit, with capacity factors well above 80%. This means that the boiler rarely operates at part load. Sargent & Lundy designed the SNCR system with four injection zones to accommodate the ''entire load and temperature range within the boiler''.[197] Because the unit will rarely operate at part load and the emission rate is a 30-day average, there is likely no need for four injection levels. Four injection levels are only required on load-following units that spend a significant amount of time at low or middle loads or units that must comply with emission limits of much shorter averaging times, such as 24 hour averages or less. In practice, this system would be designed with two, or, at most, three injection zones. The additional injection zone adds cost in the form of additional injectors and furnace penetrations, and associated labor. On the other hand, EPA has accepted Basin Electric's estimate of the cost of the SNCR system. Although we believe that there would likely be fewer injection levels, based upon the furnace exit temperature reported by the company, we expect that at least one of the injection levels will require a convective zone injection system using multi-nozzle lances, which will increase the cost. Therefore, these effects offset one another and we are accepting the cost provided by Basin Electric.

14. Similar Labor Rate Issues for SNCR as for SCR Estimate

Examination of the labor rates for the Sargent & Lundy cost estimate revealed that Sargent & Lundy assumed the same high labor rates for crafts as they did for SCR without the rates explained sufficiently. They also assumed an additional $2.7 million in additional overtime and per diem rates that are not explained.[198]

For these reasons, the Sargent & Lundy capital cost estimates for SCR and SNCR are deficient, for the reasons as described above. However, because EPA expects that the SNCR injection system necessary for Laramie River Station may require more costly multiple-nozzle lances in at least one injection zone, this should offset the cost impact of the deficiencies we have identified, and we are accepting the capital cost of the SNCR system provided by Basin Electric equal to $16.9 million per unit.

For the SCR capital cost at Laramie River, EPA is accepting some costs and not others, as described in more detail in supporting information with these comments.[199]

Comment: We are very concerned to see that EPA has introduced a retrofit factor greater than ''1'' (the default) for 13 of the 15 EGUs evaluated. The IPM model used by EPA to estimate control costs in Wyoming already includes retrofit costs in its costing algorithms. It is generally accepted that retrofit projects will incur costs over and above those for a ''greenfield'' site, and most of those retrofit costs are already included in the database used to generate the IPM algorithms. So, unless a particular situation is so extreme as to warrant an additional retrofit factor, applying a retrofit factor to an algorithm that already includes retrofit costs is double counting those costs. Not only is the application of a retrofit factor not mentioned in the **Federal Register** Notice, its only supporting documentation appears in docket item EPA–R08–OAR–2012–0026–0086[1], ''Review of Estimated Compliance Costs for Wyoming Electricity Generating Units (EGUs)—revision of previous memo'': ''Selective Catalytic NO_X Reduction (SCR) capital cost is estimated using the IPM algorithms with retrofit factors adjusted on a unit by unit basis.'' The retrofit factor is a subjective factor used to account for the estimated difficulty of the retrofit that is unique to the facility. Because site visits were not possible, the retrofit factor was estimated from satellite images that provide some insight to the configuration of the units and degree of congestion around the site and in the vicinity of where the SCR would be installed. These factors impact the ability to locate large cranes on the site—that impact how the SCR is assembled (are large sections lifted into place or is the SCR ''stick built''), how much ductwork is needed, if the SCR must be built onto a large, elevated steel structure or can be built near the ground, and if other equipment must be relocated to accommodate the space of the SCR. When using the IPM capital cost model, retrofit difficulties associated with an SCR may result in capital cost increases of 30 to 50% over the base model.[200]

A proper estimation of retrofit factors involves more than an inspection of satellite images. For example, EPA Region 8 visited the four-unit Colstrip power plant in Montana before concluding that a retrofit factor of ''1'' was appropriate. Once such a site visit is conducted, retrofit factors should be developed for each element of the cost analysis—not the ''blanket'' approach used by EPA here.

Another example is provided by Sargent & Lundy's ''Constructability Review'' for addition of SCR at Navajo Generating Station. Navajo Generating Station consists of three EGUs, with the middle unit constrained by a coal conveyor passing through. Even so, Sargent & Lundy estimated that construction effort would be only 25% greater for Unit 2 than for the other two units. EPA needs to clarify why they chose to add a retrofit factor greater than 1 (average retrofit factor of 1.33 for 13 of 15 units reviewed) to the costs when retrofit costs are already contained within data used to generate the IPM and when neither Wyoming, Basin Electric, or PacifiCorp included a comparable retrofit factor. By adding the retrofit factor, EPA has overestimated the costs of SCR: in the case of Dave Johnston Units 1, 2, and 4 and Wyodak Unit 1, this has led EPA to propose less-efficient controls than SCR.

Chapter 2, ''Cost Estimation: Concepts and Methodology'' of the CCM provides a lengthy discussion of retrofit factors. The CCM addresses SCR retrofits specifically ''A correction factor for a new installation versus a retrofit installation is included to adjust the capital costs'' (Section 4, NO_X Controls, Section 4.2, NO_X Post- Combustion, Chapter 2, SCR). The CCM retrofit factor is $728/MMBtu/hr and, for medium-size boilers like Dave Johnston Unit 4 or Wyodak, this represents a 23%–24% increase in the direct capital cost.

EPA inconsistently and without explanation applied ''retrofit factors'' that improperly increase the reported capital costs of SCR installation. Such retrofit factors are intended to account for the increased costs of unusually difficult retrofits, i.e., those that present more challenges than assumed for the ''typical'' SCR retrofit, for which costs are described by the IPM SCR cost module. The EPA unjustifiably determined that only two of the fifteen Wyoming EGUs (Laramie River Station Units 1 and 3) would be of average difficulty, while applying increases of between 20 and 50 percent to the remaining units. The EPA applied such retrofit factors even for units for which the source owners did not claim above-average installation challenges. The

[197] Exhibit 14, page 17.

[198] Appendices to Exhibit 14 of Basin Electric comments, page 4 of SNCR estimate.

[199] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013.

[200] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies SCR Cost Development Methodology FINAL'', August 2010, Project 12301–007, Perrin Quarles Associates, Inc. p 1.

EPA's exclusive evidence of potential retrofit challenges—satellite images—does not support the EPA's application of retrofit factors. (The commenter submitted a TSD that elaborated on some of these points.)

The descriptions given of the EPA's view of the retrofit difficulty at each plant based on satellite images make it clear that many guesses were made and/or that the EPA erred on the side of high retrofit difficulty to be conservative. Being conservative in cost estimates may be acceptable if such conservatism is applied equally to all units and if the EPA provides a reasoned basis for its assumptions, but the EPA did not do so. The EPA assumed that the two units in the middle at Jim Bridger ''will be somewhat more difficult to achieve access for equipment'' and applied the highest retrofit factor of 1.5 to these units, while for Laramie River Unit 2, the EPA assumed more retrofit difficulty due to its location in the middle but only applied a retrofit factor of 1.2. The EPA essentially made guesses that the middle units may have more retrofit difficulty, and did not consistently apply the same retrofit factors to the middle units of these two plants. We found it telling that PacifiCorp's capital cost estimates for installation of SCR systems at all four Jim Bridger units (which are of equal size to each other) were identical for each unit, and the same is true of Basin Electric's capital cost estimates for installation of SCR systems at all three Laramie River units (which are also equal in size). Given these facts, the EPA has no basis for its application of a higher SCR retrofit factor for the units in the middle (i.e., Jim Bridger Units 2 and 3 and Laramie River Unit 2).

To summarize, the EPA has not adequately justified the application of any retrofit factor to the costs of SCR at any of the EGUs in Wyoming, and the EPA should not apply retrofit factors to increase the capital costs of SCR without adequate justification for those retrofit factors. Further, the EPA must remember that the IPM cost module for SCR is based on actual cost data for SCR retrofits, and that virtually all SCR retrofits would have some space constraints due to most power plants being built without ever planning for SCR installation. The EPA should only apply a retrofit factor if it can justify that the cost of SCR installation would noticeably deviate from a typical installation.

Response: As noted by commenter, the IPM cost model is based upon actual retrofits and incorporates all of the costs normally associated with retrofit of an SCR. This means that many of the retrofit issues commenters have raised are incorporated into the base cost, which can then be adjusted with a retrofit difficulty factor based upon the perceived difficulty of the retrofit relative to typical retrofits. EPA disagrees with the commenter in its assertion that the EPA inconsistently and without explanation applied ''retrofit factors'' that improperly increase the reported capital costs of SCR installation.

EPA applied retrofit factors while carefully considering site conditions. Where there was uncertainty, EPA did lean toward making more conservative estimates, which would explain the average retrofit factor exceeding 1.0. Section 2.5.3.2 of the CCM discusses retrofit cost considerations as ''Probably the most subjective part of a cost estimate.'' The CCM states that, ''Since each retrofit installation is unique, no general factors can be developed. A general rule of thumb as a starting point for developing an appropriate retrofit factor is: The larger the system, the more complex (more auxiliary equipment needed), and the lower the cost level (e.g. study level, rather than detailed), the greater the magnitude of the retrofit factor.'' Thus, retrofit difficulty factor may factor in some uncertainty and be higher to account for that.

In the cost estimates EPA developed, retrofit factors were determined from satellite images using the following considerations: (1) Available access to and from the site for transportation of equipment and available space for laying down construction materials; (2) Location of equipment relative to each other and whether there is a substantial amount of demolition necessary in order to make room for SCR equipment; and (3) Access for a crane. At a highly congested site, crane access can be difficult and may entail a more costly approach. Access for a crane is a particular concern for internal units when units are located side-by-side.

There are no strict guidelines used for determining the actual value of retrofit factors. They are a matter of judgment. Per the CCM at 2.5.4.2 (page 2–28, Chapter 2 Cost Estimation: Concepts and Methodology), ''[t]he proper application of a retrofit factor is as much an art as it is a science, in that it requires a good deal of insight, experience, and intuition on the part of the analyst.'' What follows is the explanation for each of the retrofit factors used at each of the sites. As will be shown, the retrofit factors were the result of a thoughtful process, and were not arbitrary.

With regard to the Dave Johnson site, this is one of the more congested sites in Wyoming. Per the Andover report on estimated costs of NO_X controls: ''Based upon the close proximity of the boilers and associated equipment to one another, decommissioned chimneys that will limit access and ability to move a crane, the coal pile and coal conveyors that also limits access to the area of the units where construction would occur, the office building that is adjacent to Unit 1 and limits access, and the Unit 4 scrubber, retrofit of an SCR on Units 1–4 would likely entail a significantly higher than average retrofit cost. Unit 4 probably has the best access of all of the units because there may be some space between the boiler and the scrubber, but it is difficult to say for sure from the image and therefore a conservatively high retrofit difficulty was used for unit 4 that is consistent with the other units.'' [201] As noted, the site is fairly congested for all units, justifying a high retrofit factor of 1.5 for all units, not just the middle units.

Jim Bridger is also limited on space, but not so much so as Dave Johnston: ''Based upon the satellite photo, the SCR reactors would likely be installed above the ESPs and ductwork routed to the boiler. The boilers do not appear to be unusually constrained from the perspective of installing SCR ductwork; however, access for construction equipment will be much more difficult to achieve for the two middle units. The scrubbers and associated piping will limit access somewhat. Unit 4 access will be limited somewhat by the coal conveyor and because it's scrubber takes up more room than the other scrubbers. For this reason a retrofit difficulty factor of 1.5 is assumed for the middle units and 1.25 for units 1 and 4.'' [202]

On the other hand, as is apparent from the satellite image, Laramie River is a more open site than Dave Johnson. Satellite images ''show a less constrained site than Dave Johnston, with good access to both units 1 and 3. The coal conveyor is clearly visible and will be an obstruction for the unit 2 SCR. As a result, retrofit difficulty of installing SCR is expected to be average, except possibly for unit 2 which is located between units 1 and 3. Access of a crane will be somewhat more challenging for Unit 2 and an SCR retrofit difficulty of 1.2 is assumed for estimating SCR capital cost. In all cases

[201] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013, p. 30; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013.

[202] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013, p. 35; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013.

the SCR reactor is likely to be installed above the ESP ductwork.'' [203]

Naughton is much more congested than Laramie River, although access appears slightly better than for Dave Johnson. Per the Andover report:

> Babcock & Wilcox provided cost estimates for the Naughton unit 1 & 2 SCRs. Babcock & Wilcox's estimate assumed that it would be necessary to demolish stacks that will be abandoned after a planned scrubber installation and they also determined that additional fan capacity was not necessary. Babcock & Wilcox also assumed a complex support structure would be needed, which adds cost. Babcock and Wilcox also stated that units 1 and 2 are slightly offset which makes it impractical to build a common support structure for the SCR reactors; however, . . . Babcock & Wilcox has used a longer horizontal duct run on the unit 1 SCR which places the unit 1 and unit 2 SCR reactors side-by-side so that a common support structure is likely to be possible, offering some potential savings from what they have estimated. Alternatively, a shorter horizontal duct run on unit 1 may make it possible to avoid demolition of the unit 1 chimney that will be abandoned. When using the IPM algorithm a retrofit difficulty factor of 1.3 is assumed. This was based upon the fact that it appeared to be a less congested site than Dave Johnston, but there were potential challenges, such as the chimneys, that could result in longer duct runs or additional demolition.
>
> For unit 3 it is also unclear if there is enough space to install the SCR reactor on the same side of the chimney as the boiler, which, means that demolition of that chimney may be needed. There appears to be access for construction equipment, such as a crane, in the area east of the plant (the upper part of the photo) and to the north of unit 3. In estimating the cost of the SCR for unit 3, retrofit difficulty is above average because more lengthy duct runs or demolition of the chimney are likely needed, and an assumed retrofit difficulty factor of 1.3 is assumed for unit 3.

Hence, Naughton is assumed to be an above average retrofit difficulty because of the potential for some significant interference from some equipment and the possible need for longer than average duct runs.

For Wyodak, access to the site appears good, but there are some possible issues that might come up if the existing (but decommissioned) ESP needs to be demolished, which was the reason for the above average retrofit factor of 1.3. Per the Andover report:

> In the event SCR were installed at the site, the SCR reactor would likely be located above the existing (but decommissioned) ESP shown between the boiler building and the chimney . . . There is ample room on the site for lay down of material. Location of a crane near the construction site appears to be possible; however, in every direction from the boiler there is a potential interference that might complicate crane location relative to the lay-down area. Therefore, the difficulty of this retrofit is probably average to perhaps above average. A conservative estimate of retrofit difficulty of 1.3 is assumed, although a closer examination of the site may show that a lower retrofit difficulty may be possible.[204]

As a result, the retrofit factors used were not arbitrary but the result of a thoughtful process of examining the site for issues that would affect the difficulty of the retrofit.

Comment: EPA's application of the maximum retrofit factor (1.5) to Dave Johnston Units 1 and 2 is unsupported and leads to a significant $1.5 million/year and $800/ton overestimation of average costs. Neither PacifiCorp nor Wyoming proposed a retrofit factor for these units. It is especially surprising that EPA has applied the maximum retrofit factor to all four units at Dave Johnston, and that even an ''end'' unit like Unit 1 is considered to have the highest degree of retrofit difficulty. It has been our experience that end units are typically the easiest to retrofit, while the more difficult retrofits are associated with ''middle'' units. Once the SCR costs are corrected to address the issue discussed above, the incremental costs become $5,700–$5,800/ton (versus $7,050/ton at Bridger Unit 2).

The EPA applied a retrofit factor of 1.5 to Dave Johnston Units 1–3, citing close proximity of boilers, decommissioned chimneys and the coal pile. It is not clear that these issues warrant a 50 percent increase in SCR costs due to retrofit difficulty at Units 1–3.

Response: EPA's estimate of retrofit factor is based upon a thoughtful consideration of the various factors described in the previous response. With regard to the Dave Johnston site, this appears to be one of the more difficult sites in Wyoming from the perspective of retrofit.

Comment: EPA's application of the maximum retrofit factor (1.5) to SCR on Dave Johnston Unit 4 is unsupported and leads to a significant $3.8 million/year and $900/ton overestimation of average costs. Neither PacifiCorp nor Wyoming proposed a retrofit factor for this unit. We disagree with EPA's decision to apply the maximum retrofit factor to all four units at Dave Johnston, and that even an ''end'' unit like Unit 4 is considered to have the highest degree of retrofit difficulty. It has been our experience that end units are typically the easiest to retrofit, while the more difficult retrofits are associated with ''middle'' units.

The CCM retrofit factor is $728/MMBtu/hr and, for medium-size boilers like Dave Johnston Unit 4 or Wyodak. This represents a 23%–24% increase in the direct capital cost. For Dave Johnston Unit 4, the EPA applied a retrofit factor of 1.5 to the costs of SCR because ''[t]here may be more space available near unit 4 for a retrofit of SCR, but this is unclear from the photograph.'' This is a very questionable basis to justify increasing the costs of SCR by 50 percent.

Response: Because of the congestion of the overall site at Dave Johnson plant, a large reduction of retrofit factor to well below 1.5 was not justified even though Unit 4 is an end unit. There appears to be other equipment in the vicinity of Unit 4 that would obstruct access and maintaining a retrofit factor of 1.5 seems reasonable.

Comment: The EPA assigned a 1.3 retrofit factor to the SCR cost estimate for the single unit Wyodak plant. It appears the main reason for applying this factor is because the SCR would likely have to be placed on top of the decommissioned ESP, and that space constraints were not an issue. Although the EPA summarized that ''. . . the difficulty of this retrofit is probably average to above average since it is common to have some relocation of equipment,'' the EPA applied a 30 percent increase to the SCR costs for Wyodak.

Response: As noted by the commenter, EPA determined that a retrofit factor of 1.3 is conservative at Wyodak. But, because of the possible items that are apparent (as described above) from the satellite photograph and that could get in the way, it was not regarded as below average difficulty, but perhaps something slightly above average. EPA therefore does not believe that the retrofit factor should be lower than 1.0 and it may be as high as 1.3. EPA is basing its cost analysis on the more conservative estimate.

Comment: In Montana, EPA used the IPM algorithms for some sources and not for others, asserting only that use of IPM ''was intended to ensure that the direct capital costs reflect the most recent cost levels seen in the marketplace'' and thus did not over-estimate costs. 77 FR 57888. EPA also used IPM for the Arizona FIP but failed to address how its use was consistent with either the BART Guidelines or the CCM. 77 FR 72512 (Dec. 5, 2012). In Colorado, EPA said the State's cost

[203] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013, p. 39; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013.

[204] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013, p. 52; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013.

estimates for Craig Unit 1 deviated from the CCM but accepted them anyway because EPA was pleased with a State law that required emission reductions from certain other EGUs. 77 FR 76875. EPA sometimes supplements the CCM with a rule that installed SCR retrofit costs must fall between $79/kW and $316/kW, unless the state justifies a deviation from this range. North Dakota SIP, 77 FR 20929; Montana FIP, 77 FR 57889; New Mexico FIP, 76 FR 52388, 52392. EPA has proposed to apply this rule to the Wyoming SIP and FIP, 78 FR 34738. This cost range is derived from ''industry studies'' and does not appear anywhere in the CCM. Supplementing the CCM with this new requirement is inconsistent from the terms of the CCM and BART Guidelines.

Response: We agree that we have used the IPM control cost algorithms in various regional haze rulemakings as noted by the commenter. And as noted by the commenter, our intent in using the IPM cost algorithms was to ensure that our capital cost estimates for SCR reflect those currently found in the marketplace. Elsewhere in these responses to comments, we have documented in some detail how our use of the IPM algorithms is consistent with the BART Guidelines and CCM. We disagree that we have supplemented the CCM with a rule that retrofit costs must fall between $79/kW and $316/kW—2010 dollars ($81/kW to $324/kW when escalated to 2013 dollars), which was the range of actual installed capital costs found in recent industry studies as cited in our final rule for North Dakota. In the North Dakota rulemaking, we used this information to assess whether costs supplied to EPA by states or sources were consistent with those observed in the industry for numerous other retrofits spanning a wide range of retrofit difficulties. As such, this in no way represents a requirement imposed by EPA; rather, it represents a very practical means by which EPA has gauged the validity of costs. We acknowledge that, given exceptionally difficult retrofit circumstances or other factors, it is possible for a particular retrofit to fall outside of this range. In fact, we note that our revised costs supporting this final rule are in some cases in excess of the cited range. Our revised SCR costs for BART EGUs, when represented on a dollar per kilowatt basis, range from $222/kW to $467/kW, with a median cost of $322/kW (2013 dollars).[205] From this, it is clear that we have not established a requirement that SCR capital costs fall within the cited range as suggested by the commenter. For our Colorado final action, we are currently in litigation over our approval of the State's BART determination for Craig.

Comment: EPA inappropriately claimed that ''Wyoming's SCR capital costs on a $/kW basis often exceeded real-world industry costs'' (78 FR 34748) and then refers to industry studies conducted between 2002 and 2007 that report installed unit capital costs actually incurred by owners broadly ranging ''from $79/kW to $316/kW (2010 dollars).'' *Id.* EPA also noted ''instances'' in its proposed FIP ''in which Wyoming's source-based cost analyses did not follow the methods set forth in the EPA CCM.'' EPA is simply incorrect in stating that Wyoming's analyses were flawed and did not reflect real-world industry costs for the units being analyzed. The commenter states that they are presenting information on the ''real-world'' costs for the upcoming Jim Bridger Units 3 and 4 SCR projects, which recently were competitively bid for engineering, procurement, and construction contracts to be installed in accordance with the requirements in the Wyoming SIP. These real-world costs, in turn, can easily be compared to the costs assessed by Wyoming and by EPA in their BART determinations.

Even when including AFUDC, the Wyoming SIP cost basis aligns closely with the EPA's cost basis, with each agency again understating real world costs for these projects. By extension, this real-world cost information for Jim Bridger Units 3 and 4 validates the methodology used by Wyoming to determine cost information for each of PacifiCorp's BART Units. This information clearly disputes EPA's claims in its FIP that Wyoming ''did not properly or reasonably take into consideration the costs of compliance'' and that its SCR cost analyses exceeded real world industry costs and were flawed. *Id.*

Response: We disagree that it was incorrect for EPA to state Wyoming's cost analyses for SCR were flawed. As discussed in our proposed rule, EPA found several deficiencies with Wyoming's cost analyses, including: Inclusion of AFUDC, inclusion of some inappropriate owner's costs, insufficient documentation to support vendor estimates or bids, and use of incorrect baseline emission rates. 78 FR 34749. These deficiencies represented a departure from the procedures outlined in the CCM and BART Guidelines and, particularly when taken collectively, had a material impact on the cost estimates. We have addressed why each of these items are inconsistent with the CCM and BART Guidelines in other response to comments here.

Moreover, since the time of the State's analyses, EPA has been made aware of additional pertinent information by commenters, much of which has been incorporated into the revised costs presented in this final rulemaking. Examples include: Inclusion of certain costs submitted by the facility owner's where appropriately documented, shorter useful life for one facility, correction for elevation, use of ammonia instead of urea as SCR reagent, revised SNCR reagent consumption for some facilities, and use of busbar costs for auxiliary power in place of market prices.

Regarding whether Wyoming's costs exceeded real world industry costs, see EPA's response to comment immediately above.

Comment: Wyoming did not overestimate the costs of SCR. The EPA claimed to have identified a number of flaws in Wyoming's cost analyses for SCR (78 FR 34748), but only identified one flaw—that ''Wyoming's SCR capital costs on a $/kW basis often exceeded real-world industry costs.'' The EPA's use of the word ''often'' indicates that Wyoming's costs did not always exceed real-world costs, but the EPA did not explain which costs exceeded real-world costs and which did not.

The EPA specifically alleged only that the cost estimates for Dave Johnston Units 3 and 4, Naughton Units 1, 2, and 3, and Wyodak ''are in excess of the range of capital costs documented by various studies for actual installations,'' and that the EPA based this conclusion of five industry studies conducted between 2002 and 2007. The EPA did not explain why the State was wrong to rely on vendor submitted, engineered, site-specific cost estimates instead of reports of installations at other facilities as long as a decade ago. The State's costs of compliance are based on site-specific capital costs, operating costs, and maintenance costs provided by the companies in their applications for a state BART permit, and over 50 percent of the costs of compliance is driven by the capital cost to engineer and physically install a SCR system. Such costs must be evaluated on a case-by-case basis in accordance with Appendix Y. Variable costs, including reagent usage (ammonia), account only for 2 to 7 percent of SCR costs.

The BART Guidelines not only allow, but encourage states to take into account

[205] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs,'' October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013; Wyoming EGU BART and Reasonable Progress Costs for Jim Bridger—10/28/2013.

site-specific conditions that impact the cost of installing emission controls. Until the EPA explains why it was unreasonable for Wyoming to prefer site-specific, real-world costs over speculative extrapolation of costs incurred at other facilities many years past, the EPA cannot lawfully displace the State's judgment simply because EPA prefers one approach over the other.

Response: We disagree that EPA only identified one material flaw in Wyoming's costs estimates for SCR. See EPA's response to comment immediately above where we identify several flaws. Because Wyoming's approach to estimating SCR costs was not consistent with the BART Guidelines and CCM, it was appropriate for EPA to revise these costs in our proposed rule.

We agree that the BART Guidelines encourage states to take into account site-specific conditions that impact the cost of installing emission controls. However, we disagree with the commenter's characterization of the State's costs of compliance for SCR as site-specific in nature on the mere basis that they were submitted by the sources. There is nothing in the record to support claims that these costs were in fact based on detailed site-specific vendor bids, or are in any manner more site-specific than those costs relied upon by EPA in our proposed rule. As an example, the BART application submitted by PacifiCorp for Dave Johnston Unit 3, and relied upon by Wyoming, states that: ''Costs and schedules for the LNBs and OFA, SNCR, and SCR were furnished to CH2M HILL by PacifiCorp, developed using Sargent and Lundy's internal proprietary database, and supplemented (as needed) by vendor-obtained price quotes. The relative accuracy of these cost estimates is stated by S&L to be in the range of plus or minus 20 percent.'' [206]

From this, it is clear that PacifiCorp, and thereby also the State, based SCR costs on ''S&Ls internal database'' and not a unique quotation specific to Dave Johnston Unit 3 supplied by an SCR vendor. Moreover, while the BART application refers to ''vendor-obtained quotes,'' it does not make clear for which items these quotes were obtained, if any, nor are any quotes for SCR included in the BART application. Instead, the total installed capital cost of SCR (with combustion controls) is shown in PacifiCorp's economic analysis as a single line item with a value of $83,301,164, but without any detail or supporting documentation.[207] In an update to its initial BART application, PacifiCorp subsequently increased the capital cost to $129,700,000, but again without any detail or supporting documentation.[208]

We note that the capital cost estimates for SCR presented by EPA in our proposed rule were also based on the Sargent & Lundy databases as these in turn underlie the IPM cost algorithms. As such, the commenter is mistaken when characterizing Wyoming's capital costs as superior to those from EPA. However, the costs presented by EPA went on to correct the deficiencies that we have identified elsewhere (e.g., improper calculation of baseline emissions). Therefore, the capital costs provided from each agency were ultimately generated in a similar manner, but only the overall costs generated by EPA were in keeping with the BART Guidelines and CCM.

It is notable that, in order to address our concerns regarding lack of site-specific costs and associated documentation, the Wyoming sources have submitted additional cost information during the comment period for the proposed rule. The PacifiCorp comments include capital costs based on a vendor budgetary quote from Babcock and Wilcox, as opposed to capital costs based on the Sargent & Lundy databases. Similarly, Basin Electric has submitted a consultant's report that, while conceptual in nature and without vendor-based equipment costs, provides a more detailed analysis of SCR costs for Laramie River than before. These submittals contain more recent and more detailed cost information than relied upon by Wyoming in their cost analyses. The submission of these updated costs from the sources, intended to supply more site-specific costs to EPA, belies claims by the commenter that the costs originally used by the State were ''vendor submitted, engineered, site-specific cost estimates.''

Comment: We would like to point out that while the EPA makes a point of saying in their proposed rule that they have followed their own guidelines in the CCM, that manual has not been updated since 2002. Representative Lummis of Wyoming has authored language to require the EPA to update its cost manual for the first time in over a decade. The old data in the old handbook no longer reflects the true costs of designing, engineering and installing controls. Before rejecting state data on the cost of compliance, the EPA must engage states and regulating entities to acquire real-world cost data and use that data to update its manual.

Response: We consider the use of the broader costing methodology used by the CCM, the overnight method, as crucial to our ability to assess the reasonableness of the costs of compliance. Evaluation of the cost of compliance factor requires an evaluation of the cost-effectiveness associated with the various control options considered for the facility. A proper evaluation of cost-effectiveness allows for a reasoned comparison not only of different control options for a given facility, but also of the relative costs of controls for similar facilities. If the cost-effectiveness of a control technology for a particular facility is outside the range for other similar facilities, the control technology may be rejected as not cost-effective. In order for this type of comparison to be meaningful, the cost estimates for these facilities must be performed in a consistent manner. Without an ''apples-to-apples'' comparison of costs, it is impossible to draw rational conclusions about the reasonableness of the costs of compliance for particular control options. Use of the CCM methodology is intended to allow a fair comparison of pollution control costs between similar applications for regulatory purposes.

Just as importantly, while we have followed the broad methodology of the CCM as required by the BART Guidelines, we have also accounted for the cost of controls currently observed in the marketplace. In particular, our use of the cost calculations taken from the IPM, released in 2010, is designed to reflect modern day costs. Moreover, operation and maintenance costs for items such as labor, reagent, and catalyst, reflect current market values. In short, we have adhered to the broad overnight cost methodology specified in the CCM, while updating both capital and operation and maintenance costs to reflect current market conditions. Therefore, the commenter is mistaken in asserting that our costs are based on outdated information.

Comment: EPA's regional haze FIP also is improper because it assumes BART NO_X controls over $5,000 per ton are ''cost effective.'' (See e.g., 77 FR 33053.) Appendix Y, on the other hand, states that BART NO_X control costs per ton above $1,500 are not ''cost

[206] Wyoming Regional Haze SIP, Attachment A, ''BART Analysis for Dave Johnston Unit 3,'' prepared for PacifiCorp by CH2MHILL, December 2007, page 3–7.

[207] Wyoming Regional Haze SIP, Attachment A, ''BART Analysis for Dave Johnston Unit 3,'' prepared for PacifiCorp by CH2MHILL, December 2008, Attachment 1.

[208] Wyoming Regional Haze SIP, Attachment A, ''Addendum to Dave Johnston Unit 3 BART Report,'' prepared for PacifiCorp by CH2MHILL, March 26, 2008, Attachment 1.

effective.'' In the preamble to the BART Guidelines, EPA suggests that 75% of the EGUs would have BART NO_X removal costs between $100 and $1,000 per ton, and almost all of the remaining EGUs could install sufficient BART NO_X control technology for less than $1,500 per ton. EPA also recognized in the preamble that SCR was generally not cost effective for EGUs, except for EGUs with cyclone boilers (where the cost per ton was less than $1,500 per ton, with an average of $900 per ton). Based upon EPA's Preamble, BART NO_X control technology that costs more than $1,500 per ton should not be considered ''cost effective.'' Here, EPA found BART NO_X controls with a ''cost effectiveness'' number much more than $1,500 per ton to be ''cost effective.'' Therefore, EPA should withdraw its regional haze FIP.

Response: We disagree with this comment. For each source subject-to-BART, the RHR, at 40 CFR 51.308(e)(1)(ii)(A), requires that states identify the level of control representing BART after considering the factors set out in CAA section 169A(g), as follows: ''States must identify the best system of continuous emission control technology for each source subject to BART taking into account the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of visibility improvement that may be expected from available control technology.'' 70 FR 39158. Because the preamble generally discusses costs, this does not obviate the need for states (or EPA in the case of a FIP) to identify the best system of continuous emission control technology on a case-by-case basis considering the five factors. While EPA described various dollar-per-ton costs as ''cost-effective'' in various preambles (e.g., 70 FR 39135–39136), EPA did not establish an upper cost effectiveness threshold for BART determinations.

Comment: Far from stating that the CCM must be the exclusive source of cost information, the BART Guidelines state that ''[t]he basis for equipment cost estimates also should be documented, either with data supplied by all equipment vendor (i.e., budget estimates or bids) or by a referenced source (such as the EPA CCM]).'' Although the BART Guidelines then say that cost estimates should he based on the CCM, it also says that the CCM should only he used ''where possible.'' The Guidelines go on to say that the CCM ''addresses most control technologies in sufficient detail for a BART analysis.''

The CCM does not say that it addresses 'all' control technologies, just ''most'', implying that the CCM does not supply all of the necessary information. Further, the Guidelines state that the cost analysis should ''take into account any site-specific design or other conditions identified above that affect the cost of a particular BART technology option.'' Again, the CCM acknowledges that there are conditions, design scenarios, etc. that are not addressed in the CCM but that exist in the real world that must be addressed.

Response: We acknowledge that our BART guidelines state, ''In order to maintain and improve consistency, cost estimates should be based on the [CCM], where possible'' and that ''[w]e believe that the [CCM] provides a good-reference tool for cost calculations, but if there are elements or sources that are not addressed by the Control CCM or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information.'' The CCM contains two types of information: (1) Study level cost estimates of capital and operation and maintenance costs for certain specific types of pollution control equipment, such as SCR, and (2) a broader costing methodology, known as the overnight method. We agree that the language of the BART Guidelines does not require strict adherence to the study level equations and cost methods used to estimate capital and operating and maintenance costs.

We consider the use of the broader costing methodology used by the CCM, the overnight method, as crucial to our ability to assess the reasonableness of the costs of compliance. Evaluation of the cost of compliance factor requires an evaluation of the cost-effectiveness associated with the various control options considered for the facility. A proper evaluation of cost-effectiveness allows for a reasoned comparison not only of different control options for a given facility, but also of the relative costs of controls for similar facilities. If the cost-effectiveness of a control technology for a particular facility is outside the range for other similar facilities, the control technology may be rejected as not cost-effective. In order for this type of comparison to be meaningful, the cost estimates for these facilities must be performed in a consistent manner. Without an ''apples-to-apples'' comparison of costs, it is impossible to draw rational conclusions about the reasonableness of the costs of compliance for particular control options. Use of the CCM methodology is intended to allow a fair comparison of pollution control costs between similar applications for regulatory purposes. This is why the BART guidelines specify the use of the CCM where possible and why it is reasonable for us to insist that the CCM methodology be observed in the cost estimate process. The overnight method has been used for decades for regulatory control technology cost analyses, and its use ensures equitable BART determinations across states and across sources.

Comment: Although EPA contends that States must conform in all respects to the Agency's CCM, its own consultant ignores the Manual when calculating capital costs and operating and maintenance costs, and instead uses an entirely different methodology called the IPM. 78 FR 34749. EPA tries to finesse this problem by asserting that the consultant followed ''the structure of'' the CCM and BART Guidelines, *id.,* but that simply is not true. The IPM is a fundamentally different tool and uses a fundamentally different methodology than the CCM—it does not follow the CCM. Therefore, to rely on the consultant's cost report to disapprove Wyoming's cost analysis and BART analysis would be arbitrary and capricious, and not in accordance with law.

Response: We disagree. As noted elsewhere in these responses to comments, in our revised cost estimates, we have followed the broad methodology of the CCM, referred to as the overnight method, while updating capital and operating and maintenance costs to reflect current real-world costs. In doing so, we directed our consultant (Andover) to reconcile anything in the IPM cost algorithms that would be inconsistent with the CCM's overnight method. For example, the IPM cost algorithms include AFUDC, which as we have established elsewhere in these response to comments, is not part of the overnight costs. Accordingly, our consultant eliminated this cost when utilizing costs derived IPM cost algorithms. In effect, we have ''squared'' the IPM-based costs with the methodology required by the CCM.

Comment: EPA's average cost effectiveness for combustion controls and SCR for the Laramie River units is higher than Wyoming's average cost effectiveness. *Compare, e.g.,* 78 FR 34773, Table 36 (Wyoming's SCR average cost effectiveness of $3,372/ton for Unit 1) with 78 FR 34775, Table 39 (EPA's SCR average cost effectiveness of $3.718/ton for Unit 1). The higher the cost effectiveness of a given technology, the stronger the case for rejecting it. If the State was justified in rejecting SCR based on its lower predicted cost of SCR, it would be even more justified in

rejecting SCR if it had used EPA's higher cost. The outcome would not have changed, and so any error alleged by EPA is not material.

EPA's incremental cost effectiveness for combustion controls plus SCR, compared with the cost effectiveness of combustion controls plus SNCR, is lower than Wyoming's incremental cost effectiveness. However, in considering cost effectiveness for purposes of both its SIP disapproval and its FIP proposal, EPA cites and relies primarily on the average cost effectiveness for SCR, not the incremental cost. 78 FR 34776 (''[T]he cost-effectiveness for new LNBs with OFA and SCR ranges from approximately $3600/ton to $3900/ton with significant visibility improvement at the most impacted Class I area. . . . When considering the cost effectiveness and visibility improvement of new LNBs plus OFA and SCR, it is within the range of what EPA has found reasonable for BART in other SIP and FIP actions.'') EPA refers to incremental cost only incidentally—not as an affirmative reason for disapproving Wyoming's BART. *Id.* (''We also propose to find that the incremental cost-effectiveness does not preclude the selection of new LNBs with OFA and SCR.'').

Response: We disagree. The commenter fails to note that the visibility improvement presented by EPA in our proposed rule is higher than that found by the State. The tables cited by the commenter show a visibility improvement from SCR of 0.44 deciviews resulting from the State's analysis, while EPA's analysis showed a visibility improvement of 0.79 deciviews. We found that, when balancing all of the BART factors, this level of visibility improvement was significant enough to justify the costs associated with SCR. In our revised visibility modeling analysis for this final rule, we have presented a lower visibility improvement for Laramie River Unit 1 of 0.57 deciviews. We continue to find that this level of visibility improvement, and consideration of the other BART factors, warrants installation of SCR. The same can be said for the other two Laramie River units.

Additionally, the SCR costs and visibility improvement for the Laramie River units provided by the State and EPA are not directly comparable. In the BART application submitted by Basin Electric, and relied upon by the State, and unlike in the case of SNCR, no additional combustion controls are assumed in the SCR control scenario. Since the time that Basin Electric submitted the BART application to the State, additional combustion controls have been installed on the Laramie River units. We have taken account of these additional controls in our analyses. When assessing the emission reductions from SCR (or SNCR), and the associated costs and visibility improvement, we incorporated the actual emission rates currently being achieved with the additional combustion controls. We have presented the costs of compliance and visibility for the additional combustion controls plus SCR, much in the same way that the State presented the same factors for the PacifiCorp units.

Comment: The costs of SCR plus combustion controls are cost effective at all of the Wyoming EGUs regardless of whether the costs are based on EPA's cost analyses or the commenter's 2012 cost analyses conducted for the original Wyoming SIP. SCR costs for each EGU in Wyoming, show that SCR plus combustion controls is very cost effective for all BART-subject EGUs and also Dave Johnston Units 1 and 2. Further, even EPA's June 2013 cost estimates for SCR plus combustion controls show that these controls are cost effective at all Wyoming EGUs, despite what the commenter believes are deficiencies in EPA's cost effectiveness analyses that overestimate the costs of SCR plus combustion controls. These costs are within the range that has been required or proposed of other similar sources to meet BART as follows:

- Final NO_X BART determination for San Juan Units 1–4 requires installation of SCR at all four units to meet a NO_X emission limit of 0.05 lb/MMBtu, found that the costs ranged from $1,987/ton to $2,651/ton of NO_X removed, in 2010 dollars.
- EPA Region 9 has proposed SCR as BART for Four Corners Units 1–5 to meet a NO_X limit of 0.11 lb/MMBtu at a cost effectiveness of $2,515/ton to $3,163/ton in 2008 dollars. That converts to $2,407/ton to $3,028/ton in 2010 dollars.
- In its FIP for Montana, EPA found that the cost effectiveness of SCR controls for Colstrip Units 1 and 2 of approximately $3,200/ton per unit (in 2010 dollars) was reasonable.
- In its FIP for Arizona regional haze, EPA is requiring SCR along with combustion controls to meet BART at the BART-subject coal-fired units at Apache, Cholla, and Coronado power plants at cost effectiveness values ranging from $2,275/ton to $3,472/ton.

Response: We agree that the costs for SCR plus combustion controls presented in our proposed rule, taken without consideration of the remaining BART factors, may generally be considered cost effective. However, the CAA and RHR require a consideration of all five BART factors. For example, a control that is considered cost effective may not be warranted if the visibility improvement is minor. Also, there may be occasions that, while the average cost effectiveness of a control is reasonable, the incremental cost effectiveness may not be. In short, EPA must weigh more than just the cost effectiveness when considering BART.

Also note that, as described elsewhere in these responses to comments, we have revised the SCR cost estimates that we presented in our proposed rule. In today's final rule, we have again balanced the costs along with the remaining BART factors when considering the selection of BART controls.

Comment: EPA's proposed FIP is arbitrary, capricious, and contrary to law for a number of reasons, including that the EPA's BART analyses ignored relevant data. Wyoming based its BART analyses on site-specific, engineered, vendor submitted bids for installing emission controls (citing the SIP Attachment A materials related to Laramie River Station), and Basin Electric has submitted to EPA comments extensively explaining the bases for these cost estimates, including the substantial technical difficulty of installing SNCR and SCR at Laramie River Station due to the design of the three units. The EPA has disregarded the site-specific cost estimates submitted for Laramie River Station and the other BART sources in Wyoming, and the EPA has alleged without any specificity that Wyoming did not properly or reasonably take into consideration the costs of compliance. The EPA relied on the IPM Model with retrofit factors adjusted on a source-by-source basis, instead of relying on the site-specific costs.

EPA's October 23, 2012 revised cost memo states that ''[t]he retrofit factor is a subjective factor used to account for the estimated difficulty of the retrofit that is unique to the facility'' and noted that these retrofit factors were determined without site visits, but based on satellite images of the facilities. At EPA's public hearing in Casper, Wyoming, on July 26, 2013, Basin Electric's consultant, Kenneth Snell, explained to EPA in detail how the satellite images fail to reveal multiple conditions specific to Laramie River Station that make installing SCR far more expensive than EPA's consultant assumed. EPA's failure to rebut those positions is arbitrary and, moreover, that the EPA's methodology—

relying on a subjective interpretation of satellite images—is itself arbitrary and capricious because it strains credulity to claim that one can assess retrofit costs by simply looking at hazy satellite pictures of a power plant.

Response: EPA disagrees. First, Wyoming's BART analysis [209] was based upon a 2008 cost estimate by Basin Electric, which, when adjusted for the fact that they were performed prior to addition of combustion controls, resulted in similar capital costs for SCR and similar cost effectiveness. Moreover, and as noted in previous responses, the costs submitted by Wyoming should not be considered site-specific estimates, and therefore superior to EPA's costs, on the mere basis that they were submitted by a source. In any case, with their comments on EPA's reproposal, Basin Electric has roughly doubled their claimed cost of SCR, but these were not part of the Wyoming BART analysis. These new costs submitted by Basin Electric are presumably intended to be more site-specific in nature than those originally submitted to the State.

Second, the new costs offered by Basin Electric were found to be deficient in a number of respects that are discussed more specifically in other responses to comments. The new costs estimates included numerous costs that were inadequately explained or without any supporting documentation. The new cost estimates also did not include vendor quotes. Per Basin Electric's Exhibit 14, page 21: ''The LRS [Laramie River Station] cost estimates are conceptual in nature; thus, S&L did not procure equipment quotes specifically for the LRS control systems.''

EPA also disagrees with the commenter regarding the use of satellite images for assessing retrofit difficulty. As noted in responses to other comments, because they provide a unique ''bird's eye'' view, satellite images are routinely used to evaluate conditions at a site: Available space for a crane, access to and from the site, interferences that may exist at the site boundary, interferences between major pieces of equipment, available space for laying down material. With regard to SCR installation, satellite images cannot reveal whether or not the air preheater must be relocated to accommodate SCR ductwork; however, none of the commenters indicated that any affected Wyoming BART sources found it necessary to relocate their air preheater. Satellite images cannot reveal the ''ideal location'' for reagent storage equipment, although this is not a large impact on cost. When possible and resources allow, site visits may also provide useful data in addition to satellite images, but these are generally performed in addition to rather than in lieu of analysis of satellite images.

Mr. Snell's comments are largely addressed in other comments and broadly fall into three areas: (1) Criticism of EPA's use of the IPM algorithm for estimating SCR cost; (2) Assertions that EPA failed to take into account site-specific factors affecting cost; (3) Assertions that EPA failed to take into account balance of plant systems that would need to be upgraded. Each of these items raised by Mr. Snell as well as the specific issues within each item has been addressed elsewhere in other responses to comments.

Comment: It has been our experience that the effectiveness of SNCR is highly dependent upon the characteristics of each boiler. EPA states that SNCR typically reduces NO_X an additional 20 to 30% above combustion controls without excessive NH_3 slip. NO_X reduction with SNCR is known to be greater at higher NO_X emission rates than lower rates. Accordingly, EPA has estimated that the NO_X reduction from SNCR as 30% for initial NO_X greater than 0.25 lb/MMBtu, 25% for NO_X from 0.20 to 0.25 lb/MMBtu and 20% for NO_X less than 0.20 lb/MMBtu.

To support this statement, EPA cites a memo from Jim Staudt, Andover Technology Partners (''Review of Estimated Compliance Costs for Wyoming Electric Generating (EGUs)—Revision of Previous Memo'', memo from Jim Staudt, Andover Technology Partners, to Doug Grano, EC/R, Inc., February 7, 2013, p 7), but this memo provides no evidence or documentation to support the assumptions that these control levels can be achieved. Such assumptions, whether or not supported, can significantly affect the outcome of a BART determination, as EPA explained regarding Laramie River: ''Therefore, EPA predicts that the reduction that can be achieved with SNCR at the Laramie River units is 20%, which is much lower than the 48% assumed by Wyoming. This significantly reduces the tons reduced by SNCR which is in turn used in the calculation of cost effectiveness. It also affects the incremental cost effectiveness between SNCR and SCR (both in combination with additional combustion controls).'' The use of incremental costs in this manner is extremely sensitive to bias due to the interjection of control strategies based upon invalid assumptions of control efficiency.

Another commenter stated that the EPA is wrong to claim that Wyoming overestimated the ability of SNCR to reduce NO_X. The commenter made the following points in support of this claim:

- The CCM claims that ''[r]eductions of up to 65% have been reported for some field applications of SNCR in tandem with combustion control equipment such as low NO_X burners (LNB).''
- Wyoming's estimates are entirely consistent with demonstrated SNCR effectiveness. One study clearly concluded that ''SNCR has the capability of NO_X reductions in the range of 30–60%, depending on the specific retrofit application.'' *See* EPRI, *Cardinal 1 Selective Non-Catalytic Reduction (SNCR) Demonstration Test Program,* at 1–2 (2000). That study showed, for example, that a 600 MW unit equipped with LNB could reduce NO_X by an amount greater than EPA's ''typical'' results.
- The EPA's *AP 42, Fifth Edition, Volume I, Chapter 1: External Combustion Sources* recognizes that ''[t]he effectiveness of SNCR depends on the temperature where reagents are injected; mixing of the reagent in the flue gas; residence time of the reagent within the required temperature window; ratio of reagent to NO_X and the sulfur content of the fuel that may create sulfur compounds that deposit in downstream equipment.''

The commenter concluded that EPA's own literature, as well as other studies, recognize that SNCR effectiveness is highly contextual and that it can achieve reductions far in excess of Wyoming's estimates.

The commenter asserted that the EPA, without explanation, disregarded its own position on the contextual nature of SNCR effectiveness, and in turn disregarded Wyoming's well-reasoned analysis by relying instead on ''typical'' NO_X reductions. The commenter believes that the EPA has practiced arbitrary decision making because the EPA did not explain in its proposal why it now prefers a generic approach to SNCR effectiveness in reducing NO_X over its previously expressed recognition that effectiveness depends on a host of facility-specific factors.

Response: EPA agrees with the commenter that the effectiveness of SNCR is highly dependent upon the characteristics of each boiler, and those characteristics include furnace temperature, furnace CO concentration, NO_X level and other factors, but furnace temperature, CO concentration, and

[209] Wyoming Department of Environmental Quality Air Quality Division BART Application Analysis AP–6047 May 28, 2009.

NO_X level are most important. The tendency of NO_X reduction to decrease as the NO_X concentration is reduced is a well-established phenomenon. Utility boiler upper furnace temperatures are typically in the range of 2000–2300 °F, but can sometimes be lower or higher. As described in Section 1.2.3, SNCR Performance Parameters in the Control CCM, and also by Sun, Hofmann and Pachaly in 1990, and by Muzio, Montgomery, Quartucy and Texeira in 1993,[210] [211] the percentage reduction in NO_X is strongly impacted by the residence time, furnace temperature and the starting, or baseline, NO_X. Because most utility boiler furnace temperatures and residence times fall into an expected range, the possible NO_X reduction is generally related to baseline NO_X and Figure 1.5 of the CCM demonstrates the effect of baseline NO_X and temperature on NO_X reduction. Of course, there are some units that may fall outside the typical range of furnace temperatures or CO levels, and can achieve higher or lower levels of NO_X reduction. As noted in our response to other comments, the furnace temperatures at Laramie River Station as reported by Basin Electric in their recently submitted comments are much higher than typical, and this will limit the possible NO_X reduction.

On the other hand, EPA disagrees that EPA ''disregarded its own position on the contextual nature of SNCR effectiveness, and in turn disregarded Wyoming's well-reasoned analysis''. On the contrary, EPA carefully considered the contextual situation at Laramie River Station and the State's analysis in reaching its opinion. Experience has shown that for utility boilers NO_X reductions of 48% using SNCR alone have only been possible from much higher NO_X baselines than exist at Laramie River Station. In practice, facility owners have generally found that, when using SNCR, the lowest cost approach is to first reduce NO_X as far as possible with combustion controls and then use SNCR for additional reductions beyond what combustion controls can provide. As a result, SNCR is rarely used alone to provide 48% NO_X reduction on electric utility boilers because the baseline levels in practice are typically too low to achieve such high NO_X reduction through SNCR.

The Cardinal Station citation raised by the commenter is from a test on a 600 MW unit that had a NO_X baseline of around 450–500 ppm of NO_X [212]—in the range of about 0.6 to 0.7 lb/MMBtu, well above the emission rate of the Laramie River Station units, which, after additional combustion controls is about 0.19 lb/MMBtu (annual). This unit achieved 25% NO_X reduction at full load and 30% NO_X reduction at 350 MW in long term tests. As a result, this project does not support the possibility of 48% NO_X reduction with SNCR at Laramie River Station, which has a much lower baseline NO_X level than at the Cardinal Station.

Finally, in Exhibit 14 to Basin Electric's comments,[213] Sargent & Lundy states that a ''33% reduction is not likely to be achievable'' and conditionally indicates that a 20% reduction should be achievable from a baseline emission rate of 0.19 lb/MMBtu. EPA agrees that based upon the information that is available, 20% is a more reasonable level of reduction to expect from SNCR at Laramie River Station.

Comment: Contrary to EPA's assertion, Wyoming's estimate of the reduction achievable with SNCR does not depart from the BART Guidelines. The Guidelines do not specify the effectiveness of SNCR, so there is no contradiction. EPA observes that Wyoming assumed that after installation of combustion controls (new LNBs and OFA), SNCR would reduce NO_X emissions from 0.23 lb/MMBtu to 0.12 lb/MMBtu, a 48% reduction. EPA, however, insists that its consultant contends that SNCR typically reduces NO_X by 20% to 30%, depending on the level of NO_X going to the SNCR unit. According to EPA's consultant, when the input level of NO_X is 0.19 lb/MMBtu, which EPA says was the annual average at Laramie River Station Unit 1 in 2012, then after installation of new LNBs and OFA the reduction achievable with SNCR is only 20%. 78 FR 34748. The consultant says that would reduce the NO_X emission rate only to 0.15 lb/MMBtu. Andover Report at 7.

The only authority cited by EPA's consultant for the assumed 20% reduction is an October 15, 2012 email from Fuel Tech. *Id.* at 13. No information is provided by EPA or its consultant about the expertise of Fuel Tech, who at Fuel Tech sent the email, why an email from Fuel Tech should be deemed reliable, persuasive or authoritative, or why it should take precedence over Wyoming's analysis.

EPA's statements in the Montana FIP demonstrate that EPA's critique of Wyoming's estimate is misplaced. In that case, EPA determined that with an inlet concentration of 0.20 lb/MMBtu, SNCR can reduce NO_X emissions by 25%, as compared to the 20% EPA endorses for a nearly identical inlet concentration at Laramie River Station. 77 FR 23988, 24023, 24032, 24039; 77 FR 57864, 57885–57886. EPA relied on information from Fuel Tech to support the feasibility of a 25% NO_X reduction at this inlet concentration. 77 FR 57885. EPA explained that: ''[H]igher NO_X reductions can be achieved at mid to low load heat inputs, possibly up to 40%. Given that the Colstrip Unit 1 and 2 frequently operate at below full load, it is likely that on an annual basis SNCR can achieve better than the 25% emission reduction assumed by EPA.

EPA further explained that its review of Clean Air Markets Division (CAMD) emissions data showed that ''there are many EGUs equipped with SNCR (with combustion controls) that are achieving an emissions rate of 0.15 lb/MMBtu *or lower* on a monthly basis.'' *Id.* at 57886 (emphasis added). For example, Boswell Unit 4 had a NO_X rate of 0.35 lb/MMBtu with LNB and close-coupled over fire air (CCOFA). *Id.* With SNCR and SOFA, the unit achieved a monthly NO_X rate between 0.11 and 0.14 lb/MMBtu over a full 12 month period—a reduction of 60% to 69%. *Id.* In response to comments that EPA had overstated the benefits of SNCR, EPA stated that it would not adopt a higher post-SNCR emission rate ''without a showing that there are circumstances unique to Colstrip Unit 1 and 2 that would prevent SNCR from achieving the same reductions as at Boswell Unit 4.'' *Id.*

Response: As noted in other comments, EPA carefully considered the contextual situation at Laramie River Station in reaching its opinion. The Wyoming analysis [214] indicated that NO_X was reduced by SNCR from 0.23 lb/MMBtu to 0.12 lb/MMBtu. This seemed to be a higher level of NO_X reduction than expected and inconsistent with other experience. The BART analysis suggests no additional NO_X reduction from OFA versus LNB. Experience has shown that for utility boilers NO_X reductions of 48% using SNCR alone have only been possible

[210] Sun, W., Hofmann, J., and Pachaly, R., ''Post-Combustion NO_X Reduction With Urea—Theory and Practice'', Seventh Annual International Pittsburgh Coal Conference, September 10–14, 1990.

[211] Muzio, L., Montgomery, T., Quartucy, G., Texeira, D., ''The Effect of Residence Time On SNCR Processes'', EPRI/EPA 1992 Joint Symposium on Stationary Combustion NO_X Control, Bal Harbor, FL, May 24–27, 1993.

[212] Stallings, J., ''Cardinal 1 Selective Non-Catalytic Reduction (SNCR) Demonstration Test Program. EPRI Report 1000154, July 2000, pages 4–7 and 8–1.

[213] Exhibit 14, pages 15, 16.

[214] Department of Environmental Quality, Air Quality Division, BART Application Analysis, AP–6047, Laramie River Station, May 28, 2009.

from much higher NO_X baselines than exist at Laramie River Station, and a NO_X reduction from 0.19 lb/MMBtu (the NO_X emissions rate after installation of combustion controls) to 0.12 lb/MMBtu—roughly 37% reduction—is not likely to be feasible either. In practice, facility owners have generally found that, when using SNCR, the lowest cost approach is to first reduce NO_X as far as possible with combustion controls and then use SNCR for additional reductions beyond what combustion controls can provide. Those coal-fired utility units that the commenter states are achieving below 0.15 lb/MMBtu emission rates and are equipped with SNCR are also using combustion controls—most often LNBs and SOFA—that lower the NO_X sufficiently that less than 20% NO_X reduction is necessary to achieve under 0.15 lb/MMBtu.

As a result, SNCR is rarely used *alone* to provide 48% NO_X reduction on electric utility boilers because the baseline levels in practice are typically too low to achieve such high NO_X reduction through SNCR. In fact, Exhibit 14 to Basin Electric's comments, Sargent & Lundy states that ''33% reduction is not likely to be achievable'' and conditionally indicates that 20% reduction should be achievable from a baseline emission rate of 0.19 lb/MMBtu. This is more consistent with what EPA has determined.

EPA also cited input from SNCR technology supplier, Fuel Tech, which supports EPA's opinion that an expected NO_X reduction would be in the range of 20%. Fuel Tech is the largest supplier of SNCR technology to the electric utility industry and is therefore a very knowledgeable source of information on SNCR.

Comment: Wyoming did not underestimate the usage and cost of urea, and its estimate regarding urea does not conflict with the BART Guidelines. EPA contends that producer prices for urea have increased over the past three years and that Wyoming's analysis is defective because it does not take those price increases into account. EPA, however, cannot use information not available at the time of Wyoming's BART determination to second-guess that determination. EPA's own Guidelines counsel that in making a BART determination, a state should consider technologies ''available before the close of the State's public comment period,'' but explicitly provide that ''in order to provide certainty in the process,'' a state ''*need not* consider technologies that become available after this date.'' 40 CFR Part 51, App. Y., section IV(D)(2)(3) (emphasis added). This makes sense. Absent some time cutoff, a state's SIP would be in a constant state of flux, subject to constant challenge based on ever changing information and technology not available to the State at the time it made its BART determination. This is particularly true given the amount of time it takes EPA to review a state's SIP. It is also consistent with 40 CFR 51.308(f), which requires states to reevaluate and revise their regional haze SIPs every ten years. That regulation clearly contemplates that states have a duty to take into account new information only in connection with the required periodic SIP revisions—not on an ongoing basis.

EPA is again overstepping its role in this process. Wyoming completed its BART analysis in 2009, more than three years ago, and it would have been impossible to incorporate the alleged urea price increases in that analysis. Simply put, Wyoming's BART determination is hardly arbitrary and capricious simply because it failed to take into account alleged urea price increases some three years after Wyoming completed its BART analysis. Wyoming did precisely what the Guidelines instruct: made a BART determination based on information available before the close of its public comment period. 40 CFR Part 51, App. Y., section IV(D)(2)(3). To disapprove Wyoming's cost analysis based on information that was not available to would be to employ a ''gotcha'' approach that runs contrary to EPA's own regulations and counter to EPA's commitment to do its job fairly and objectively. If the urea issue is truly material, EPA should, at a minimum, allow Wyoming to consider whether this new information would affect its BART determination before disapproving that determination.

Another commenter made a number of the same points, stating that changes in urea prices are not a valid basis for disapproving the state's cost analyses, and even if they were, EPA's facts are mistaken. According to the commenter, the EPA asserted that the BART sources underestimated the cost of SNCR and EPA supported this conclusion by stating that Wyoming underestimated ''SNCR reagent (urea) usage and cost.'' The commenter indicated that the EPA did not explain how Wyoming underestimated urea usage, but the EPA asserted that ''prices for urea have increased in the last three years'' since Wyoming submitted its plan to EPA.

This commenter finds it remarkable that EPA would claim that a change in urea prices in the time since Wyoming submitted its SIP somehow invalidates the SIP, indicating that the time that has elapsed since Wyoming submitted its plan to EPA is due in large part to EPA's failure to take timely action on Wyoming's plan. According to the commenter, the EPA did not claim that Wyoming's analyses were invalid when Wyoming submitted its plan in January 2011, and the EPA did not explain how the change in urea market prices led Wyoming to unreasonable conclusions. The commenter stated that the EPA appears to believe that Wyoming and other states must constantly update their BART analyses to account for changing urea market prices up until the date that EPA takes final action on the plan. The commenter asserted that under this theory, the EPA can hold SIPs hostage, waiting for commodity prices to change, and then disapprove SIPs on that basis alone. The commenter indicated that the EPA cited no legal basis for this theory.

The commenter noted that the BART Guidelines expressly acknowledge that ''[i]n order to provide certainty in the process,'' states ''need not consider technologies that become available after [the close of the comment period on the state plan] (citing 40 CFR part 51, App. Y, section IV(D)(2)(3)). The commenter believes that in order ''to provide certainty in the process,'' the EPA cannot claim that state plans are perpetually subject to invalidation as a result of changing commodity prices. The commenter stated that the State's price for urea does not conflict with the BART Guidelines, and EPA offers no evidence that its price is more reliable than the State's price. Commenter provided the following additional statements: Even if urea prices have increased, assumptions regarding such prices do not constitute a failure to follow the BART Guidelines because the Guidelines do not specify what the price is or how it should be determined. EPA relies on its consultant's report to claim that prices have increased, but that report also says that there has been significant variability in cost. Andover Report at 7–8. There is no analysis by the consultant as to whether, given the cited price variability, the current price is likely to go up or down in the future or what the actual cost of urea is likely to be going forward. The consultant relies on a single source at a single point in time to pick a urea price to apply for the life of an SNCR installation, with no consideration of the price variability. The reliability of the resulting price is no greater than a roll of the dice at Las Vegas, and EPA offers no explanation why its consultant's price is superior to the State's price. It is merely different,

and this is yet another technical issue upon which EPA is required to defer to the State's assessment.

EPA's consultant modified its initial report issued in October 2012 in the revised report issued in February 2013, purportedly to account for an alleged change in urea prices. However, the February 2013 report cites the very same source for current urea prices as the October 2012 report. Compare Andover Report (Oct. 23, 2012) at 7. n.23, EPA docket cite EPA–R08–OAR–2012–0026–0081, with Andover Report (Feb. 7, 2013) at 7 n.22, EPA docket cite EPA–R08–OAR–2012–0026–0086. Both reports cite the same 10/12/2012 email from Doug Kirk of Fuel Tech. The additional 10/15/2012 email from Jennifer Zagorsky of Potash Corp that is cited in the October report is deleted from the February report. There is no explanation for the change.

Moreover, urea prices are relevant to operating costs for SNCR but are not relevant to SCR. If the State's urea prices were too low, that would mean the State had underestimated the cost of SNCR, which is what EPA claims in its proposal. 78 FR 34748. Such an underestimate would have no material impact on the State's BART determination and thus provides no basis for EPA's disapproval. Once again, this is a fact that in retrospect supports the State's BART decision, rather than demonstrating it to be arbitrary. If Wyoming's estimate of the cost of SNCR should have been higher, as EPA maintains, the higher cost would tend to add further support for rejecting SNCR—the more expensive a control technology, the stronger the reason to reject it as BART. So if EPA is correct in claiming the State's assumed urea price was too low, it is incorrect in claiming this made a difference in the State's BART determination. A mistake in a cost assumption, if there was a mistake, is not a *per se* reason to reject a BART determination. Such a mistake would help support disapproval of a cost analysis and resulting BART determination only if it overstated costs in a material way and thus tended to make a technology appear significantly more costly than it actually would be.

If the State rejected SNCR based on an allegedly too-low cost of urea, perhaps EPA could argue that the State was wrong in rejecting SNCR. But EPA makes no such argument. It asserts only that its consultant's urea price is different from the State's price. As explained above respecting SNCR, to succeed in arguing that the State's rejection of SNCR justifies disapproval of the State's BART, EPA would, at a minimum, have to show that the State was arbitrary and capricious. The choice of BART is the prerogative of the State, and the State is charged with evaluating and balancing all five BART factors and deciding how much weight to give to each factor. EPA may not disapprove the State's judgment merely because it disagrees with the State on what is a reasonable cost, or how the State balanced costs with other BART factors. In fact, nothing in EPA's proposal takes issue with how Wyoming weighed or balanced the BART factors, or with the State's judgment regarding the terms of the settlement agreement on which the State's BART determination for Laramie River was based. EPA's complaint is not with the State's judgment in applying the BART factors. Rather, it is that the State used information with which EPA disagrees. But that cannot justify disapproval of the State's cost analysis or BART determination.

Another commenter argued that the information EPA relied on to conclude that urea market prices have increased is itself outdated, noting that the report EPA cited as support for its urea price claim was completed October 23, 2012, and relied on vendor emails from Fuel Tech and PotashCorp dated October 12, 2012 and October 15, 2012, respectively, to conclude that urea cost approximately $650 per ton. The commenter pointed out that the same report recognizes that ''there has been significant variability in [urea] cost,'' and added that since the date of that report, urea prices have continued to vary significantly, falling by roughly 50 percent.[215] The commenter noted that in its February 2013 revised cost analyses, EPA acknowledged the beginning of the price decrease, pegging urea costs at $450 per ton. The commenter added that urea prices are today far closer to Wyoming's price assumptions than EPA's, which commenter stated were among the highest prices for urea in the last four years. Therefore, the commenter asserted, even if changes in commodity prices following SIP submission were a valid basis for disapproving SIP analyses that relied on prices at the time of SIP development, the EPA is factually mistaken to claim that Wyoming unreasonably underestimated urea prices; rather, the EPA has unreasonably overestimated urea prices by supporting its analysis with an abnormally high price that is not reflective of the current market.

Response: We agree that a change in the market price of urea, in and of itself, may have not provided EPA sufficient grounds for rejecting the State's SNCR analysis. However, we identified a number of deficiencies in our proposed rule, that when taken collectively, led EPA to conclude that Wyoming's consideration of the costs of compliance and visibility improvement for the EGUs was inadequate and did not properly follow the requirements in the BART Guidelines and statutory requirements. 78 FR 34748. Therefore, regardless of the market price of urea, EPA would have reached the same conclusion.

Also, regardless of the cost of urea, EPA found material errors with the State's cost analyses for SNCR that required that we revise the analysis. In particular, as described in some detail in response to other comments, the State significantly overestimated the ability of SNCR to reduce NO_X at Laramie River Station. There, the State assumed that SNCR would reduce NO_X by 48%. In response to comments above, EPA has definitively established, using information from a number sources, including Basin Electric's own consultant, as well as a major SNCR supplier, that SNCR cannot approach this level of control in the case of Laramie River Station. As such, it was appropriate, if not obligatory, for EPA to revisit the SNCR analysis for Laramie River Station.

Finally, today we are providing updated SNCR cost analyses in order to address information provided by various commenters. Because we have taken into consideration input from a number of commenters when revising costs, we believe that they represent the most informed and robust costs for SNCR presented yet. In particular, we have revised the costs for Laramie River to reflect high furnace temperatures and low reagent utilization (a factor not considered in Wyoming's analysis). And we have also updated the SNCR costs to reflect the most recently available cost of reagent as delivered to Wyoming. Our analyses are consistent with our response on a similar comment in the Legal Section of this final action.

Comment: EPA erroneously calculated urea costs. EPA made two fundamental and significant errors that have the effect of overstating the costs of SNCR, which in turn justified the EPA's conclusion that SCR is cost effective. The errors are as follows:

- EPA mistakenly converted pounds to tons in its calculation of operation and maintenance costs for urea. *See* EPA's Revised Cost Analyses for Jim Bridger Units 1–4—Detailed Spreadsheet Supporting Analyses (NO_X-SNCR tab, rows 62–64) (Bridger Costs); EPA's Revised Cost Analyses for

[215] Citing PotashCorp., Market Data, August 14, 2013, which can be found at *http://www.potashcorp.com/customers/markets/market_data/prices.*

Wyoming Sources—Detailed Spreadsheet Supporting Analyses (NO_X-SNCR_0 1_03 tab, rows 62–64) (EPA Costs). The cost formula multiplies the urea rate (pounds/hour) times the cost (dollars/ton) and divides that product by the source's megawatt rating to yield a dollar per megawatt hour cost for urea. In converting pounds to tons, EPA mistakenly divided by 1,000, when it should have divided by 2,000 (the number of pounds in a ton).

• EPA incorrectly calculated the water dilution variable for operation and maintenance costs in urea. See Bridger Costs (NO_X-SNCR tab, rows 62–64); EPA Costs (NO_X-SNCR_01_03 tab, rows 62–64). EPA's cost calculation incorporates the wrong spreadsheet cell (auxiliary power cost). It should have instead incorporated spreadsheet cell for the hourly water rate in thousands of gallons per hour.

Response: The reagent cost calculation is correct. The urea rate (assuming 100% urea) is multiplied by the cost for 50% by weight urea and is multiplied by 2 (to account for the fact that the cost is for 50% by weight urea) and then divided by 2000 (for the tons to pounds conversion). The effect is to divide by 1000, which is the equation shown. Commenter is correct that there was an error in the dilution water cost calculation. The error has been corrected in EPA's revised cost estimates. The error has negligible impact on the estimated cost of SNCR.

Comment: EPA asserts that it was an error for Wyoming to evaluate SNCR using a controlled emission rate of 0.12 lb/MMBtu, which is about a 48% reduction from 0.23 lb/MMBtu (the rate without new LNB and OFA). 78 FR 34748. EPA claims that after combustion controls reduce emissions to 0.19 lb/MMBtu, SNCR can achieve only a 20% further reduction, to 0.15lb/MMBtu. *Id.,* citing a Fuel Tech vendor report. EPA declined to accept Wyoming's conclusion that SNCR would cut emissions by 20% to 30%. *Id.*

This conflicts with EPA's findings in the North Dakota FIP. 77 FR 20898. EPA found that SNCR plus LNB and SOFA at Coal Creek Station Units 1 and 2 could reduce NO_X from a baseline of 0.22 lb/MMBtu to 0.115 lb/MMBtu, which is a 48% reduction. EPA explained that after combustion controls reduced emissions to a degree, SNCR by itself would cut emissions another 25%, despite the facility's claim that SNCR would achieve only a 20% reduction. *Id.,* citing a Fuel Tech report.

Response: EPA does not dispute that SNCR in combination with combustion controls can reduce NO_X by 48% in some cases. As described in our response to other comments, EPA does not agree that 48% reduction of NO_X is possible at Laramie River Station using SNCR alone.

Comment: We agree with EPA that on an annual basis SCR can achieve emission rates of 0.05 lb/MMBtu or lower. We recommend that EPA consider that some coal-fired EGUs are achieving lower emissions; e.g., our search of the CAMD database found seven conventional coal-fired EGUs averaging 0.04 lb/MMBtu or lower on an annual basis in 2012. Unlike SNCR, for SCR the ability to achieve low NO_X emissions is less a function of boiler characteristics and more a function of SCR design; it is generally accepted that SCR can reduce NO_X emissions by 80–90+%. However, the average control efficiency assumed by EPA for all Wyoming EGUs was 75% (74% median value).

The efficiency of NO_X removal is determined primarily by the amount of catalyst used, as pointed out by Hitachi in an email from Hitachi to EPA Region 9 regarding SCR at the Navajo Generating Station. In response to a question from the EPA on SCR NO_X performance guarantee, Hitachi replied that a 3 plus 1 SCR design could be designed to guarantee NO_X emissions of 0.05 lb/MMBtu on a 30-day rolling average. However, Hitachi also stated that the utility and their engineer need to determine what margin needs to be applied to insure the unit is capable of achieving less than the permit level on a 30-day rolling average. The EPA stated that in an engineering study performed by Sargent & Lundy that with a NO_X permit limit between 0.07 and 0.08 lb/MMBtu, the SCR would be designed for 0.05 lb/MMBtu. The difference between 0.05 and 0.07 is the margin necessary for compliance. By underestimating the efficiency of SCR and potentially overestimating the efficiency of SNCR, EPA has overestimated the incremental costs for SCR.

Response: We agree with the information provided by the commenters that SCR technology has, in some cases, the potential to achieve emissions of less 0.05 lb/MMBtu (annual). However, emission limits associated with BART do not need to meet the lowest emission rate achieved with that technology at any coal-fired power plant. The RHR provides that: ''The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART.'' 40 CFR 51.308(e)(1)(ii)(A).

In determining the controlled emission level, EPA must consider emission rates that are practically achievable in light of routine variations in operation and understanding that the SCR must be designed to maintain emissions below the required limit. SCRs in the U.S. are typically either 2 plus 1, or 3 plus 1 systems, with two or three initially full catalyst layers plus a spare layer for future catalyst additions. EPA is not aware of, nor has commenter provided information for, any 4 plus 1 SCR systems operating on coal-fired utility boilers. Therefore, EPA would favor more commonly used 2 plus 1 or 3 plus 1 SCR designs rather than the 4 plus 1 system described in commenter's citation from Hitachi.

Additionally, the BART Guidelines state that: ''[i]n assessing the capability of the control alternative, latitude exists to consider special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative'' (40 CFR Part 51, Appendix Y, section IV.D.3) and that ''[t]o complete the BART process, you must establish enforceable emission limits that reflect the BART requirements''. (40 CFR Part 51, Appendix Y, section V). The five-factor BART analysis described in the Guidelines is a case-by-case analysis that considers site-specific factors in assessing the best technology for continuous emission controls. After a technology is determined as BART, the BART Guidelines require establishment of an emission limit that reflects the BART requirements, but does not specify that the emission limit must represent the maximum level of control achieved by the technology selected as BART.

While the BART Guidelines and the RHR do not preclude selection of the maximum level of control achieved by a given technology as BART, the emission limit set to reflect BART must be determined based on a consideration and weighting of the five statutory BART factors. Therefore, limits set as BACT during PSD review, or emission rates achieved from the operation of individual facilities under an emissions trading program (e.g., CAA Interstate Rule) may provide important information, but should not be construed to automatically represent the most appropriate BART limit for a given technology.

As noted in our response to other comments, EPA does not believe that we have overestimated the performance of SNCR, nor does EPA believe that the performance of SCR has been underestimated.

Comment: EPA's errors in calculating SCR costs resulted in significantly skewed cost-effectiveness determinations for every unit analyzed. EPA overstated the costs per ton of SCR by between 33 and 99 percent. Although even EPA's cost estimates for SCR are within the range that the EPA previously has found reasonable, the revised cost analyses correcting what the commenter believes are EPA errors make it clear that SCR is cost effective for every Wyoming EGU.

Response: Commenter's assertion that EPA's costs are too high is largely based upon disagreement over the retrofit factors used, EPA's inclusion of a provision for taxes and insurance, and disagreement with use of 7% interest in determining the capital recovery factor. EPA has responded to each of these issues in other comment responses and has developed revised cost estimates that will incorporate changes where EPA believes the changes are warranted.

Comment: Wyoming has overestimated the cost of SCR. Wyoming has not provided justification or documentation for their cost estimates. We (the commenter) were not provided with any vendor estimates or bids, and Wyoming did not use the CCM, as recommended by the BART Guidelines. For example, the cost estimates used by Wyoming and EPA contained AFUDC, which is not allowed by the CCM and has been rejected by EPA Region 8 in other analyses. As a result, total capital costs estimated by Wyoming for SCR exceeded $300/kW at ten of the fifteen EGUs evaluated. EPA has compiled a graphic presentation of SCR capital costs adjusted to 2009 dollars. The EPA data confirm that SCR capital costs typically range from $73–$243/kW. Wyoming has not demonstrated unique features for the Wyoming EGUs that would justify cost estimates so much higher than the range for the industry.

Response: We agree that in some cases Wyoming has overestimated the cost of SCR. In order to address the cost analysis deficiencies noted by the commenter, EPA has performed revised cost analyses for EGUs where the cost of SCR is pertinent. In our revised cost analyses, we have followed the structure of the CCM, though we have used the IPM cost models to estimate direct capital costs and operating and maintenance (O&M) costs.

3. Consideration of the Five Factors

Comment: We received numerous comments that the State followed the requirements of the RHR and CAA, and simply did not come to the same conclusions as EPA. Commenters stated that Wyoming's BART determinations were based on a consideration of all five BART factors and that the State weighed each factor appropriately.

Response: We disagree with this comment. As discussed in detail in section VII.C.3.a of our proposed rulemaking, the EPA identified numerous issues and errors with the State's cost analyses, including the fact that the State underestimated the cost of SNCR and overestimated the cost of SCR; the State overestimated the emission reductions from SNCR; the State underestimated the control efficiency of SCR; the State overestimated the capital costs for SCR; and the State allowed for some costs not allowed by the CCM and thus their cost analyses did not meet the requirements of the RHR. 78 FR 34748.

Likewise, for the visibility improvement modeling, EPA discussed in detail in section VII.C.3.b of our proposed rulemaking why the State's visibility modeling did not meet the requirements of the RHR (78 FR 34749). As stated in our proposed rulemaking, Wyoming did not consider the visibility improvement associated with SNCR, which is clearly in conflict with the requirements set forth in section 169A(g)(2) of the CAA, as well as in the implementing regulations, which require that states take into consideration ''the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.'' In addition, it was not possible for EPA, or any other party, to ascertain the visibility improvement that would result from the installation of the various NO_X control options because Wyoming modeled the emission reductions for multiple pollutants together in its SIP. Finally, Wyoming did not establish baseline emission rates used for modeling in a manner consistent with BART Guidelines. That is, Wyoming did not use ''the 24-hour average actual emission rate from the highest emitting day of the meteorological period modeled (for the pre-control scenario).'' 70 FR 39170. Instead, Wyoming modeled baseline emission rates reflective of permitted emission limits, leading to both an underestimation, and in some cases, overestimation of visibility impacts.

Therefore, contrary to the commenters claim, today's action is the result of Wyoming's failure to meet certain statutory and regulatory requirements, and not a simple matter of the State and EPA arriving at different conclusions.

Comment: Wyoming's BART NO_X determinations for the Naughton power plant further demonstrate Wyoming's consideration and balancing of all five factors, including visibility improvement, and its individualized consideration for each unit. For Naughton Units 1 and 2, Wyoming found that costs of compliance (total capital costs and cost effectiveness), power losses (energy impacts) caused by post-combustion NO_X controls, environmental considerations related to chemical reagents used with post-combustion NO_X controls (non-air quality environmental impacts), and visibility improvement information indicated that LNBs and OFA are BART NO_X. However, for Naughton Unit 3, based upon its much greater ''visibility improvement'', Wyoming determined that SCR is BART NO_X. Wyoming's BART NO_X analyses across the Naughton Plant's three units demonstrate Wyoming's consideration and weighing of all five BART factors, including the decision to require different levels of BART NO_X controls across various units at the same plant when Wyoming determined that the visibility improvements and other factors at one unit justified more stringent control. This example is yet one more indication, contrary to EPA's assertions, that Wyoming did adequately consider ''visibility improvement'' information in each of its BART determinations, including Wyoming deciding in its discretion the ''weight and significance'' appropriate for each BART factor at each BART unit.

Response: We disagree with the commenter's assertion that the State's determination for the Naughton units shows how the State considered all five factors when the information that the State was relying on was not accurate as pointed out in our response above.

Comment: PacifiCorp submitted its BART studies to Wyoming in 2007, and the State completed its BART analyses during 2008. At that time the remaining useful life of all PacifiCorp BART units was considered to be at least 20 years. Primarily due to EPA's delays in dealing with the Wyoming Regional Haze SIP, this assumed twenty-year life span is no longer a valid basis for certain units. EPA now must take into account the current useful life of the units, rather than the useful life assumed under Wyoming's BART analyses completed at a different point in time. Dave Johnston Unit 3's current depreciable life ends in 2027 and the life for Naughton Units 1 and 2 ends in 2029.

As a practical matter, the SCRs required under the regional haze FIP at Dave Johnston Unit 3 and Naughton Units 1 and 2 could not be installed until shortly before the end of 2018, due to the regulatory processes that apply to PacifiCorp's major investment

decisions, as well as the associated permitting and competitive procurement timelines. At that time, the useful life for Dave Johnston Unit 3 will be nine years, and for Naughton Unit 1 and 2 eleven years. EPA must use these shorter useful lives in its BART analyses. Taking into consideration the remaining useful lives of these particular BART units clearly demonstrates that EPA's current assessed cost effectiveness conclusions (whether using the Andover Report costs or PacifiCorp's updated information) do not support the installation of SCR on these units because they are not cost effective. To the extent EPA needs to include firm retirement dates commensurate with the depreciable lives for purposes of finalizing the regional haze FIP, then PacifiCorp requests that EPA do so.

Response: We agree in part. However, because of our revised cost and visibility analyses, and our conclusions regarding BART that stem from those analyses, the comment is no longer pertinent to all of the units in question.

Using a remaining useful life of 20 years, our revised analysis for Naughton Unit 1 shows that the cost effectiveness of new LNBs with OFA and SCR is $3,109/ton, while the incremental cost effectiveness is $10,384/ton. The visibility improvement associated with new LNBs with OFA and SCR is 0.33 deciviews. Similarly, using a remaining useful life of 20 years, our revised analysis for Naughton Unit 2 shows that the cost effectiveness of new LNBs with OFA and SCR is $2,566/ton, while the incremental cost effectiveness is $8,440/ton. The visibility improvement associated with new LNBs with OFA and SCR is 0.42 deciviews. Given these costs and visibility improvements, taken along with the other BART factors, we no longer find that SCR is warranted for Naughton Units 1 or 2, even assuming a longer remaining useful life. Therefore, because the commenter suggested alternative control options in lieu of the proposed SCR, which we would otherwise not require, the comment is no longer pertinent to these two units. However, as described below, it remains relevant to Dave Johnston Unit 3.

Using a remaining useful life of 20 years, our revised analysis for Dave Johnston Unit 3 shows that the cost effectiveness of LNBs with OFA and SCR is $2,635/ton, while the incremental cost effectiveness is $7,583/ton. The visibility improvement associated with new LNBs with OFA and SCR is 0.51 deciviews. Given these costs and visibility improvement, taken along with the other BART factors, we continue to find that SCR would be warranted for Dave Johnston Unit 3. However, using a remaining useful life of 9 years, as identified by PacifiCorp, our analysis shows that the cost effectiveness of LNBs with OFA and SCR is $3,742/ton, while the incremental cost effectiveness is $11,781/ton. Given the costs that result from the shorter remaining useful life, along with other BART factors, we find that SCR is not warranted. As a result, we find that combustion controls (LNBs) and an earlier retirement date are BART for Dave Johnston Unit 3.

We note that depreciable life is the result of financial accounting rules, such as for tax purposes, and is determined by capital investments in the plant and associated accounting rules for the timing of depreciation of those capital investments. As a result, the depreciable life is often shorter than the economic life of the facility. Economic life, which is the actual expected viable life of the facility, is the key consideration in regard to the remaining useful life (one of the five BART factors). As a result, depreciable life is not relevant to a BART analysis unless the depreciable life that results from a capital investment for BART is longer than the economic life of the facility, in which case asset impairment charges could result at the end of the economic life. Nonetheless, we understand PacifiCorp's comment as meaning that, for financial reasons, they would prefer to shutdown the units on an accelerated schedule in lieu of installing SCR.

Finally, while PacifiCorp has presented revised cost information along with their comments, we have not accepted these costs without examination. As described in other responses, while allowing some of the costs suggested by PacifiCorp, we have not allowed others. More information regarding our cost analyses for the units in question can be found in the cost report located in the docket.[216]

Comment: In its proposed rule, the EPA found that the limits and technologies mandated in the rule are cost effective based on amortizing those costs over a 20 year period. Here, the Agency's cost modeling is seriously flawed as many of the units subject to the new rule have remaining lives significantly less than 20 years. For example, Dave Johnston has a remaining life of only 14 years and Naughton 16 years. Amortizing the larger investment required by the FIP over these shorter lives would cause rates to go up even more, casting doubt on the veracity of the EPA's conclusion that the FIP is cost effective.

Response: See response above. We note, however, that we are using the remaining useful life periods as presented by PacifiCorp in the comment above for Dave Johnston Unit 3, which differ from this commenter's numbers for remaining useful life.

Comment: We received comments that the State considered the energy and non-air quality environmental impacts of compliance when developing the State's plan. The commenters went on to say that it is not apparent that EPA addressed the energy and non-air quality impacts in their analyses.

Response: We disagree with this comment. Throughout our proposed rulemaking, we consistently acknowledged that we are proposing to accept the State's energy and non-air quality impacts analysis (e.g. 78 FR 34759). In the State analyses for all BART sources, it states that the energy and non-air quality impacts do not preclude the selection of any of the control technologies the evaluated for the BART sources. In weighing all of the BART factors ourselves, we agree with this conclusion and adopt it as our assessment of the energy and non-air quality impacts.

Comment: There are three types of energy impacts that should be considered. These include the energy associated with operating the controls, the energy that must be provided when the unit is removed from service in order to install the controls, and most importantly to Wyoming and its citizens, the energy that must be replaced when the emissions controls prescribed for a given unit are not economically justifiable and result in accelerated unit retirements and replacements.

The latter scenario is of particular concern because the EPA has now proposed SCR controls for PacifiCorp's Naughton Unit 1, Naughton Unit 2 and Dave Johnston Unit 3. Unlike the Wyoming SIP, the EPA's FIP requires controls that are not expected to be justifiable and would result in accelerated unit retirements and replacements, potential natural gas conversions, and the associated costs and socio-economic impacts of removing major coal-fueled generation resources from service in areas of Wyoming that rely heavily on these facilities.

Response: The commenter raises concerns about energy impacts,

[216] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/28/2013; Wyoming EGU BART and Reasonable Progress Costs for Jim Bridger—10/28/2013.

specifically: The energy associated with operating the controls, the energy that must be replaced when the unit is taken out of service, and the energy that must be supplied if the unit is retired in lieu of addition of controls. The energy associated with operating the controls are accounted for in the variable operating cost of SNCR and SCR. Most of the construction occurs with the unit operating, but the unit must be shut down when ductwork tie-ins are made to the SCR. Regarding replacement energy when the unit is taken out of service, the generation units have periodic outages of several weeks for major maintenance items, such as turbine overhaul where there is adequate time to make the tie-ins for the equipment. It is reasonable to assume that facility owners would schedule outages for the SNCR or SCR retrofits during periods when other maintenance is being performed that requires the unit to be out of service, and this is what is commonly done in practice. EPA has allowed five years after the final rule to meet the emission limits, which should provide companies ample opportunity to schedule retrofit activities during a normally scheduled outage. As a result, retrofit of NO_X controls would not have a significant impact on the energy production of the generating unit.

As for the energy that must be replaced if a unit is retired, the CAA and BART Guidelines do not explicitly require that this impact be taken into consideration as part of the non-air quality and energy impacts.

Comment: EPA's proposed approach is a myopic effort to focus on only one portion of what is supposed to be a multi-faceted decision. Appendix Y became law after notice-and-comment rulemaking, and states are justified in relying on it when crafting their regional haze SIPs. Indeed, EPA made clear that the Appendix Y guidelines ''are designed to help States and others . . . determine the level of control technology that represents BART for each source.''

BART determinations are composite decisions, with many facts and data from each of the five BART factors playing a role in the ultimate BART determination as decided by Wyoming. EPA's proposal to pluck out a single BART factor (visibility improvement) as the sole justification for rejecting Wyoming's entire NO_X BART determination for some units is arbitrary and capricious because it makes a single factor more important than any of the others and also more important than the composite BART determination as a whole. EPA's approach also disregards each of the five BART factors as Wyoming evaluated them and ignores the ''weight and significance'' of each factor alone, and in combination with the others, as Wyoming determined in its BART decisions.

Response: We disagree with this comment. The commenter is not correct in asserting that EPA rejected the State's BART determinations for certain sources based only on a single BART factor—visibility improvement. EPA's rejection of the State's BART determination was based on EPA's consideration of all five BART factors. Nowhere in our notice do we indicate that we are rejecting the State's BART determination based solely on the consideration of visibility improvement. Moreover, as noted elsewhere in these responses to comments, we found several instances in which the State's analyses were inconsistent with the RHR and BART Guidelines, requiring that EPA revise the State's analyses.

Comment: Use of the BART guidelines is only required for sources located at electric generating facilities with a total capacity greater than 750 megawatts. *See* 40 CFR 51.308(e)(ii)(B). Only three power plants in Wyoming met these criteria: Basin Electric's Laramie River Station, PacifiCorp's Jim Bridger, and PacifiCorp's Dave Johnston plants. For consistency, and as a matter of State discretion, Wyoming went above and beyond the requirements by following the five-step process for all BART sources, not solely the three aforementioned large electric generating facilities. EPA should commend Wyoming for taking this approach, not use it as an excuse for invalidating the SIP.

Response: We agree that the BART guidelines are only mandatory under the regional haze regulations for ''fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts.'' 40 CFR 51.308(e)(1)(ii)(B). However, the fact that a state may deviate from the guidelines for other BART sources does not mean that the state has unfettered discretion to act unreasonably or inconsistently with the CAA and our regulations. Where the BART guidelines are not mandatory, a state must still meet the requirements of the CAA and our regulations. In other words, the State must still adopt and apply the *best available* retrofit technology, considering the statutory factors.

Comment: Based on the erroneous claims that the SIP incorrectly analyzed costs, calculated baseline NO_X emissions, and modeled visibility improvement, EPA proposes a FIP for eight BART sources in Wyoming. For each of these sources, EPA proposes to approve all of the State's BART NO_X analyses, except for the cost of compliance, baseline emissions, and visibility factors. In other words, EPA approves the State's analyses of some BART factors, but not the others.

EPA, however, does not explain how it weighed the five BART factors after substituting its cost of compliance, baseline emissions, and visibility modeling for the State's. For example, for the Laramie River Station units, EPA reiterates its disagreement with the State's analyses and shows how its analyses change those factors. 78 FR 34776. But EPA does not explain how it analyzed those new factor conclusions in relation to the remaining Wyoming BART factors that EPA proposes to approve. For each of the eight BART units, EPA takes the same approach, failing to explain how it balanced the multiple BART factors.

Response: We disagree with this comment. As stated above, EPA came to its conclusions on the State's BART determinations based on a consideration of the five factors on an individual source basis. We considered the visibility benefits and costs of control together by weighing the costs in light of the predicted visibility improvement and the other BART factors.

Comment: There are no threshold minimum acceptable cost effectiveness levels, nor any requirements regarding how much weight a state must give to cost factors versus other factors such as visibility. EPA provides no explanation regarding what it views as a reasonable cost factor, or why or how such a factor should be balanced with visibility factors.

Response: See response above.

Comment: EPA must consider the energy that must be replaced when the emissions controls prescribed for a given unit are not economically justifiable and result in accelerated unit retirements and replacements. This scenario is of particular concern because the EPA has now proposed SCR controls for PacifiCorp's Naughton Unit 1, Naughton Unit 2 and Dave Johnston Unit 3. Unlike the Wyoming SIP, the EPA's FIP requires controls that are not expected to be justifiable and would result in accelerated unit retirements and replacements, potential natural gas conversions, and the associated costs and socio-economic impacts of removing major coal-fueled generation resources from service in areas of Wyoming that rely heavily on these facilities.

Response: As noted above, the CAA and BART Guidelines do not explicitly require that these impacts be taken into

consideration as part of the non-air quality and energy impacts.

Comment: EPA's assertion that Wyoming underestimated the ability of SCR to reduce NO_X was arbitrary. The EPA cited no legal or factual support for its assertion (at 78 FR 34748) that SCR can achieve emission rates of 0.05 lb/MMBtu or lower on an annual basis. EPA approved Colorado's use of a 0.07 lb/MMBtu annual emission rate for SCR at coal-fired power plants because the EPA explained (at 77 FR 76871, 76873) that rate ''is within the range of actual emission rates demonstrated at similar facilities in EPA's Clean Air Markets Division (CAMD) emission database.'' EPA also said in that Colorado action that an emission rate as low as 0.05 lb/MMBtu can be achieved only ''in some cases[.]'' In its proposed disapproval of Wyoming's SIP, the EPA has not explained why Wyoming's analyses are distinct from Colorado's.

Response: We disagree. In fact, the cost analyses submitted by both PacifiCorp and Basin Electric in comments support EPA's assumption that 0.05 lb/MMBtu is achievable on an annual basis. PacifiCorp's comments include a budgetary price estimate for three units from Babcock & Wilcox indicating an outlet NO_X rate of 0.04 lb/MMBtu.[217] Though Babcock & Wilcox does not specify the averaging time basis of this rate, because emission rates are lower over longer averaging times, the emission rate would only be lower if not already expressed on an annual basis. Similarly, the report prepared for Basin Electric by Sargent & Lundy indicates an annual emission rate of 0.05 lb/MMBtu for the Laramie River units.[218] Therefore, it does not appear that either Sargent & Lundy or Babcock & Wilcox dispute whether SCR is capable of achieving an annual emission rate of 0.05 lb/MMBtu. In addition, the commenter has not provided any information to substantiate that SCR cannot achieve an *actual annual emission rate* of 0.05 lb/MMBtu.

Further, as noted by other commenters, information in the CAMD database reveals that there a number of coal-fired EGUs retrofitted with SCR which are achieving actual emissions of 0.05 lb/MMbtu or less on an annual basis. It is important to note that the commenter is questioning the annual emission rate achievable with SCR (0.05 lb/MMBtu) that EPA assumed for the purpose of calculating cost effectiveness. By contrast, when establishing a 30-day emission limit for SCR, the annual rate must be adjusted upward to account for: (1) A margin for compliance, (2) a shorter averaging period, and (3) start-up and shutdown emissions. Therefore, EPA agrees that a 30-day rolling average emission limit of 0.07 lb/MMBtu is appropriate for SCR. In fact, we have approved this emission limit for Wyoming sources where the State has required the installation of SCR. However, we continue to find that it was appropriate for EPA to use the anticipated actual annual emission rate, as opposed to the allowable 30-day limit, in calculating cost effectiveness. The approach taken by EPA is consistent with the BART Guidelines: In general, for the existing sources subject-to-BART, you will estimate the anticipated annual emissions based upon actual emissions from a baseline period. 70 FR 39167. That is, cost effectiveness is more appropriately based on the reduction in annual emissions, not the change in allowable emissions.

Finally, we disagree that we have treated Wyoming in a manner distinct from Colorado with regard to the control effectiveness of SCR. As noted by the commenter, in Colorado we held that SCR can achieve an annual emission rate of 0.05 lb/MMBtu. However, in Colorado we also held that it was unlikely that an analysis performed around this rate would have altered the state's conclusions regarding BART. For units where Colorado did require the installation of SCR (Craig Unit 2, Hayden Units 1 and 2, and Pawnee), Colorado established a 30-day rolling average emission limit of 0.07 to 0.08 lb/MMbtu. These emission limits are commensurate with those established in Wyoming by both EPA and the State for SCR.

4. Visibility Improvement

Comment: The implementation by EPA of its NO_X FIP is an overreach of its authority given the record in this case. In particular, as it relates to the Laramie River Station, EPA arbitrarily requires in its FIP the installation of SCRs to address regional haze. However, the facts reveal that the installation of SCRs is not justified because—even based on EPA's own calculations—the visibility improvement that could be achieved is imperceptible. Nowhere in EPA's proposed rule does it evaluate its FIP as achieving an improvement in visibility at an individual Class I area that meets the standard deciview definition, i.e., a full deciview being equal to the amount of visibility improvement that is detectable by the human eye. In addition, EPA failed in its analysis to consider the predicted change in visibility between control options and whether the incremental improvement for a given control is even perceptible. Conceding these facts, the imposition of a FIP to achieve an imperceptible improvement in visibility is arbitrary and capricious.

Response: We disagree that the visibility improvements for Laramie River Station or other BART sources are de minimis or too small to just justify the expense of requiring controls. The BART Guidelines are clear that it is not necessary for the visibility improvement of a particular control option to be above the perceptible threshold. 70 FR 39129.

Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility. Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment. The same facts apply to the commenter's assertions on incremental visibility improvement.

In addition, we received numerous general comments that controls on sources were not warranted because the visibility improvement was less than the perceptible amount of 1.0 deciview, to which we respond in the same way.

Comment: EPA's reliance on cumulative analysis of visibility improvement is contrary to the CAA. The aggregate approach EPA is employing in its proposed rule has been rejected by the D.C. Circuit. The Court held that an EPA requirement for a group consideration of visibility impacts was not allowed by the CAA. Instead, EPA must consider all five BART factors for each source. As the Court explained, with the cumulative approach, ''it is therefore entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable visibility improvement.''

Response: We disagree that our consideration of visibility improvement was contrary to the CAA. Here the commenter has conflated two separate issues related to cumulative visibility analyses. In the D.C. Circuit ruling, *American Corn Growers Ass'n* v. *EPA,* 291 F.3d 1 (D.C. Cir. 2002), the issue was related to the cumulative visibility

[217] Letter from Babcock & Wilcox Power Generation Group, Inc., to PacifiCorp Energy, page 3, August 19, 2013.

[218] Laramie River Station SNCR and SCR Cost Estimates, prepared for Basin Electric Power Cooperative by Sargent & Lundy, Table 1, page 14, August 26, 2013.

impacts *from multiple sources.* There, the court held that a source may be unduly required to install controls because of the emissions from other sources. By contrast, in the instance related to our proposed rule, the issue is related to the cumulative visibility impact *to multiple Class I areas* from a single source. Therefore, there is no relationship between the approach rejected by the D.C. Circuit Court and that used in our assessment of visibility improvement.

Comment: EPA found that SCR provided only a 0.36 delta deciview incremental visibility improvement for Dave Johnston Unit 3, using EPA modeling, with an incremental cost of $7,163.00. 78 FR 34777–34778. EPA failed to justify in its proposed rule how a 0.36 delta deciview improvement, or approximately one-third that humanly detectible, justifies the tremendous cost of SCR. Likewise, EPA found that installing SNCR at Dave Johnston Unit 4 results in an incremental 0.11 delta deciview improvement. The alleged incremental visibility benefit of installing SNCR at Wyodak is 0.12 delta deciview at an incremental cost of $3,725. 78 FR 34784–85. EPA provides no justification for requiring such tremendous costs for such an inconsequential visibility improvement that likely falls within CALPUFF's margin of error. EPA's modeling approaches are inconsistent because EPA has determined in other states that visibility improvements greater than those used to justify SNCR at Wyodak are too small or inconsequential to justify additional pollution controls. See 77 FR 24794 (0.27 deciview improvement termed ''small'' and did not justify additional pollution controls in New York); 77 FR 11879, 11891 (0.043 to 0.16 delta deciview improvements considered ''very small additional visibility improvements'' that did not justify NO_X controls in Mississippi); 77 FR 18052, 18066 (agreeing with Colorado's determination that ''low visibility improvement (under 0.2 delta deciview)'' did not justify SCR for Comanche units). Tellingly, the ''low visibility improvements'' that Colorado found at the Comanche units not to justify post-combustion NO_X controls, as agreed to by EPA, were 0.17 and 0.14 delta deciview. 77 FR 18066. In Montana, where EPA issued a regional haze FIP directly, it found that a 0.18 delta deciview improvement to be a ''low visibility improvement'' that ''did not justify proposing additional controls'' for SO_2 on the source. 77 FR 23988, 24012. Here, EPA's actions requiring additional NO_X controls based on little-to-no additional visibility improvement are arbitrary and capricious, especially when EPA did not require additional NO_X controls in other states based on similar visibility improvements. This is particularly true in Montana where EPA had direct responsibility for the regional haze program.

Response: As stated elsewhere in our response to comments, we must consider the five factors for each facility when making a BART determination. Even though one factor (such as visibility improvement) may be similar between two units, it must be weighed in the context of the other BART factors. In addition, as we discuss in other response to comments, in accordance with the BART Guidelines, controls may be warranted even in instances where the visibility benefit is less than perceptible.

We note that, in light of comments submitted during the public comment period, we have revised our BART determinations for the Naughton Units 1 and 2, the Dave Johnston Units 3 and 4, and Wyodak. See sections III.B and V.D for a discussion on our consideration of the BART factors and our BART determination for these units.

5. PM BART Determinations

Comment: We received comments that EPA's BART determinations with respect to PM emissions from Wyoming EGUs are flawed. One commenter pointed out that contrary to the BART guidelines, EPA failed to propose BART limits on condensable PM and total PM ($PM_{2.5}$ + PM_{10}), focusing instead solely on filterable PM. Commenters went on to state that EPA underestimated the control effectiveness of baghouses, which should be able to achieve a limit of 0.010 lb/MMBtu or even lower, and thus EPA overestimated the costs effectiveness for baghouses.

Response: We disagree with both points made in this comment. On the first point, the BART Guidelines do not explicitly require that states establish separate emission limits for condensable PM.[219] However, we do recognize, by merit of the compliance test methods specified for PM (e.g. EPA Method 5B), that the BART emission limits in the Wyoming SIP only pertain to filterable PM.

On the second point, the commenter has not provided any data or information to substantiate that using a lower limit (i.e., 0.010 lb/MMBtu) for baghouses would have changed the PM BART determinations. Given that the cost effectiveness for baghouses was generally excessively high, we do not expect that using a lower limit would have changed the BART determination. Using Jim Bridger Unit 1 as an example, an emission limit of 0.015 lb/MMBtu results in an emission reduction of 709 tpy, while using an emission limit of 0.010 lb/MMBtu results in an emission reduction of 829 tpy (calculated in the same manner as in Wyoming's BART determination: 6,000 MMBtu/hr heat input and 7,884 hours of operation). In this example, the cost effectiveness of the new polishing fabric filter was $8,980/ton, and the incremental cost effectiveness was $16,396/ton. Given these costs, we have no reason to conclude that such a modest difference in the reduction (120 tpy) would lead to a meaningful improvement in visibility. This is particularly true since, on a per unit mass basis, PM emissions have a lower visibility impact than SO_2 or NO_X. A similar conclusion can be drawn for other EGUs where baghouses were considered.

6. Incremental Costs and Visibility

Comment: Wyoming and EPA have placed undue weight on incremental costs and incremental benefits. Wyoming and EPA have essentially based their BART and reasonable progress determinations on incremental costs and incremental benefits. (In almost every case, Wyoming stated that the average cost-effectiveness of the proposed BART technologies for NO_X are all reasonable.) However, in discussing average and incremental costs, EPA BART Guidelines explain: ''The average cost (total annual cost/total annual emission reductions) for each may be deemed to be reasonable. However, the incremental cost of the additional emission reductions to be achieved may be very great. In such an instance, it may be inappropriate to choose control B, based on its high

[219] The BART Guidelines do not specify that States must establish a BART limit for both PM_{10} and $PM_{2.5}$. The BART Guidelines provide the following: ''You must look at SO_2, NO_X, and direct particulate matter (PM) emissions in determining whether sources cause or contribute to visibility impairment, including both PM_{10} and $PM_{2.5}$.'' [Appendix Y to Part 51, section III.A.2.] This language in the BART Guidelines was intended to clarify to States that when determining whether a source is subject to BART, the modeling evaluation to determine the source's impact on visibility has to account for both PM_{10} and $PM_{2.5}$ emissions. There are several instances in which we state in both the preamble to the RHR, and in the BART Guidelines that PM_{10} may be used as indicator for $PM_{2.5}$ in determining whether a source is subject to BART. Neither the RHR nor the BART Guidelines specify that states must make separate BART determinations for PM_{10} and $PM_{2.5}$. Therefore, we disagree that we must evaluate separate limits or disapprove the PM BART determination for the Wyoming SIP on the basis that a BART determination for $PM_{2.5}$ was not made.

incremental costs, even though its average cost may be considered reasonable.'' Although EPA does not explain in its BART Guidelines what it considers ''very great'' and ''high'' incremental costs, it goes on to provide an example of how incremental cost is calculated, and explains: ''The incremental cost of Option 1, then, is $20,000 per ton, 11 times the average cost of $1,900 per ton.''

The clear implication of EPA's advice in the BART Guidelines is that incremental costs become a deciding factor only if they greatly exceed average costs. Instead, EPA has determined that incremental costs only twice the ''reasonable'' average costs are excessive. In doing so, EPA ignores the established fact that pollution control costs increase exponentially with control efficiency, which means that incremental costs will always exceed average costs.

Response: We disagree with most aspects of this comment, but do agree with the commenter that EPA has not defined what the terms ''very great'' or ''high'' mean when pertaining to incremental costs. We do not agree with the commenter that the one of the examples EPA provided in 40 CFR part 51, Appendix Y, should be interpreted to mean that incremental costs only become a deciding factor if they greatly exceed average costs by some magnitude over twice the average costs. In addition, incremental costs are to be considered within the context of the five factors, including average cost effectiveness and visibility improvement. Our BART determinations reflect the statement in the BART Guidelines the commenter referenced in that while average cost effectiveness may be reasonable, the EPA determined that the high incremental costs in some instances made the selection of more stringent controls not to be reasonable, when considered with visibility improvement. We discuss in each instance our evaluation of incremental and average costs and explain our conclusions.

Comment: Incremental visibility improvement is not mentioned in the reasonable progress provisions or BART Guidelines, and EPA cannot create a new criterion for the sole purpose of eliminating a control option that is reasonably cost-effective and would yield a significant visibility improvement. If EPA is going to compare costs and visibility benefits, it must do so in a transparent and objective manner, and state its criteria for acceptance or rejection of a control strategy. Relatively subjective statements about costs being ''high'' or visibility improvements ''small'' are not sufficient to justify the decisions.

Response: We disagree with this comment. The RHR states ''When making this determination [BART Step 5 on visibility impacts], you have flexibility in setting absolute thresholds, target levels of improvement, or de minimis levels since the deciview improvement must be weighed among the five factors, and you are free to determine the weight and significance to be assigned to each factor.'' 70 FR 39170. EPA concludes that in exercising its discretion, a state or EPA may consider the incremental degree of visibility improvement, which is a part of visibility improvement. EPA's consideration of incremental visibility improvement in our proposed action in Wyoming is also consistent with EPA actions in other states (e.g., Kansas (76 FR 80754), Nebraska (77 FR 40150), and Oregon (76 FR 38997)). In comparing control options and selecting one, it is natural to compare the visibility improvement (that is, to compute the incremental visibility improvement) for each option.

Comment: EPA in some cases rejected the best systems of continuous emission reduction as BART based on a subjective judgment that the incremental costs of concededly superior controls are not warranted by the visibility benefits they yield. However, EPA has failed to offer any rationale for these cost-benefit determinations, let alone the increment threshold applied. As a result, EPA's conclusions are at odds with the EPA's own analysis demonstrating that installing the most effective controls will yield needed visibility improvements.

EPA's approach is inconsistent with the purpose of the RHR and the five-factor BART analysis. The CAA identifies the elimination of human-caused visibility impairment in Class I areas as the purpose and required outcome of the haze program. 42 U.S.C. 7491(a)(1). Congress directed states and the EPA to impose the best system of continuous emission reduction on BART-subject sources, and identifies BART as the feasible, cost-effective technology that produces the most visibility benefits. For NO_X emissions at Wyoming EGUs, EPA's source-specific BART analyses uniformly point to SCR plus combustion controls as the appropriate technology.

To avoid this result, however, EPA puts the technologies that it has already determined are feasible and cost-effective through an incremental benefit filter in which it assesses not just which control technology makes the most visibility improvement, but how much more progress it makes over the second best technology relative to their costs. EPA applies this additional filter without disclosing what the threshold of improvement over the next best technology or the ratio of incremental improvement to incremental cost has to be, instead simply declaring that ''the cost effectiveness value [of SCR] is significantly higher than [inferior technology] and there is a comparatively small incremental visibility improvement over the [inferior technology].''

If haze plans only compel installation of controls with lower incremental costs and large incremental benefits (whatever those might be), then it may be impossible to reach the goal of attaining natural conditions in the Class I areas. This is especially true for Wyoming, where there are many large pollutant sources affecting many Class I areas. The level of visibility improvement that can be achieved through reduction of emissions from any one source might always be deemed too small to justify the cost of controls, in which case we will never be able to eliminate that last increment of haze pollution because it is too small to justify. While EPA or states may argue that additional emissions reductions can be achieved in the future, the opportunity to reduce haze-causing emissions in initial SIPs/FIPs by requiring BART, as recognized and directed by Congress in the CAA, is the best chance to make significant progress on this pervasive pollution problem. EPA's use of the incremental benefit analysis to eliminate the best pollution-reduction systems does not comply with the law.

Response: We do not agree with this comment. As stated above, EPA based its decisions on the BART determinations based on a careful weighing of the five factors, including average and incremental cost effectiveness. Much like average cost effectiveness, EPA has not established a threshold for incremental cost effectiveness as each BART determination is an individual decision based on the five BART factors. In accordance with the BART Guidelines, for each BART-eligible facility, we considered incremental cost effectiveness, and when weighed with the other BART factors, we reasonably concluded that more or less stringent controls were not warranted.

7. Other Comments on BART

Comment: The majority of BART sources were constructed between 1962 and 1977. They have a typical life

expectancy of 50–60 years. They likely will be retired before 2064 and replaced with state-of-the-art power generation technology and pollution control equipment. This will be a major factor in achieving the 2064 natural background goal for nitrate when these units are replaced. Thus, there is no need for controls on these sources now.

Response: While the goal of the regional haze program is to achieve natural visibility conditions in all mandatory Class I Federal areas by 2064, the statute explicitly calls for a program of reductions over time, and incremental reasonable progress towards the long-term goal. The requirement for states to implement BART applies during the first planning period ending in 2018 and is the first increment of progress. Furthermore, the remaining useful life of a facility is one of the five factors considered for BART. Thus, for example, if a facility has made a federally-enforceable commitment to either shut down or change fuels by a date certain, the shortened useful life of the facility is incorporated into the cost analysis as part of the amortization of total capital costs.

Comment: Wyoming's SIP is silent with respect to BART emissions limits during malfunctions and emergencies. However, EPA proposes a FIP requirement that: ''These [BART] emission limitations shall apply at all times, including startups, shutdowns, emergencies, and malfunctions.'' 77 FR 33061. As EPA has previously noted, EPA's proposed FIP requirement for Wyoming is not required by the RHR: ''Kansas' inclusion of the startup, shutdown, and malfunction provisions as exemptions from the BART emission rates are not required elements of the regional haze SIPs to be developed and submitted by States pursuant to section 169 of the CAA.'' See 76 FR 52604, 52618. EPA has also stated that ''EPA's disapproval of the startup, shutdown, and malfunction provisions . . . does not trigger an obligation on the part of EPA to issue a FIP pursuant to section 110(c) of the CAA, 42 U.S.C. 7410(c).'' *Id.*

Yet, EPA proposes to impose a FIP for startup, shutdown, emergency, and malfunction emissions for Wyoming sources despite EPA's prior statements that such exemptions do not trigger an EPA obligation to issue a FIP. EPA's proposed action for Wyoming is arbitrary, unauthorized and unlawful.

Wyoming does not agree with EPA's proposal to include emergencies and malfunctions in 40 CFR 52.2636(c)(2). Permitted emission limits should reflect the potential-to-emit (PTE) of a stationary source. The PTE refers to a stationary source's maximum capacity to emit under its physical and operational design. In estimating a source's PTE, Wyoming has consistently only utilized emissions that are anticipated to occur on a continuous or regular basis under the source's physical and operational design. See *United States* v. *Louisiana-Pacific Corp.,* 682 F. Supp. 1141, 1158 (D. Colo. 1988). Emissions that occur outside of a source's physical and operational design or, are unplanned, are not included in PTE estimates, and are addressed instead in accordance with Wyoming's enforcement discretion. The Wyoming Supreme Court recently upheld Wyoming's approach. See *Sierra Club* v. *Wyoming Depart of Envtl. Quality,* 251 P.3d 310, 2011 WY 42 (Wyo. 2011). Therefore, Wyoming requests that EPA withdraw its proposed FIP provision addressing emergencies and malfunctions.

Response: We disagree with this comment. The RHR states that ''Section 302(k) of the CAA requires emissions limits such as BART to be met on a continuous basis. Although this provision does not necessarily require the use of continuous emissions monitoring, it is important that sources employ techniques that ensure compliance on a continuous basis.'' 70 FR 39172. The rule goes on to state that ''[m]onitoring requirements generally applicable to sources, including those that are subject to BART, are governed by other regulations.'' See, e.g., 40 CFR part 64 (compliance assurance monitoring); 40 CFR 70.6(a)(3) (periodic monitoring); 40 CFR 70.6(c)(1) (sufficiency monitoring) (70 FR 39172). Therefore, it is clear that the rule intended for BART emission limits to be met on a continuous basis and did not provide either explicitly or implicitly exceptions for startup, shutdown, or malfunction. Furthermore, it has been EPA's longstanding position that SIP provisions generally cannot contain automatic exemptions for startup, shutdown, and malfunction.[220] With respect to PTE, the comment does not identify how the arguments about PTE are relevant to a BART emissions limit. Finally, regarding claims of inconsistency with the final action for Kansas, commenter quotes from the proposed not the final agency action. As explained in the final agency action, EPA did not take final action on those portions of the Kansas submittal, the state withdrew them.[221]

Comment: The EPA's proposed FIP states only that subject-to-BART sources must comply within five years of adoption of the FIP. This blanket schedule of compliance for FIP sources is contrary to the CAA. For one thing, by its very language, the EPA's proposed FIP fails to ensure that subject-to-BART sources ''procure, install, and operate, as expeditiously as practicable'' any additional controls that may represent BART as required by the CAA. See 42 U.S.C. 7491(b)(2)(A) and (g)(4). The EPA only requires that sources comply within five years, but does not actually require sources to comply with BART limits established in the FIP ''as expeditiously as practicable.'' Thus, EPA's proposed FIP fails to implement the statute. Furthermore, simply stating verbatim in the FIP that ''sources shall comply with the emission limitations and other requirements of this section within five years of the effective date of this rule'' fails to give force and effect to the statutory requirements that

[220] See for example, EPA's September 20, 1999, guidance, ''State Implementation Plans: Policy Regarding Excess Emissions during Malfunctions, Startup and Shutdown,'' cited in the next footnote.

[221] As EPA Region 7 explained in their final action 76 FR 80754, 80755–6 (Dec. 27, 2011): ''As EPA explained in the proposed notice, the Consent Agreements exempted periods of startup and shutdown for both Kansas City Power and Light and Westar Energy from compliance with applicable emission limits, which were not narrowly defined, and exempted periods of malfunction for Westar Energy. EPA proposed to disapprove the exemptions because they are inconsistent with the Clean Air Act and EPA's September 20, 1999, guidance, ''State Implementation Plans: Policy Regarding Excess Emissions during Malfunctions, Startup and Shutdown.'' Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' September 20, 1999; and 52 FR (45109 November 24, 1987).

EPA subsequently received a letter from the State dated December 1, 2011, withdrawing the SSM provisions in the Consent Agreements in their entirety from the regional haze SIP. Specifically, the following four provisions were withdrawn from EPA's consideration for approval in the regional haze SIP:

1. All references to, ''excluding periods of startup and shutdown'' in Paragraph 23 of the Kansas City Power and Light Company regional haze agreement;

2. The reference to, ''excluding periods of startup, shutdown and malfunction'' in footnote 1 of Appendix A to the Westar Energy, Inc. regional haze agreement;

3. All references to, ''excluding periods of startup and shutdown'' in Chapter 9.3.1 of the Kansas regional haze SIP;

4. And the sentence, ''The Agreements between KDHE and the affected BART sources currently exclude emissions associated with startup, shutdowns, and malfunctions (SSM) in the agreed upon emission limits'' in Chapter 9.5 of the Kansas regional haze SIP.

Since the SSM provisions were withdrawn by the State, and are therefore no longer before EPA, neither EPA's proposed disapproval of these exemptions, nor the comments on that proposed disapproval, are relevant to this final action.

compliance occur as ''expeditiously as practicable.'' Here, the CAA is clear that in mandating ''expeditious'' compliance, FIPs must ensure that subject-to-BART sources comply as soon as possible. In this case, the EPA's proposed FIP simply fails to ensure compliance with BART as soon as possible. It lacks any concrete dates by which subject-to-BART sources must comply, other than to state that sources must comply within the statutory maximum compliance date of five years.

However, the CAA is clear that if a source can comply with BART before five years, it must comply by that earlier date. See 42 U.S.C. 7491(g)(4). Simply deferring to the five-year deadline undermines the Congressional intent behind the ''as expeditiously as practicable'' provision. It is notable that the EPA actually required ''expeditious compliance'' for Jim Bridger Units 3 and 4.

Response: We have reviewed the compliance dates for meeting BART limits that are contained in the SIP. Given the magnitude of the retrofits being undertaken, we believe that five years from the effective date of this final rule is as expeditiously as practicable. We note that our compliance dates for Jim Bridger Units 3 and 4 are based on the fact that those are the dates in the State's SIP which we are approving for these two units.

Comment: Compliance with the perceived dictates of the CAA need not be as inflexible as contemplated in the EPA's proposal. By exploring and employing creative solutions, it is possible to reduce emissions to satisfy the CAA while ensuring reasonable value and more cost-effective expenditures for PacifiCorp's ratepayers. Two recent examples of successful creative alternatives that will save ratepayers many millions of dollars include the recent proposals of (1) Public Service of New Mexico for its San Juan Generating Station, and (2) PacifiCorp regarding its Naughton Unit 3 in Wyoming.

Notably, the EPA's revised 2013 proposal for Wyoming implicates ten of PacifiCorp's coal-fueled units. Given the number of affected PacifiCorp generation plants, Wyoming appears to be a particularly fertile ground for encouraging the type of alternative solution that satisfied the CAA with regard to San Juan and Naughton Unit 3. We urge the EPA, in response to these comments, to signal its willingness to consider all feasible compliance options that PacifiCorp may offer (including those that the EPA has no authority to order) to provide the lowest-cost solution for ratepayers in achieving emissions reductions.

Response: We agree with the commenter's points that there is some flexibility under the CAA to meet the requirements of the RHR. As with past actions, EPA is willing to consider alternatives compliance proposals that are put forth.

Comment: Wyoming's regional haze program has been underway for several years. Under EPA's RHR, BART controls were expected to be installed by the end of 2013. Wyoming appropriately and effectively developed and implemented a regional haze program that met the 2013 timeline. As required by the Wyoming SIP, and with the one exception of Naughton Unit 3 which has a deadline of 2014, PacifiCorp has fully implemented Wyoming's BART requirements for its Wyoming BART units. As a result, in 2013 alone, there will be 76,000 fewer tons of visibility impairing pollutants emitted by PacifiCorp BART units than was emitted in 2004.

Had Wyoming waited for EPA's final FIP, none of these reductions would have occurred to date. In other words, the Wyoming SIP required regional haze reductions to begin earlier and extend over a longer period of time than EPA's FIP. It is striking to note that from 2005–2021 the State's regional haze program will have removed 243,000 tons more NO_X from PacifiCorp's Wyoming facilities than EPA's proposed FIP.

In 2022, the EPA's FIP begins providing an annual benefit of 5,100 tons per year. Ironically this benefit only lasts for six years, when the units at which EPA's proposed FIP requires more stringent controls are retired. By 2027, the Wyoming Regional Haze SIP will have removed over 210,000 more tons of NO_X from PacifiCorp's units than the EPA's proposed FIP, with a significantly lower cost (more than $300 million less in capital) and will require significantly lower expenditures in operation and maintenance between 2022 and 2027.

Response: We acknowledge that the emission reductions already achieved by PacifiCorp's Wyoming facilities are substantial. However, the emission reductions already achieved at the PacifiCorp facilities do not release EPA from its obligation under the CAA to review Wyoming's SIP, or to promulgate a FIP where we find that the SIP fails to comply with the CAA or RHR.

We disagree that the SIP will result in greater emission reductions than the FIP. As discussed in section III.B, in response to comments received during the public comment period, we have made several changes to our proposed BART determinations for the PacifiCorp units. Even so, our final rule today continues to achieve greater emission reductions than the Wyoming SIP for the PacifiCorp units. For Wyodak, our BART determination (new LNBs with OFA and SCR) results in an additional 2,496 tons per year when compared to the SIP. For Dave Johnston Unit 3, though PacifiCorp has the option to shut down the unit in 2027, our BART determination (new LNBs with OFA and SCR) results in an additional 1,597 tons per year when compared to SIP. Clearly, even though we are no longer requiring some of the BART controls which we proposed, the FIP achieves greater emission reductions than the SIP at any point in time. Regardless, the BART determination for any BART source is founded on a consideration of the statutory BART factors, and not a comparison of overall reductions achieved between a federal and state plan.

D. BART Sources

1. Basin Electric Laramie River Station Units 1–3

a. General Comments

Comment: We received numerous comments expressing concern over the economic impact our proposed FIP would have for customers of Basin Electric, and the commenters urged us to approve the State's regional haze SIP. The commenters went on to point out that Basin Electric is a non-profit electric cooperative that must pass costs on directly to consumers. One commenter noted that the projected cost to install SCR for each of the three units at Laramie River will be $200 million for Western Minnesota and Missouri Energy Services members. If that cost is spread over a 10-year period, the cost would be $110 million a year, which relates to an increase in electric rates of 8 percent.

Response: In considering the costs of compliance, the BART Guidelines instruct states and EPA to evaluate several metrics, focusing specifically on average cost-effectiveness and incremental cost-effectiveness, not total capital cost or total annual cost. EPA has found that the average and incremental cost-effectiveness of SCR is reasonable for all three units at Laramie River. While the BART Guidelines suggest that total capital cost and total annual cost, as well as incidental increases in prices to consumers, can be considered as part of an affordability demonstration, Basin Electric did not provide the necessary detailed information to suggest that installing SCR at Laramie River would be

unaffordable, either for the cooperative or its rate payers. Consequently, we believe that our analysis of the costs of control, which focused on cost-effectiveness, was appropriate.

Comment: We received numerous comments that EPA's FIP would result in additional costs of $600–$700 million for the owners of Laramie River Station with no perceptible visibility improvement.

Response: See the response above. We have addressed the issue of perceptible visibility improvement in section V.C.4. As explained in the introductory section and elsewhere, the visibility improvements from controls at Laramie River are significant, even when considered on a unit by unit basis.

b. NO_X BART Determination

Comment: One commenter provided a spreadsheet with cost calculations for each of the affected Laramie River units.

Response: EPA has reviewed the spreadsheet.[222] The major difference in calculations relates to selection of retrofit factor and cost of property taxes and insurance (excluded by commenter). Commenter indicates that all facilities have a retrofit difficulty of 1.0. EPA disagrees and has provided our reasons for retrofit factors in other comments. In addition, for certain units where we have incorporated new cost information submitted by the facility owner's during the comment period, we are no longer applying a retrofit factor. Finally, property taxes and insurance costs should be included, but only to the extent that they are actually realized. See details in the cost report included in the docket.[223]

Comment: EPA's decision to change its initial NO_X BART proposal for Laramie River Station Units 1–3 from SNCR to instead propose requiring SCR is well-supported by EPA's analysis. When site-specific information is appropriately considered, the costs of SCR at Laramie River Station are even lower than EPA estimated. EPA used a ''social interest rate'' of 7 percent in its analysis when the plant's owner used an interest rate of only 6 percent; the EPA accepted the owner's claimed costs of new LNBs with OFA (after subtracting disallowed costs), even though other data submitted by the company demonstrated lower costs for these combustion controls; and the EPA's cost estimates assumed unreasonably high auxiliary power costs of $0.06/kilowatt hour (''kWhr''), when even the owner assumed an auxiliary power cost of $0.015/kWhr in its cost-effectiveness analyses. Making the suggested cost changes to the analysis would result in cost effectiveness values ranging from $3,244/ton to $3,532/ton, as opposed to the EPA's values ranging from $3,589/ton to $3,903/ton. The substantial visibility benefits afforded by SCR on Laramie River Units 1–3 also justify a finding that SCR is BART on these units. The costs and visibility improvements are consistent with what other states in their SIP or EPA in a FIP have found reasonable for BART controls.

Response: EPA has addressed each of the issues raised by the commenter in other responses. EPA has provided revised cost estimates based upon input and consideration of all commenters.

Comment: The Sargent & Lundy Evaluation demonstrates that the costs of installing SCR at Laramie River Station are excessive and supports Wyoming's determination that OFA plus LNB constitutes BART. In response to EPA's proposed SIP disapproval and FIP, Basin Electric requested that Sargent & Lundy prepare detailed and site-specific cost estimates for installation and operation of SNCR and SCR at the Laramie River Station. Sargent & Lundy, ''SNCR and SCR Cost Estimates, Laramie River Station'' (August 26, 2013) (S&L Evaluation). Sargent & Lundy is a leading engineering, design, and consulting firm and a system supplier that has extensive experience with the specification, evaluation, selection, and implementation of emission control technologies and coal-fired power plants, including more than 98 projects for the control of NO_X emissions. S&L Evaluation section 2. Indeed, Sargent & Lundy has participated in the installation of more than 72 SCR systems and 26 SNCR systems. *Id.* The Sargent & Lundy Evaluation follows the BART Guidelines and uses the methodology in the CCM where possible, while addressing site-specific variables that are critical to reaching an accurate cost estimate for these NO_X control technologies at Laramie River Station.

The Sargent & Lundy Evaluation estimates that the total capital costs of SCR would exceed $746 million, while annual costs of an SCR system for the Laramie River units would total more than $86 million. S&L Evaluation, Tables 3, 7. Total capital costs for installing SNCR on all three units, on the other hand, would be approximately $50.6 million with annual costs of approximately $20 million. *Id.* Tables 2, 6. Moreover, the cost effectiveness of SNCR based on the Sargent & Lundy Evaluation would be between $6,967 to $7,013 per ton of NO_X removed. Cost effectiveness values for SCR range from $8,531 per ton of NO_X removed to $9,048 per ton of NO_X removed, with an incremental cost effectiveness compared to SNCR of between $9,157 per ton to $9,862 per ton. *Id.* Table 7. The Sargent & Lundy Evaluation demonstrates that the costs of installing SCR at Laramie River Station are excessive and supports Wyoming's determination that OFA plus LNB constitutes BART.

Response: As noted on page 21 of Exhibit 14 of Basin Electric's comments: ''. . . Cost estimates prepared for Laramie River Station are based on equipment costs and budgetary quotes available from similar projects and Sargent & Lundy's experience with the design and installation of retrofit SNCR and SCR control systems. The Laramie River Station cost estimates are conceptual in nature; thus, Sargent and Lundy did not procure equipment quotes specifically for the Laramie River Station control systems. Rather, equipment costs for the Laramie River Station projects are based on conceptual designs developed for the control systems, preliminary equipment sizing developed for the major pieces of equipment, and recent pricing for similar equipment . . .''

As noted in EPA's response to other comments, EPA has found a number of deficiencies in Sargent & Lundy's estimates and disagrees with the costs they have arrived at for SCR. Also as described in response to other comments, in light of recently submitted information, EPA has accepted Basin Electric's estimated capital cost of SNCR.

Comment: The Sargent & Lundy Evaluation and resulting cost estimate is far more accurate than the study level estimate contemplated by the CCM and the IPM algorithms relied upon by EPA in its SIP disapproval and FIP. The Sargent & Lundy Evaluation takes into consideration site-specific design and operating parameters and provides a conceptual, or scoping-level, estimate for SNCR and SCR at Laramie River. S&L Evaluation section 4.5.

The BART Guidelines state that ''cost estimates should be based on the OAQPS Control Cost Manual, where possible'' and in those cases where the CCM addresses the control technology in ''sufficient detail for a BART analysis.'' 70 FR 39166. In all cases, however, ''[t]he cost analysis should also take into account any site-specific design or other conditions . . . that affect the cost of a particular BART technology option.'' *Id.* The CCM

[222] Wyoming EGU BART and Reasonable Progress Costs—10/2013.

[223] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013.

describes various technologies and provides general costing methodology, but EPA acknowledges that the methodology is intended to provide a ''rough order of magnitude'' estimate of costs that is accurate to within ±30%. CCM section 1.2, page 1–4. This rough estimate is appropriate for regulatory development because it can be prepared at a ''relatively low cost with minimum data.'' *Id.* section 2.2, page 2–3 (internal quotations omitted). See also S&L Evaluation at section 4.5. But ''EPA does not claim cost estimates for industry at greater than study level accuracy for industrial users'' because ''the industrial user will necessarily have much more detailed information than the generic cost and sizing information.'' CCM section 2.2, page 2–4, 2–5.

The BART Guidelines may reference the CCM because it provides a simple and less costly methodology for estimating costs, but neither the Guidelines nor the CCM require use of a less accurate methodology where more accurate methodologies are appropriate. Indeed, the BART Guidelines require consideration of site-specific variables that in some cases, such as with SCR, are not factored into the examples provided by the CCM. 70 FR 39166. Under these circumstances, the Manual ''offers the user an opportunity for greater accuracy than that used by regulators'' and gives users the discretion to ''exercise 'engineering judgment' on those occasions when the procedures need to be modified or disregarded.'' CCM section 1.2, page 2–4, section 1.3, page 1–7.

The cost estimates prepared by Sargent & Lundy are scoping-level estimates, which required the use of numerous site-specific design parameters that are not included in the general CCM equations and reflect all costs to install the control systems, taking into account site-specific variables and physical constraints. S&L Evaluation section 4.5, Attachments A1, A2. These estimates are far more accurate than EPA's estimates, reinforce Wyoming's BART determination, and demonstrate there is no basis for EPA to disapprove the State's action.

Response: We agree that source-specific costs can be useful in the BART analysis and agree with a number of the cost estimates in the Sargent & Lundy analysis. However, as noted in our response to other comments, EPA found Sargent & Lundy's estimates of SCR capital cost deficient in a number of respects, specifically: (1) Inadequate explanation for the high labor rates that were assumed when compared to published labor rates; (2) High overtime and per diem costs without sufficient explanation; (3) Apparent duplication of costs associated with General Facilities; (4) Inclusion of AFUDC; (5) Apparent duplication of contingencies and other cost adders; and (6) Addition of unnecessary SO_3 mitigation system. All of these contributed to excessively high capital cost. Sargent & Lundy also assumed excessively high cost for replacement catalyst, which contributes to high operating cost.

As described in our responses to other comments, in light of recently submitted information, EPA has accepted Basin Electric's estimated capital cost of SNCR.

Comment: The Sargent & Lundy's estimate for SCR considers critical site-specific variables that are not captured by the CCM. The Sargent & Lundy estimate for SCR is based on an in-depth, detailed study of site-specific costs conducted by a team of engineers with extensive experience in SCR installations. In order to establish SCR control system design parameters and to prepare inputs for the capital cost estimate, Sargent & Lundy engineers performed a site walkdown to identify site constraints for the SCRs and associated plant modifications and reviewed operating conditions at Units 1 through 3 affecting flue gas conditions at the SCR inlet. Sargent & Lundy then developed general arrangement drawings for the SCRs and new ductwork, on which estimations for material quantities were made. Finally, Sargent & Lundy evaluated the existing forced draft (FD) fan buildings to determine whether the existing buildings could support the SCR structures based on the conceptual design.

Sargent & Lundy's evaluation identified important design considerations affecting the SCR cost estimates, many of them directly related to the considerations that EPA acknowledges in the CCM make broad brush cost estimates for SCR nearly impossible. CCM section 2.5.4.2, page 2–28 (installation of SCR can ''impose an addition expense to 'shoe-horn' the equipment into the right locations'' where ''there is generally little room for the reactor to fit in the existing space and additional ductwork, fans, and flue gas heaters may be needed to make the system work properly.''). The considerations include, inter alia, congested existing plant configuration, and limited auxiliary power available at the station. S&L Evaluation section 4.3.1.

The site congestion at Laramie River Station substantially complicates installation of SCR systems because the location of the FD fan buildings limits the open area available to drop support columns for the SCR. *Id.* Based on the site walkdown and review of drawings provided by Basin Electric, the conceptual design placed the SCRs directly above the existing FD fan buildings, which will require that the SCR support columns penetrate the FD fan buildings. This, in turn, would require the construction of deep foundations for the SCR support columns in a congested area resulting in challenging and time-consuming efforts to ensure adequate support. *Id.* Another related complicating factor relates to constructability issues. All three units are constructed side-by-side in a row with little space between them, which limits crane placement and would require selection of larger, more expensive cranes during installation. *Id.* Another major design consideration identified by Sargent & Lundy is the need for entirely new auxiliary power equipment for the SCR and replacement induced draft (ID) fans because the existing ID fans currently are running at full capacity. *Id.*

In addition, Sargent & Lundy's Evaluation took into consideration, among other factors, the following site-specific conditions that affect the cost of SCR at Laramie River Station: (1) Boiler Building Reinforcement. SCR duct work will penetrate the existing boiler building structural columns, thereby requiring that the boiler building structural supports be redesigned and rebuilt and engineered to ensure continued support of the 20-story boiler building. (2) SCR Reactors and Catalyst. The conceptual design calls for two reactors per unit using anhydrous ammonia as the reagent. To achieve required NO_X emission reductions on a consistent basis, three layers of catalyst would be required and the SCRs would need to be designed to hold four layers of catalyst. (3) Ammonia System. The conceptual design located the anhydrous ammonia system in a remote location from the units and, therefore, the cost estimate assumed that all three SCR units would share a single ammonia storage facility. (4) Structural Stiffening. Structural stiffening of the ductwork and equipment downstream of the boiler and upstream of the new ID fans would be required by federal regulation to operate at more negative pressures due to installation of the SCR.

Response: EPA has reviewed the submitted comments, and believes that for each of the items cited, insufficient information was provided to justify why the cost of SCR at Laramie River Station would be so much higher than for other SCRs. Commenter cites the location of the SCR reactor as an issue. This is an

issue that is common to every SCR retrofit. Based upon information used by EPA and information submitted by Basin Electric, there is no indication that location of the SCR reactor will be any more difficult than at any other site. In fact, the location is a rather common location. There was no indication that major equipment would need to be relocated. Therefore, in this respect Laramie River does not appear to be any more difficult than a typical SCR retrofit.

Pertaining to site congestion, Laramie River is no more congested than a typical facility that retrofits SCR, and in some respects is less congested. There is greater difficulty in retrofitting unit 2 (the middle unit), and EPA accounted for that with a higher retrofit difficulty factor. Commenter indicates that the SCR support steel will interfere with equipment at the ground level, specifically, the FD fan buildings, requiring installation of steel and deep foundations in a congested area. SCRs are rarely installed at ground level and are normally installed above other equipment. SCR support steel is therefore commonly installed in this area below the SCR and there typically is other equipment that interferes with this. This is not an unusual situation and is not a reason for SCR cost at Laramie River Station to be higher than a typical retrofit. Side-by-side installation is common, and EPA has accounted for that with a higher retrofit difficulty factor for unit 2.

Most boilers are inside a boiler building and SCRs are always built outside the boiler building, making it always necessary to route ductwork through the boiler building wall or through the roof. Making penetrations for SCR ductwork through the boiler building wall is very common in SCR retrofits, and this is not a reason to justify a higher cost for an SCR retrofit at Laramie River station. SCR reactor 3 plus 1 and in two sections is a common SCR arrangement for a boiler of this size and does not justify a higher than average cost for Laramie River. All SCR systems have ammonia storage facilities and typically try to combine storage for all units at a site together. Ammonia storage is not a major cost item and where the system is located on the site will not make a large difference in overall cost. Pertaining to the need for an additional fan, the cost estimate used by EPA had a specific line item cost for the fan and associated costs for electrical and other modifications. Structural stiffening of ductwork is typically required when an ID fan is added. The cost estimate by EPA included provision for this.

Notwithstanding these points, EPA has accepted parts of Basin Electric's cost estimate where those costs are supported. See EPA's response to other comments for more information.

Comment: Sargent & Lundy estimated capital costs based on the conceptual design of SCR installation at Laramie River Station and in-depth itemized studies, not the type of generic cost factors set forth in the CCM. As a result, the Sargent & Lundy Evaluation provides cost estimates that reflect more accurately the actual costs Basin Electric would incur for installation of SCR at Laramie River.

The Sargent & Lundy Evaluation uses an SCR design with itemized budgetary cost estimates for major equipment items and site-specific costs. S&L Evaluation section 4.5, Attachment A2. For example, the estimate includes line-item costs for upgrades, replacements, or installations of the following plant subsystems to support SCR operation at the Laramie River Station: (1) Foundation work to support SCR systems; (2) Economizer ductwork modifications; (3) Larger ID fans will be required on all three units, requiring replacement of the existing ID fans; (4) Existing electrical systems are not capable of handling the new fan loads and SCR control systems and will require significant upgrades; (5) Structural stiffening of the duct work downstream of the air heater and upstream of the new ID fans; (6) The existing Distributed Control System needs to be expanded; (7) Dry sorbent injection control systems will be required on Units 1 and 2 for SO_3 mitigation, resulting from the wet scrubbers installed on those units; and (8) Ammonia unloading area construction, including two storage tanks and tank equipment, as well as ammonia delivery and vaporization equipment.

Because of the site-specific nature of these items, the assumptions in the CCM would not be adequate to account for them, yet these types of system upgrades add substantial cost to the SCR installation.

Sargent & Lundy prepared direct capital cost estimates for each of these systems, including all costs associated with equipment, labor, and freight. S&L Evaluation section 4.5. As EPA acknowledges, due to the site-specific nature of SCR, detailed vendor quotes are difficult to obtain because they cannot be done in an ''off-the-shelf'' fashion. CCM section 2.5.4.1, page 2–27. Sargent & Lundy, however, has used example vendor quotes for major pieces of equipment, including ammonia handling system, unity auxiliary transformers, catalyst modules, and sootblowers and sonic horns, and adjusted the quotes as necessary to account for the site-specific factors such as Laramie River Stations' boiler size, flue gas rates, flue gas temperatures, and inlet and outlet NO_X concentrations. S&L Evaluation section 4.4.1; Attachment A2. Sargent & Lundy also provided process equipment cost estimates for manufactured equipment in Attachment E of its Evaluation.

Sargent & Lundy estimated material and commodity costs by multiplying the quantity of the material needed to install the system based on the conceptual design by the unit cost for the commodity, which was estimated using Sargent & Lundy in-house data, vendor catalogs, and industry publications. *Id.* section 4.4.2. The basis for the estimates of materials is set forth in detail in the Sargent & Lundy Evaluation. *Id.* section 4.4.2.1. Labor costs were estimated based on man-hour estimates from industry publications, union craft rates for southeastern Wyoming, and a local labor productivity factor. *Id.* See also *id.* at Attachment F (Example Industry Publications—Commodity Costs and Man-Hour Estimates). Where the conceptual design provided insufficient detail on which to generate an estimated cost, Sargent & Lundy used allowances based on the typical scope of similar projects. *Id.* section 4.4.3.

Sargent & Lundy considered both fixed and variable operating and maintenance costs. S&L Evaluation section 4.5. Variable costs for SCR include costs of anhydrous ammonia and catalyst replacement costs, while fixed costs include property taxes and insurance. *Id.* section 4.5 and Table 5. Sargent & Lundy's analysis did not use the maintenance materials and labor cost in the CCM of 1.5% of Total Capital Investment because it results in significantly higher than expected maintenance costs than reported by industry. Rather, Sargent & Lundy used a lower maintenance materials and labor cost of 0.25% of Total Capital Investment, which results in a conservative estimate of operating and maintenance costs. *Id.* section 6.1.2.

Indirect capital costs were estimated based on total direct capital costs using the factors set forth in EPA's CCM. S&L Evaluation section 4.4.5. For large projects like SCR, with project durations of between 1.5 years and four years, Sargent & Lundy typically would account for escalation, reflecting the increases in equipment, material, and labor costs that occur during the duration of the project. *Id.* section 4.4.6.1. Sargent & Lundy has taken a

conservative approach in its estimate, however, and has calculated estimates in constant 2013 dollars without including escalation, which is consistent with the constant dollar approach discussed in the CCM. *Id.;* CCM section 4.2, page 2–43.

Response: As noted on page 21 of Exhibit 14 of Basin Electric's comments: ''. . . Cost estimates prepared for Laramie River Station are based on equipment costs and budgetary quotes available from similar projects and Sargent & Lundy's experience with the design and installation of retrofit SNCR and SCR control systems. The Laramie River Station cost estimates are conceptual in nature; thus, Sargent and Lundy did not procure equipment quotes specifically for the Laramie River Station control systems. Rather, equipment costs for the Laramie River Station projects are based on conceptual designs developed for the control systems, preliminary equipment sizing developed for the major pieces of equipment, and recent pricing for similar equipment . . .''

The approach used by Sargent & Lundy is essentially how the cost algorithms for IPM were developed, upon which EPA relied. Both are empirically-based estimates that, as demonstrated in our response to other comments, use many of the same inputs. However, Sargent & Lundy developed a very detailed cost estimate that includes many line items that would otherwise be included in the Project Contingency or other areas, such as General Facilities, and thereby double-counted these costs.

EPA has addressed comments relative to capital cost estimates in our other responses. EPA has reviewed the assumed variable operating costs and has commented on them in other comments. Regarding fixed operating costs, the IPM algorithm represents information from actual facilities, and is therefore used in EPA's analysis. As far as indirect capital costs, EPA agrees that escalation should not be included because the CCM requires use of the overnight method.

Comment: When site-specific conditions are taken into consideration, the costs of installing SCR at Laramie River Station would total nearly $747 million, with annual costs of $86,074,000. The per unit breakdown of capital costs are set forth in Table 5 and Table 3 of the Sargent & Lundy Evaluation. Direct costs include: Equipment, material, labor, spare parts, special tools, consumables, and freight. Total project costs include equipment costs for the SCR, ammonia handling system, and balance-of-plant systems including the ID fan, auxiliary power system, electrical system, and dry sorbent injection control systems on Laramie River Units 1 and 2. See S&L Evaluation section 4. Indirect costs include: General facilities, engineering and home office fees, contingencies, preproduction costs, and initial catalyst fills. See Cost Manual section 2.5.2, pages 2–41 through 2–47; S&L Evaluation section 4.4.5.

In all cases, Sargent & Lundy used methodology that results in a conservative estimate of total costs taking into account the unique, site-specific factors discussed above. The Sargent & Lundy Evaluation explains the effect of these factors on the cost estimate, consistent with the BART Guidelines and the CCM. S&L Evaluation section 5.2.1; CCM section 4.2, page 2–21. In addition, as acknowledged by EPA's own consultant, SCR capital costs have risen significantly over the past decade. S&L Evaluation section 5.2.1, citing Cichanowicz, Edward J., ''Current Capital Cost and Cost-Effectiveness of Power Plant Emissions Control Technologies,'' (January 2010).

Response: EPA disagrees with commenter and has identified numerous deficiencies in the cost estimate developed by Sargent & Lundy for the Laramie River Station that are discussed in previous responses to comments. Furthermore, the IPM cost algorithm used had already been adjusted to address escalation to 2009 dollars and, per the memo by EPA's contractor for this action, the Chemical Engineering Plant Cost Index (CEPCI) [224] was used to escalate costs after that period. Per the memo for the IPM algorithm: ''The data sets were escalated to update the MOG information to 2009 and all of the data was cross referenced with current 2009 projects. The MOG and S&L cost data were updated to reflect the changes in equipment and labor rates. The CEPCI index for power plants was used to escalate the costs. The Handy-Whitman index was also used to escalate the project costs to account for regional effects; the results were compared with the CEPCI index and were within 2% for total project costs.'' [225]

Comment: The Sargent & Lundy Evaluation considers site-specific data, including operating parameters for the Laramie River Station units and design parameters for SNCR that were developed based on input from Basin Electric and on Sargent & Lundy's extensive experience. S&L Evaluation section 4.1, Table 1. See also *id.* at Attachment A1. Prior to undertaking the cost estimate, Sargent & Lundy developed a conceptual design taking into consideration site-specific design and operating parameters. S&L Evaluation section 4.2.1. The Evaluation highlights each of these project-specific considerations, which include, among other items: (1) Considerations Related to Use of Urea as the Reagent. The SNCR estimate is based on use of urea as a reagent, which would be delivered by truck and unloaded into fiberglass reinforced plastic storage tanks. The tanks would be cross tied and solution would be transferred using stainless steel piping. Centrifugal pumps would be needed to pump solution to metering modules and variable frequency drives would be used to maintain constant pressure. Finally, distribution modules would be needed to provide diluted urea solution and atomizing air to individual injectors. The design, quantity, type and placement of injectors are critical to SNCR performance. (2) Furnace Modifications. Penetrations in the boiler water wall would be required at injector locations; and to support injector penetrations, water wall tubes would need to be removed and replaced with tubes curved around the location. Also, reinforcement may be necessary to support the injectors. (3) Process and Freeze Protection Tracing System. A freeze protection system would be necessary for outdoor piping and instruments. The system would be designed to accommodate both normal plant operations and extended shutdowns during cold weather. S&L Evaluation section 4.2.2.

The equipment costs were estimated based on SNCR original equipment manufacturers for control systems on similar coal-fired boilers in light of the conceptual design of the control technology. Equipment costs were developed for SNCR metering skids and injectors, compressors, reagent storage tanks, and related ancillary equipment. *Id.* section 4.4.1. Consistent with the SCR cost estimate, material and commodity quantities for structural, mechanical and electrical items were developed for each subsystem included as part of the SNCR system and provided as inputs to the cost calculation. *Id.* section 4.4.2.1. Material and commodity pricing was based on in-house data, vendor catalogs, and industry publications. *Id.* Where the

[224] The CEPCI is an industry index that allows for adjustment of plant construction costs from one period to another.

[225] Sargent & Lundy, ''IPM Model—Revisions to Cost and Performance for APC Technologies SCR Cost Development Methodology FINAL'', August 2010, Project 12301–007, Perrin Quarles Associates, Inc. p 1.

conceptual design provided inadequate detail on which to base costs, allowances were used. *Id.* section 4.4.3. Similar to the SCR cost estimate, labor costs were based on local labor rates, with an estimate of man-hours required for installation of each line item in the SNCR estimate. *Id.* section 4.4.4.

Indirect capital costs were based on the CCM, using default factors set forth in Section 4.2, Chapter 1, Table 1.4. *Id.* section 4.4.5. The estimate includes variable and fixed operating and maintenance costs, including costs for urea. *Id.* section 4.5. Sargent & Lundy did not include either escalation or AFUDC in its cost estimate because the installation of SNCR systems are less capital and time intensive and can be done in a shorter period of time than SCR systems. S&L Evaluation section 4.4.6.3.

Based on methodology consistent with the CCM, total site-specific costs for installation of SNCR at Laramie River Station are approximately $50.5 million, with annual costs of $19.75 million. The breakdown of total costs per unit can be found at Table 2 of the Sargent & Lundy Evaluation.

Response: Based upon information provided by Basin Electric in their comments, EPA has accepted Basin Electric's estimated capital cost for SNCR and the estimated chemical utilization.

Comment: The Sargent & Lundy Evaluation supports Wyoming's BART determination. The average effectiveness of both SNCR and SCR are high, and the incremental cost of SCR compared to SNCR is even higher. Sargent & Lundy calculated the cost effectiveness of SNCR and SCR technologies based on emission rates resulting from Laramie Rivers' installation of LNB and OFA, consistent with the BART Guideline's directive to use baseline emission rates that ''represent a realistic depiction of anticipated annual emissions for the source.'' 70 FR 39167. For comparison purposes, Sargent & Lundy also performed a sensitivity analysis showing the values generated by using the 2001 through 2003 emission rates, which EPA's relied upon in making the BART determination in its proposed FIP. S&L Evaluation section 6.1.3, Tables 11–12. The cost effectiveness of SCR still remains between $5,955 and $6,298 costs per ton of NO_X removed and incremental cost effectiveness from SNCR is above $9,000 per ton of NO_X removed. *Id.* Table 12. These cost effectiveness values remain prohibitive, and reinforce Wyoming's determination that OFA plus LNB constitutes BART at Laramie River and EPA's 2012 rejection of SCR as not cost effective.

The Sargent & Lundy Evaluation further supports Wyoming's BART determination for Laramie River Station by providing a more precise cost estimate for both SCR and SNCR. At significant expense, Basin Electric arranged for an evaluation of the costs of compliance with SCR and SNCR at a level of detail that far exceeds what the CCM requires, but represents the gold standard for estimating the costs of compliance for a control technology. This evaluation demonstrates that the costs to install SCR at Laramie River would reach $750 million, far above what EPA estimates in the proposed SIP disapproval and FIP. In sum, the Sargent & Lundy Evaluation supports Wyoming's BART determination, and its decision not to require SCR, with a detailed consideration of the costs of compliance for Laramie River. Moreover, the Evaluation highlights the fundamental inadequacies in EPA's own cost estimates, on which EPA bases both its decision to disapprove the SIP and the BART determinations in its FIP.

Response: EPA disagrees with commenter and has identified numerous deficiencies in the cost estimate developed by Sargent & Lundy for the Laramie River Station that are discussed in previous responses to comments. EPA calculated emission reductions from emission rates indicative of pre-BART levels in 2001–2003, prior to addition of combustion controls for BART. The estimated reduction of NO_X by SNCR and SCR used baseline levels that were based upon actual emission rates achieved after the addition of those combustion controls.

Comment: The EPA's expert, Andover, used aerial photographs to assess the structural and mechanical changes necessary for installation of the SCR. As witness Ken Snell demonstrated at the July 26, 2013, public hearing, however, an aerial photograph is wholly inadequate to assess site-specific conditions that affect SCR costs. Those relevant site-specific conditions include, among others, the following: (1) Site elevation—Laramie River is situated at 4,750 feet above mean sea level (MSL), a fact which affects the flue gas volume which require a larger SCR reactor, duct work and structural support; (2) Regional labor productivity factor—necessary to account for local workforce characteristics, labor availability, project location, project complexity, local climate and working conditions; (3) Location of conveyor rooms—aerial photo cannot reveal conveyor rooms located in boiler buildings; (4) Location of FD Fan buildings—aerial photo cannot reveal the location of the existing FD fan buildings; (5) Space constraints—aerial photo cannot determine the space constraints between the FD fan buildings and existing ESPs; (6) Ammonia handling—aerial photo cannot provide information about where the ammonia handling system required for an SCR could be located, or where pipe routing could be placed; (7) Ductwork routing—aerial photo does not provide information regarding ductwork routing and SCR tie-ins to the existing economizers and air heaters; and (8) Subsystems ignored—aerial photo does not provide any information regarding plant subsystems such as ID fan capacity, equipment reinforcement, auxiliary power systems, electrical system capacity, or other plant subsystems.

Failure to take into consideration the site-specific, plant-specific characteristics for installation of SCR systems necessarily leads to a significant underestimation of the costs to install such control technology. EPA's expert Andover, using generalized data and an aerial photograph, estimated the total capital investment for installation of an SCR at $330,000,000. However, when actual site conditions are considered—i.e. site elevation, regional productivity factors, site congestion, balance-of-plant subsystem upgrades and other indirect costs—expert Ken Snell estimated the total capital investment at $746,906,000. Failure of EPA's expert to take into consideration the Laramie River Station's specific characteristics and plant configuration omits approximately $460,000,000 in very real costs. To turn a blind eye to site-specific characteristics that have a major impact on costs of installation skews the EPA's cost analysis by more than 100 percent. Basing the Laramie River Station BART determination on EPA's cost estimates would be arbitrary and capricious.

EPA proposes to reject Wyoming's SIP despite a finding that ''Wyoming considered all five steps above in its BART determinations'' because of alleged ''flaws and deficiencies'' in the cost assumptions and methodology, including Wyoming's alleged failure to ''follow the methods set forth in the EPA Control Cost Manual.'' 78 FR 34748–34749. To address these alleged deficiencies, EPA hired its own consultant, Andover Technology Partners (''Andover''), to perform an independent cost analysis of installing SNCR and SCR at the Laramie River Station. Andover, Review of Estimated Compliance Costs for Wyoming Electricity Generating Units (EGUs)

(Oct. 23, 2012), EPA–R08–OAR–2012–0081 (''Andover Report''); Andover, Review of Estimated Compliance Costs for Wyoming Electricity Generating Units (EGUs)—revision of previous memo (Feb. 7, 2013), EPA–R08–OAR–2012–0086 (''Andover Update''). Ironically, it is the cost methodology relied upon in the Andover Report that deviates from the BART Guidelines and the CCM, thereby making Andover's analysis inconsistent with EPA's claim that cost estimates should not deviate from the CCM. As a result, EPA's cost estimates are less accurate than the Wyoming cost estimates and the Sargent & Lundy Evaluation and do not form a legally supportable basis on which to base either a SIP disapproval or the promulgation of a FIP.

Sargent & Lundy, at Basin Electric's request, has provided a critique of the Andover Report that highlights the numerous technical irregularities in the cost estimate relied upon by EPA for the proposed disapproval of the Wyoming SIP and the FIP. Sargent & Lundy Laramie River Station Andover Report Comparison (August 26, 2013), Exhibit 16 (''S&L Critique'') to commenter 0148. The Sargent & Lundy Critique demonstrates that EPA's reliance on the Andover Report is not in accordance with section 169A of the CAA and the BART Guidelines for three reasons: (1) Andover relied primarily on the IPM for cost methodology, which is not consistent with the BART Guidelines or the CCM methodology and never was intended to be used to develop a site-specific cost estimate. (See section 2.3, EPA Use of the IPM Cost Models.); (2) Andover failed to take into account site-specific conditions and resulting balance of plant systems required for SCR and SNCR and therefore did not comply with the directive in the BART Guidelines that cost estimates ''take into account any site-specific design or other conditions . . .'' 70 FR 39166.; (3) Andover ignored NO_X reductions achieved to date by existing control equipment, thereby artificially increasing the cost effectiveness of SCR.

If EPA is basing its SIP disapproval on failure to adhere to the methodology set forth in the CCM, EPA's reliance on the cost estimation in the Andover Report is wholly inappropriate and imposes an arbitrary double standard. Not only does the Andover Report rely on methodology that deviates from the CCM, but EPA's approach is inconsistent with the requirements of the BART Guidelines because it does not adhere to the three-step approach for cost estimation set forth in the Guidelines and fails to appropriately account for ''site-specific design or other conditions'' that ''affect the cost of a particular BART technology option.'' 70 FR 39166. Reliance on the Andover Report for disapproval of the Wyoming SIP or imposition of a FIP would constitute arbitrary and capricious decision making and would run contrary to the very provisions of law on which EPA proposes to base its decision.

Response: EPA disagrees with commenter and has identified numerous deficiencies in the cost estimate developed by Sargent & Lundy for the Laramie River Station that are discussed in previous responses to comments. EPA has also noted in other responses to comments that, except for elevation, each of the site-specific issues raised by commenter has been addressed, or commenter has not provided adequate information to support their assertion that there are unique costs that are not accounted for in EPA's cost estimate. We disagree with the characterization of the cost development methodology contained in IPM as inconsistent with BART guidelines. As noted in the documentation for IPM's cost development methodology for SCR, the cost estimate methodology is based upon two databases of actual SCR projects.[226] These databases include 2004 and 2006 industry cost estimates prepared for the Midwestern Ozone Group, and a proprietary in-house database maintained by engineering firm Sargent & Lundy. The Midwestern Ozone Group information was cross-referenced with actual 2009 projects, and as explained elsewhere in this document, escalated accordingly. Sargent & Lundy then used the information in these databases to develop the equations described in the cost component taking into account the pre-control NO_X emission level, degree of reduction, coal type, facility size, and numerous other unit-specific factors. While a costly engineering evaluation that included site visits in addition to our use of satellite imagery might be useful, we disagree that our approach is not sufficiently site specific to satisfy BART guidelines. As noted by EPA in previous responses, EPA's use of satellite imagery enabled us to evaluate each of the major site-specific issues.

Comment: EPA argues that ''[w]hen considering the cost effectiveness and visibility improvement of new LNBs plus OFA and SCR, it is within the range of what EPA has found reasonable for BART in other SIP and FIP actions.'' 78 FR 34776. EPA's cost effectiveness and visibility improvement numbers for Laramie River Station Units 1–3 are within the range of what EPA has found not to be reasonable for BART. The case for rejecting SCR becomes even more compelling when EPA's numbers are corrected to comply with the BART Guidelines, CCM, and EPA guidance, and to reflect site specific conditions. With these comments, Basin Electric is submitting updated and more accurate reports with cost estimates and visibility modeling results based on inputs that are more correct and consistent with EPA's BART Guidelines. Average and incremental cost effectiveness values for SCR at Laramie River Station in these reports are far higher than assumed by EPA, and visibility improvement associated with SCR is far lower than EPA assumed. For EPA to disapprove the State's BART determination for Laramie River Station and proceed with its FIP in light of this new information would be egregiously inconsistent with BART actions it has taken for other sources.

The following discussion explains that even with EPA's cost and visibility values for Laramie River Station, its proposed action at Laramie River Station is inconsistent with actions elsewhere and EPA should withdraw its proposed disapproval.

The comparison to Gerald Gentleman Station (GGS) Units 1–2 is striking. SCR was rejected at GGS despite substantially lower costs and very similar visibility improvement. GGS is a valid point of comparison despite the fact that Nebraska adopted the Transport Rule as a BART alternative. 77 FR 40159. EPA did not make a final determination as to whether to select SCR as BART for GGS because Nebraska became subject to the Transport Rule and relied on that as a BART alternative. *Id.* However, EPA's proposed rule discusses the costs and benefits of SCR. 77 FR 12770, 12779 (March 2, 2012). In its proposed rule, EPA agrees with Nebraska's decision to reject SCR at an average cost effectiveness of $2,297/ton and an incremental cost effectiveness of $5,445/ton (both as calculated by Nebraska). The projections of visibility improvement were the same in the proposal and the final rule, i.e. 0.62 delta deciview for each of GGS Units 1 and 2. The proposed rule states that ''EPA agrees that the State's NO_X BART determination for GGS is reasonable.'' 77 FR 12779. EPA never retracted that conclusion.

The difference between EPA's pending proposals for Wyodak Unit 1 and Laramie River Station Units 1–3 are equally striking. The average and incremental cost effectiveness is virtually the same for these units. So are

[226] *http://www.epa.gov/airmarkets/progsregs/epa-ipm/docs/v410/Appendix52A.pdf.*

the baseline and incremental visibility improvement figures. Yet EPA proposes to require LNB, OFA and SNCR at Wyodak Unit 1, as opposed to LNB, OFA and SCR at each Laramie River Station unit. 78 FR 34785. EPA bases these differing outcomes on the fact that SCR at Wyodak Unit 1 would achieve a cumulative visibility improvement of 1.16 deciviews, whereas SCR at Laramie River Station Units 1–3 would reportedly achieve cumulative visibility improvements of 2.12, 1.97, and 2.29. *Id.* Cumulative visibility improvement at multiple Class I areas is not a valid criterion for use in BART determinations. Disregarding the invalid cumulative criterion, EPA inconsistently eliminated SCR as BART at Wyodak based on cost and visibility values very similar to EPA's cost and visibility values for Laramie River Station.

Also noteworthy is EPA's decision to reject SCR as BART at Healy Unit 1 because of its $5,300/ton cost effectiveness, 0.786 deciview visibility improvement from the LNB/OFA baseline, and 0.17 deciview incremental improvement compared to SNCR. EPA recalculated the costs after publishing its proposed rule to account for various potential useful life scenarios. The $5,300/ton figure shown here is for a 30 year life. For a 20 year useful life, SCR would cost $5,900/ton. EPA concluded that these costs are ''not justified'' given the visibility improvement (which was not recalculated after proposal).

A comparison of the costs and visibility impacts of installing and operating SCR at Laramie River Station Units 1–3 to the costs and visibility impacts of SCR at the facilities listed above quickly shows that SCR must be rejected as BART. EPA has made no attempt to explain why it proposes to disapprove the State's BART for Laramie River Station and proposes SCR instead, when it has eliminated SCR at other facilities based on similar information. To the extent the information at the other facilities is a little different than at Laramie River, EPA has not and cannot show that the difference is significant or a reason to treat the facilities differently.

Response: We disagree with the commenter's assertion that our proposed action for Laramie River Station, as it relates to the consideration of SCR as BART, was inconsistent with our proposed action for other BART sources in Wyoming or with EPA actions in other States.

Regarding NO_X BART for Gerald Gentlemen Station in Nebraska, we note that our proposed approval of the State's NO_X BART determination, as described by the commenter, does not reflect final agency action. In our final rulemaking for Nebraska, where the State is subject to the Transport Rule and FIP for NO_X, we provided the following:

> Given the emission reductions provided by the NO_X emission limits associated with Nebraska's NO_X BART determination of LNB and OFA for GGS Units 1 and 2, which strengthen the Nebraska SIP, in conjunction with the existing Transport Rule FIP which already applies to Nebraska and has been determined to provide greater reasonable progress than BART, in today's action, EPA is finalizing its proposed approval of Nebraska's SIP as satisfying the requirements of the Regional Haze Rule with respect to BART for NO_X, *and therefore do not inquire further here as to whether the cost effectiveness of SCR is low enough and the associated deciview improvement significant enough to reasonably determine that SCR is BART for GGS Units 1 and 2.*[227]

Therefore, because the Transport Rule removed the need for EPA to consider SCR for Gerald Gentlemen Station any further, there is no factual basis to determine whether our consideration of SCR in Wyoming differs from that in Nebraska. In simpler terms, the commenter has erred by drawing a comparison with a BART determination that was never finalized.

We also disagree that our proposed NO_X BART determinations for Laramie River Station were inconsistent with that for Healy Unit 1 in Alaska. There, the cost effectiveness of SCR, using a 20 year lifetime comparable to that used for Laramie River Station, was found to be $5,900/ton.[228] This cost effectiveness is greater than that for any of the Wyoming units for which EPA proposed SCR as BART, or for which EPA is finalizing SCR as BART today. The cost effectiveness of SCR (with combustion controls) for Laramie River Station units estimated by EPA in our proposed rule ranged from $3,589/ton to $3,903/ton[229]—at least 34% less than at Healy Unit 1. While we have revised these costs effectiveness estimates for today's rule, they remain well below the $5,900/ton cost effectiveness that EPA calculated for Healy Unit 1.

Finally, while the costs and visibility improvement (at one Class I area) for the Laramie River units and Wyodak described in our proposed rule may have been similar, we disagree that the cumulative visibility benefit was not a valid criterion for use in BART determinations. Refer to the modeling section above where we address our consideration of cumulative visibility benefits.

We have addressed the updated cost estimates and visibility modeling submitted by Basin Electric during the public comment period in other response to comments.

Comment: SCR should be rejected for Laramie River Station Units 1–3 because of its high cost per deciview of visibility improvement. EPA did not report the $/deciview for Laramie River Station, but dividing the annualized costs by the visibility improvement (from the pre-LNB/OFA baseline) reveals that SCR would cost between $23.0 million and $27.8 million per deciview of improvement in the Class I area with the greatest visibility improvement. These figures are very similar to the $/deciview numbers seen at Martin Drake, Colstrip, Corette, and GGS, and substantially higher than the $10.8 million and $20 million figures reported for Lakeland Electric and JEA Northside. The Laramie River figures are also well above the $14 million to $18 million per deciview range that has frequently been seen as cost effective. EPA has not considered or justified SCR at Laramie River in light of its high cost per deciview.

Not only has EPA proposed to mandate SCR for Laramie River at $/deciview levels where SCR has previously been rejected, EPA has frequently refused to apply the $/deciview metric in accordance with the BART Guidelines. The Guidelines expressly allow states to evaluate control technologies based on ''cost-effectiveness measures (such as $/deciview),'' 70 FR 39170, but EPA has generally opposed reliance on such a standard by the states. While acknowledging that the dollar per deciview is ''an additional cost effectiveness metric that can be employed along with $/ton for use in a BART evaluation,'' EPA has not used $/deciview because it is ''unnecessary,'' it ''complicates the BART analysis,'' and it is ''difficult to judge.'' 77 FR 57871. In other rulemakings, EPA has stated that ''[w]e do not generally recommend the use of this metric as it can be complicated to use and the results can be difficult to assess.'' 77 FR 76871, 76873 (Dec. 31, 2012). EPA also has objected to the $/deciview metric because it claims that metric is based on the impacts of a single day. 77 FR 57871.

EPA's reasons for refusing to consider the $/deciview metric are frivolous. Even if the $/deciview metric is complicated or difficult to use, that does not distinguish it from any other aspect of the BART determination process. EPA's concern that the $/deciview metric is based on a single day holds no

[227] 77 FR 40159 (emphasis added).

[228] 78 FR 10548.

[229] 78 FR 34775–34776.

water. EPA sometimes bases the visibility improvement (delta deciview) of potential control technologies on the ''maximum 98th percentile impact,'' meaning the 98th percentile day with the highest deciview improvement during the relevant period, and proposes to do so in its analysis of Laramie River. 78 FR 34775. Indeed, it is that day's deciview improvement which is used to calculate $/deciview. The $/deciview metric has the virtue of directly comparing cost to visibility improvement. It would constrain EPA's current use of a nebulous sliding scale where the agency gives itself the latitude to point to any one of several variables as justification for overriding the State's choice of BART or for making its own.

Response: We disagree that our reasons for not considering the $/deciview metric are frivolous. We maintain that, for the reasons discussed in other regional haze actions, as cited by the commenter, the $/deciview metric is problematic and does not offer any better basis for making BART determinations than those used by EPA here—cost effectiveness, incremental cost effectiveness, and visibility improvement. Moreover, the BART Guidelines do not require EPA or the states to conduct a $/deciview analysis when evaluating the visibility improvement factor. Instead, the BART Guidelines allow flexibility in this area, stating that: ''You have flexibility to assess visibility improvements due to BART controls by one or more methods. You may consider the frequency, magnitude, and duration components of impairment.'' 70 FR 39170. While the BART Guidelines suggest cost per deciview as a possible parameter for consideration, its use is entirely discretionary. There are numerous examples of BART analyses conducted by states and EPA that have not calculated this metric.

Comment: The Laramie River Station began commercial operation in July, 1980, with a permitted limit for NO_X emissions of 0.71 lb/MMBtu. However, Laramie River was able to significantly outperform its permitted limits, achieving an average emission rate that was much lower, approximately 0.45 lb/MMBtu. In 1996 and 1997, Laramie River replaced burner nozzles on all three units and again reduced its NO_X emission rates, to an average of about 0.27 lb/MMBtu. Now, pursuant to Wyoming's BART permit, Laramie River is required to further reduce its NO_X emissions to a limit of 0.21 lb/MMBtu and 14,474 tons/year in 2014, and reduce emissions even further by the end of 2017, to 12,773 tons/year (equivalent to 0.158 lb/MMBtu). By 2017, the Wyoming regional haze SIP will have required the station to reduce its NO_X emission rate by 65% from the NO_X rate emitted when the units were originally started up. This demonstrates that the State has achieved very substantial NO_X emission reductions without undue and wasteful expense.

To put the reductions already achieved in perspective, the combination of past reductions and future required reductions results in total NO_X reductions at Laramie River of 0.29 lb/MMBtu (from 0.45 lb/MMBtu to 0.158 lb/MMBtu). This has been done and will be done at a significant but reasonable cost. In contrast, EPA proposes to require the expenditure of nearly $750 million dollars to reduce NO_X emissions further, from 0.158 1b/MMBtu to 0.05 lb/MMBtu, a reduction of only 0.11 lb/MMBtu, less than half of what has already been accomplished.

Response: We disagree with this comment. The RHR and BART Guidelines instruct states to calculate the cost-effectiveness and visibility improvement associated with the various control options against a realistic emissions baseline. For the purposes of BART, most states, including Wyoming, used a baseline period of 2000–2004, which corresponds to the five-year period that followed the promulgation of the RHR. Setting a baseline that predates the promulgation of the RHR, as the commenter suggests, would be inappropriate because it would allow emission reductions that were achieved as the result of compliance with other CAA programs to be attributed instead to BART. Thus, any reductions achieved at Laramie River between 1980 and 1997 cannot be credited to the source owner, but must be incorporated into the baseline, as both the State and EPA properly did in this case. In regards to reductions achieved at Laramie River that have been or will be achieved due to compliance with the State's BART determination, these reductions will also occur under EPA's FIP. Consequently, a more accurate way of comparing the State's regional haze SIP to EPA's FIP is to subtract the ultimate emission rate achieved by each plan from the baseline. Using the commenter's emission rates, the State's regional haze SIP would reduce emissions at Laramie River by 0.112 lb/MMbtu from the baseline, while EPA's FIP will reduce emissions by 0.22 lb/MMbtu. For a more detailed discussion of baseline emissions and the flaws in the commenters' logic, see our response to similar comments on the consideration of existing controls in use at a source.

Comment: The costs of installation of the SCRs at Laramie River Station impose an economic impact that is unjustified by the facts of this case. The regulation of regional haze is focused on improving visibility, not public health. Yet, the improvement in visibility that EPA suggests will be created by installation of SCRs, as opposed to the Wyoming SIP's LNBs/OFA, does not carry with it a significant improvement in visibility. By EPA's own calculations, installation of SCRs will result in only a 0.79 deciview visibility improvement at the most impacted Class I area, Badlands National Park, and those calculations substantially overstate the visibility improvement that would actually be achieved. By its very definition, this small incremental improvement in visibility is not even perceptible by the human eye.

Response: We disagree with this comment. As stated in section IV.C.5 above, even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility. Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment.[230]

Comment: EPA asserts that Wyoming's alleged ''deviations'' from the BART Guidelines and CCM form adequate grounds for rejection of its SIP—yet the BART determinations included in EPA's proposed FIP eschew the very standards to which it holds the State. EPA's estimate of the ''cost of compliance'' for installation of SCR and SNCR at Laramie River Station is grounded in an outside consultant's report that expressly dismisses the recommendations of EPA's own CCM in favor of a methodology that is inconsistent with the directives of the BART Guidelines and fails to account

[230] The preamble to the BART Guidelines state, ''[e]ven though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility. Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment'' (70 FR 39104, 39129, July 6, 2005).

for critical site-specific factors that affect the cost of these technologies at Laramie River. The resulting cost estimates are not representative of the costs that Basin Electric would incur for the installation of SCR and SNCR and do not form a legally supportable basis on which to promulgate a FIP. To finalize a FIP based on the cost effectiveness estimates in the Andover Report would constitute arbitrary and capricious decision making and would run contrary to the same provisions of law on which EPA bases its disapproval of Wyoming's SIP.

The Andover Report uses a high-level model that was never intended to be used to estimate site-specific costs. But neither Andover nor EPA offers any explanation of why reliance on the IPM model is more appropriate than either the CCM recommendations or a site-specific scoping level study such as the Sargent & Lundy Evaluation. Indeed, EPA's preamble notes that the cost estimate relied primarily on the IPM model, but then simply parrots the conclusions of the Andover Report without further analysis or discussion. Although EPA has the discretion to rely on a model of its choice, EPA's reliance on the IPM model to estimate costs requires both an explanation of the assumptions made and a defense of this particular methodology—particularly because EPA has proposed disapproval of Wyoming's SIP for failure to adhere strictly to the CCM methodology. *See Appalachian Power,* 249 F.3d at 1053. EPA has failed to ''make plain its course of inquiry, its analysis and its reasoning'' and therefore promulgation of a FIP based on the Andover Report would be arbitrary and capricious. O*lenhouse,* 42 F.3d at 1575.

EPA's BART determinations relied upon methodology that does not comply with the BART Guidelines. Specifically, Andover did not adhere to the three-step process in the BART Guidelines for estimating the ''costs of compliance'' because the analysis set forth in the report did not adequately define the emission units being controlled, failed to identify site-specific design parameters that affect cost and performance of the controls, and used the IPM model to develop cost estimates that are neither technically defensible nor representative of the costs of SCR and SNCR systems at Laramie River.

First, Andover's use of the IPM model—which requires only four inputs—is so general that it failed to adequately define the operating parameters of Laramie River Station Units 1 through 3. Second, both the IPM model and Andover's manipulation of the cost algorithms ignored numerous site-specific variables that would have a substantial effect on the costs incurred by Basin Electric. These variables include, among other items, failure to account for the elevation of Laramie River and the complexities of SCR at the facility. Finally, Andover used out-of-date and inaccurate emissions from Laramie River Units 1 through 3 on which to base its cost effectiveness analysis. These emissions estimates did not take into consideration the reductions that result from the installation of OFA and LNB at these units, which have reduced the baseline NO_X emissions to 0.19 lb/MMBtu. As a result of these inadequacies, the Andover Report makes inaccurate cost estimates that are not representative of the costs that Basin Electric would incur for installation of either SNCR or SCR. By relying on the Andover Report, EPA has ''complete[ly] failed to consider the criteria that should inform'' its BART determination, and a court would accord EPA's BART determination no deference and would determine that it is arbitrary, capricious, an abuse of discretion and not in accordance with the law. *Nat. Resources Defense Council,* 725 F.2d at 771; *see also Appalachian Power,* 249 F.3d at 1052; *Sierra Club* v. *Costle,* 657 F.3d at 333.

Response: Each of the commenter's claims have been addressed above in other responses and elsewhere in this document. In these responses we have substantiated that the cost methodology employed by EPA, including use of the IPM-based cost algorithms, is consistent with the BART Guidelines and CCM. Moreover, we modified our cost estimates in response to site-specific information provided by Basin Electric during the comment period. Therefore, we reject the commenter's assertions that (1) we have dismissed the recommendations of the CCM in favor of a methodology that is inconsistent with the directives of the BART Guidelines, and (2) failed to account for critical site-specific factors.

We have addressed the commenter's concern regarding whether our cost-effectiveness analysis reflects the relatively lower emissions achieved with recent combustion control updates (OFA and LNB) in section V.A.12 above.

Comment: Wyoming concluded that SCR would lower the NO_X emission rate of Laramie River Units 1–3 to 0.07 lbs/MBtu on a 30-day rolling average basis and used the 0.07 lbs/MMBtu controlled NO_X rate to estimate costs. 78 FR 34748; *WDEQ Revised NO_X BART Impact Analysis* AP–6047A (January 3, 2011) (''2011 Revised BART Analysis'') at 3, Table 2–2, *docket cite* EPAR08–OAR–2012–0026–0003.

The State's administrative record supports its selection of 0.07 lb/MMbtu on a 30-day rolling average as an appropriate post-SCR NO_X emissions rate. Wyoming first presented this emissions rate in its BART Application Analysis AP–6047. Wyoming BART Analysis at 8, Table 2. Wyoming explained its rationale in its December 31, 2009 response to comments on BART Permit AP–6047. *Available at* EPA–R08–OAR–2012–0026–0058, Exh. 3.

Wyoming then provided a table comparing SCR control efficiencies at seven similar coal fired EGUs. The NO_X emission rate selected by Wyoming is squarely within the range of control efficiencies identified by the State's search. Of note are the NO_X emission rates for the Iatan Station (0.08 lb/MMbtu, 30-day average), Big Cajun II Power Plant (0.07 lb/MMBtu annual average), and OPPD—Nebraska City Station (0.07 lb/MMbtu, 30-day average). *Id.* Wyoming's explanation and supporting data negate any contention that the State violated the CAA or acted unreasonably when it chose to evaluate SCR using a NO_X control efficiency of 0.07 lb/MMbtu on a 30-day rolling average basis.

EPA contends that whereas Wyoming assumed that adding SCR controls at Laramie River would achieve a control effectiveness of 0.07 lb/MMBtu, ''EPA has determined that on an annual basis SCR can achieve emission rates of 0.05 lb/MMBtu or lower.'' 78 FR 34748. EPA provides no explanation and cites nothing to support how it ''determined'' this to be the case. It doesn't associate the 0.05 lb/MMBtu with any specific facility or unit—it just makes this blanket assertion.

Nor can EPA assert that Wyoming's 0.07 lb/MMBtu assumed control level conflicts with the CAA or the BART Guidelines. Nothing in the Guidelines dictates what SCR can achieve, and EPA cites no provision of the Guidelines to support its claim. In fact, EPA's blanket claim that 0.05 lb/MMBtu must always be used itself conflicts with the Guidelines, which make clear that BART is a site-specific determination, not a blanket finding. The notion that EPA can apply an across-the-board value and thereby deprive the State of its ability to exercise discretion on an individual case basis is contrary to the holding in *American Corn Growers,* 291 F.3d at 7–10.

The lack of support for EPA's claim that the 0.07 lb/MMBtu is a ''flaw'' is reinforced by EPA's own acceptance of this value in BART analyses by other States. For example, in Colorado, commenters on EPA's proposed

approval of the State's regional haze SIP, including BART determinations, argued that the State was wrong in assuming that at Tri-State's Craig Station Units 1 and 2, SCR would achieve only a 0.07 lb/MMBtu NO_X emission rate on an annual basis; however, EPA did not disapprove Colorado's BART determinations for this reason or find that this was an error. EPA's response to the comments stated that it agreed that ''SCR in some cases can achieve annual NO_X emission rates as low as 0.05 lb/MMBtu'' but that the ''annual emission rate assumed by Colorado, 0.07 lb/MMBtu, is within the range of actual emission rates demonstrated at similar facilities in EPA's Clean Air Markets Division (CAMD) emission database.'' 77 FR 76871, 76873. Similarly, although commenters argued that SCR at Alaska's Healy Unit 1 could achieve a NO_X emission rate of 0.035 lb/MMBtu, EPA evaluated using a rate of 0.07 lb/MMBtu to evaluate SCR. 78 FR 10546, 10548. EPA evaluated SCR using an emission rate of 0.06 lb/MMBtu for Nevada's Reid Gardner Generating Station. 77 FR 21896, 21903 (calling this a ''mid-range option'').

Also, EPA accepted an even higher post-SCR NO_X emission rate of 0.10 lb/MMBtu for Jeffrey Energy Center Units 1 and 2. Kansas SIP Approval, 76 FR 80754, 80756. This emission rate was ''within the range of effectiveness that the State believed to be reasonable as a retrofit control on older tangential-fired units.'' *Id.* EPA deferred to Kansas, noting that ''EPA believes the State's decision to choose a control efficiency within the middle of the range for the purpose of estimating cost is a reasonable approach and is acceptable according to the BART Guidelines.'' *Id.* If it was not error and not unreasonable or arbitrary for Colorado and Kansas to use 0.07 or 0.10 lb/MMBtu, it cannot be error, or unreasonable, or arbitrary, for Wyoming to use the same or lower value.

Response: We have addressed the control effectiveness of SCR above in section V.C.3 above. Again, we agree that it was appropriate for Wyoming to set the 30-day rolling average emission limit for SCR installations at 0.07 lb/MMBtu. And again, EPA's use of an actual annual emission rate of 0.05 lb/MMBtu for cost calculation purposes is supported by information supplied by control equipment consultants or vendors and submitted along with comments from PacifiCorp and Basin Electric.

We also note that the commenter has compared the 30-day allowable rates established at certain facilities to the annual emission rate used by EPA to calculate cost effectiveness. These values are not directly comparable. This is because: (1) The former is on a 30-day basis, while the latter is on an annual basis, and (2) the former is an allowable emission limit, while the latter is an actual emission rate.

The remaining comments have been addressed elsewhere in this document.

Comment: For the same reasons that SNCR is not a relevant basis for disapproving Wyoming's BART for Laramie River Station, the price of urea is likewise not relevant. The price of urea relates only to SNCR technology, not to SCR. As noted above, SNCR is not a relevant factor to support EPA's rejection of the State's NO_X BART for Laramie River Station because neither the State's SIP nor EPA's proposed FIP chooses SNCR as BART. SNCR has been taken off the table by EPA, so the attempt to base its BART disapproval on SNCR issues is specious. EPA cannot reasonably base its disapproval on the State's alleged failure to properly consider the cost of a technology that EPA itself rejects.

Response: We disagree. The BART selection process requires a comparison between all technically feasible control options, not the evaluation of individual control technologies in isolation. While the BART Guidelines do not specify the order in which control options must be evaluated (e.g., beginning with the most stringent or beginning with least stringent control), they do specify that the CAA factors must be considered for all options: ''In the final guidelines, we have decided that States should retain the discretion to evaluate control options in whatever order they choose, so long as the State explains its analysis of the CAA factors.'' 70 FR 39130. The only exceptions are ''. . . if you find that a BART source has controls already in place which are the most stringent controls available . . .'', or ''. . . . if a source commits to a BART determination that consists of the most stringent controls available . . .'' 70 FR 39165. In these situations, it is not necessary to complete an analysis of all five BART factors. Therefore, because neither of these criteria was met, the State was required to perform an analysis of all five BART factors for all technically feasible control options. And if, as EPA has established in other responses, the analysis of one of those options, such as SNCR, was flawed, then the State could not sensibly identify the best available option among all of the control options considered. Therefore, regardless of whether the State or Wyoming rejected SNCR as BART, it is mistaken for the commenter to suggest that the analysis of SNCR was somehow immaterial in the selection of BART.

It is particularly important that the costs of SNCR be properly estimated in relation to the calculation of incremental cost effectiveness. (The incremental cost of effectiveness should be calculated in addition to the average cost effectiveness. 70 FR 39167). The cost of SNCR affects the incremental cost effectiveness between SCR and SNCR, as well as incremental cost effectiveness between SNCR and combustion controls. If the cost of SNCR is incorrect, the incremental cost effectiveness between control options will also be incorrect. This underscores the point that, if the underlying assumptions were flawed, the State could not have reasonably chosen between competing control options.

We have addressed the price of urea in a separate response.

Comment: EPA is proposing that the FIP NO_X BART emission limit for Basin Electric Laramie River Unit 1, Unit 2, and Unit 3 is 0.07 lb/MMBtu (30-day rolling average). While we are generally pleased with EPA's proposal, we note that EPA's analysis is based on only 74% NO_X control by the SCRs, and still results in each EGU contributing 0.5 deciview to visibility impairment at Badlands National Park.

Based on an evaluation of the rolling 30-boiler operating day average NO_X emission rates from Laramie River Units 1–3 with emissions data available in EPA's CAMD database, a NO_X limit of 0.07 lb/MMBtu on a rolling 30-boiler operating day basis would only require Laramie River Units 1–3 to achieve 61–70 percent NO_X removal across the SCR systems. A 0.05 lb/MMBtu NO_X emission limit applicable on a rolling 30-boiler operating day average basis would only require 73–79 percent NO_X removal across the SCR, which is readily achievable.

Response: We have addressed the control effectiveness of SCR above in section V.C.3 above.

Comment: Moreover, the Sargent & Lundy evaluation demonstrates, based on a detailed scoping-level cost analysis, that SCR will cost approximately $9,000 per ton of NO_X removed, further demonstrating the arbitrariness of EPA's proposed disapproval of the State's NO_X BART determination for Laramie River Station. Sargent & Lundy Evaluation, Table 7.

Response: We disagree that SCR will cost $9,000/ton as indicated by the commenter. We have incorporated certain costs claimed by Sargent & Lundy in their evaluation, but not others. We have addressed the Sargent

& Lundy cost analysis, including our rationale for not accepting certain costs, in detail in other responses. Our revised cost analysis of SCR plus combustion controls, indicates that the cost effectiveness for the three units is between $4,375/ton and $4,461/ton.

Comment: EPA should have used 30-day average emission limits in the cost effectiveness analysis, rather than expected/actual emission rates, to be consistent with how EPA and states have done other BART cost effectiveness calculations.

Response: We disagree. As we have stated in other responses, our use of the anticipated actual annual emission rate is consistent with the BART Guidelines. As we previously noted, cost effectiveness is more appropriately based on the reduction in annual emissions, not the change in allowable emissions.

Comment: We received a comment that EPA's consultant did not take into account site-specific data for Laramie River Station.

Response: We have addressed this issue in a separate response. As noted there, we have incorporated many of the costs suggested by Basin Electric's consultant, Sargent and Lundy, in our revised costs supporting this final action.

Comment: Wyoming has underestimated the cost of SNCR. Wyoming estimated LNB+OFA+SNCR would cost $2,056–$2,109/ton. EPA calculated the incremental costs of SCR versus LNB+OFA+SNCR, its preferred control option, and estimated incremental costs of $7,054–$7,242/ton. We are concerned that Wyoming underestimated the cost of SNCR, which biases its emphasis on incremental costs against SCR. We calculated the costs of SNCR using the CCM (with the reagent correction used by EPA for Montana), and heat inputs and emission estimates from CAMD data for 2001–2003. Based upon application of the CCM, we estimate SNCR cost-effectiveness at $2,358–$2,536/ton, which is $300–$400/ton higher than Wyoming's estimates.

Response: We agree that Wyoming has underestimated the cost of SNCR for the Laramie River Station units. In order to address deficiencies in Wyoming's SNCR cost estimates for the Laramie River Station units identified by commenters, such as the control effectiveness of SNCR, we have conducted a revised cost analysis.

Comment: Wyoming has underestimated the ability of SCR to reduce emissions. In estimating the annual cost-effectiveness of the LNB+OFA+SCR option, Wyoming assumed 0.07 lb/MMBtu, which represents 74% control efficiency on an annual average basis, as opposed to the generally-accepted 90%. Wyoming has not provided any documentation or justification to support the higher emission rates used in its analyses. In other recent BART actions, EPA has determined that SCR can achieve 0.05 lb/MMBtu on an annual basis. Such an underestimate at Laramie River Station biases the cost-benefit analysis against SCR and is inconsistent with other EPA analyses.

Response: The commenter has incorrectly assumed that a 90% control efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Regardless, we agree that SCR can in most cases achieve a performance rate of 0.05 lb/MMBtu on an annual basis. (See the section IV.C.4 of this document for more information regarding the control effectiveness of SCR). We have revised the SCR costs for the Laramie River Station units accordingly.

Comment: The final state BART determination sets NO_X emission limits of 0.21 lb/MMBtu, 30-day average, and related lb/hour and tons/year limits. However, EPA does not analyze these limits and find they are unreasonable. It analyzes instead a NO_X emission limit of 0.23 lb/MMBtu, which is not the actual final BART limit but rather an initial limit in the BART permit that was appealed and was changed in the settlement of that appeal and incorporated in the final SIP. Therefore, EPA's disapproval pertains to a BART limit that is different than the actual BART limit. Using the wrong BART limit is arbitrary and unreasonable.

Response: In our revised cost and visibility analyses for the Laramie River Station BART units, we have addressed the issue described by the commenter. However, we have not analyzed the 0.21 lb/MMBtu limit directly as it is assessed on a 30-day rolling average basis. Instead, as described above, we have used the actual annual emission rate of 0.19 lb/MMBtu demonstrated since the installation of new LNBs and OFA. Our approach is consistent with the BART Guidelines which state: ''. . . you will estimate the anticipated annual emissions based upon actual emissions from a baseline period.'' 70 FR 39167.

Comment: The purpose of the regional haze program is to improve visibility in Class I areas. The amount of emission reductions by itself, without any connection to visibility improvement, is irrelevant because without some connection to visibility improvement we cannot judge the significance of such reductions in light of the ''overarching purpose of the regional haze program'' to protect visibility in Class I areas. Since EPA acknowledges that SNCR would not improve visibility by a perceptible amount, the amount of NO_X emission reductions standing alone does not further the purpose of the program.

Response: We disagree that the visibility improvements for Laramie River Station are de minimis or too small to justify the expense of requiring controls. The BART Guidelines are clear that it is not necessary for the visibility improvement of a particular control option to be above the perceptible threshold: ''Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility. Failing to consider less-than-perceptible contributions to visibility impairment would ignore the CAA's intent to have BART requirements apply to sources that contribute to, as well as cause, such impairment.'' 70 FR 39129.

EPA followed the BART Guidelines in determining what BART was for each unit, taking into account the five factors, including visibility improvement and the cost effectiveness of controls (which includes an assessment of the dollars per ton removed).

2. Jim Bridger Units 1–4

a. NO_X BART Determination

Comment: In estimating the annual cost-effectiveness of the LNB/SOFA+SCR option, Wyoming assumed 0.07 lb/MMBtu on an annual average basis. Based on the 0.026 lb/MMBtu NO_X emission rate predicted for the LNB/SOFA option, and the 0.20 lb/MMBtu annual emission rates demonstrated by all four Bridger units, outlet emissions at 0.07 lb/MMBtu represent only a 65%–73% SCR control efficiency as opposed to the generally-accepted 90%. Wyoming has not provided any documentation or justification to support the higher emission rates used in its analyses. In other recent BART actions, EPA has determined that SCR can achieve 0.05 lb/MMBtu on an annual basis. Such an underestimate at Bridger biases the cost-benefit analysis against SCR and is inconsistent with other EPA analyses.

Response: The commenter has incorrectly assumed that a 90% control

efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Nonetheless, we agree that SCR can, in most cases, achieve a performance rate of 0.05 lb/MMBtu on an annual basis.

Comment: Based on an evaluation of the rolling 30-boiler operating day average NO_X emission rates from Jim Bridger Units 1–4 over the period of January 1, 2011 through March 31, 2013 with emissions data available in EPA's CAMD, a NO_X limit of 0.07 lb/MMBtu on a rolling 30-boiler operating day basis would only require Jim Bridger Units 1–4 to achieve 66–68 percent NO_X removal across the SCR systems. The commenter asserted that a 0.05 lb/MMBtu NO_X emission limit applicable on a rolling 30-boiler operating day average basis would only require 75–77 percent NO_X removal across the SCR, which the commenter believes is readily achievable. (The commenter's arguments regarding the achievable level of NO_X control with SCR are summarized elsewhere in this document.)

Response: We have addressed the control effectiveness of SCR above in section V.C.3 above.

Comment: EPA's reliance on selected ''affordability'' language in its BART Guidelines does not support EPA's decision to exempt all Jim Bridger from SCR BART requirements. First, Congress established five factors—no more—that EPA must consider when making source-by-source BART determinations. 42 U.S.C. 7491(g). Applying those five factors alone, EPA determined that SCR was BART for all four Bridger Units. 78 FR 34756. By considering the ''affordability'' of BART controls across PacifiCorp's entire fleet, EPA has arbitrarily relied on factors which Congress has not intended it to consider. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983f); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc.* v. *Nat'l Marine Fisheries Serv.,* 265 F.3d 1028, 1034 (9th Cir. 2001); see also *North Carolina* v. *Envtl. Prot. Agency,* 531F.3d 896, 906 (D.C. Cir. 2008) (standard of review is the same under the APA and the CAA, 42 U.S.C. 7607).

Response: We disagree with the commenter that when considering the five factors alone, SCR is BART on all the Jim Bridger units. As discussed in section III.B.6 above, when considering the five factors, we find it unreasonable to require SCR as BART on these two units and instead we are approving the State's LTS for (all four or Units 1 and 2) the Jim Bridger units. We are not relying on the affordability analysis in making this final determination.

Comment: 40 CFR part 51, Appendix Y, section IV.E.3 makes clear that the affordability analysis should be limited to the economic impact of the BART unit at issue—not to a utility's fleet-wide BART obligations as a whole. EPA's application of this language to PacifiCorp's BART obligations at other power plants is improper. In addition, the BART Guidelines establish a very narrow test for applying the affordability language, which is whether requiring installation of the control technology would ''have a severe impact on plant operations.'' 40 CFR part 51, app. Y, section IV.E.3. In such circumstances, the BART Guidelines suggest that EPA prepare ''an economic analysis that demonstrates, in sufficient detail for public review, the specific economic effects, parameters, and reasoning.'' EPA has not prepared an economic analysis demonstrating the specific economic, parameters, and reasoning for its decision to exempt the Jim Bridger facility from further BART controls. Instead, EPA simply concludes that ''it would be unreasonable to require any further retrofits at this source within five years of our final action'' based on PacifiCorp's BART obligations at other facilities. 78 FR 34756. Further, PacifiCorp has not presented evidence that installation of SCR at each Bridger unit within the first regional haze planning period would cause any noticeable economic impact, let alone ''severe'' impact, such a shutdown of one or all of the units.

Response: As discussed in more detail in a response to another comment below, we agree that PacifiCorp has not provided sufficient evidence to show that the installation of SCR at the Jim Bridger units within five years after our final action would cause a severe economic impact. We are basing our decision to not require SCR for BART based on our weighing of the five factors.

Comment: The BART Guidelines also suggest that if the agency grants an affordability exemption from the best level of control, it must then select a ''slightly lesser degree of control.'' 40 CFR part 51, app. Y, section IV.E.3. EPA's proposal does not require any additional level of control under BART. Instead, EPA's 2013 re-proposal selects the pre-existing LNB/OFA as BART for each unit. EPA's choice of LNB/OFA as BART does not even represent the ''second best'' control technology for eliminating NO_X related visibility impairment—which would be SNCR. 78 FR 34756 (Table 13).

Response: As stated above, we are not basing our BART determination for Jim Bridger Units 1 and 2 on an affordability argument.

Comment: The BART Guidelines ''affordability'' language recommends that states (or EPA) consider ''whether other competing plants in the same industry have been required to install BART controls if this information is available.'' 40 CFR part 51, app. Y, section IV.E.3. This provision suggests that SCR requirements should be applied consistently among competing utility companies. EPA's exemption of PacifiCorp from SCR obligations at the Jim Bridger units is inconsistent with its actions at other competing utility companies with large coal fleets, to which EPA has not offered ''affordability'' exemptions from SCR requirements. For example, EPA has required Salt River Project, a competing utility, to install SCR on numerous coal-plant units in its fleet, including Coronado and Navajo (Arizona), Craig and Hayden (Colorado) and Four Corners (New Mexico). Each of EPA's BART determinations for these plants requires installation of SCR as BART within the mandated five-year implementation deadline.

EPA's 2013 re-proposal for Jim Bridger exempts the plant from both the SCR requirement and the five-year implementation deadline, potentially giving PacifiCorp an advantage over the competing utilities. Thus, EPA's 2013 re-proposal rule is not only inconsistent with its own BART Guidelines, it is competitively unfair.

Response: We agree that other utility companies have had to install SCR within the five year BART window and that evidence provided by PacifiCorp does not support delaying controls on Jim Bridger Units 1 and 2 until 2022 and 2021, respectively. Nonetheless, as stated earlier, we are no longer basing our BART determination for Jim Bridger Units 1 and 2 on an affordability argument.

Comment: We are very familiar with the ''affordability'' provisions of the BART Guidelines and have dealt with this issue in Arizona (Apache power plant) and Washington (Alcoa's Intalco primary aluminum smelter). In both of those cases, the company requesting the affordability exemption from BART provided extensive documentation (much of it confidential) to EPA and the FLMs to support its request. It was only after a thorough review by EPA that the affordability exemptions were approved. In this case, it appears that the only information presented by PacifiCorp to

support its request is its ''assertions'' dated July 12, 2012. We believe that a more rigorous analysis is necessary in order for EPA, FLMs, and the public to be assured that the additional time being proposed by EPA is necessary and appropriate. For example, an important part of such an analysis would be the ''installation schedule'' that PacifiCorp has designed in order to minimize the number of units that are out of service system-wide for installation of emissions controls at any one time. Currently, the only schedule available in the docket is the July 2012 letter from PacifiCorp to EPA in which PacifiCorp simply reiterates the dates proposed for its ''Installation Requirements.''

Response: As stated in other responses to comments, we agree that the information provided by PacifiCorp was not sufficient to support the delay of SCR controls on Jim Bridger Units 1 and 2, but we are not relying on that information in our BART determination.

Comment: EPA's proposal for Jim Bridger Units 1 and 2 is a ''do nothing'' BART determination. Although the Agency claims that it is proposing to approve the State's proposal to require the use of LNBs for Units 1 and 2 and for both units to meet an emission rate of 0.28 lb/MMBtu over a 30-day rolling period, this emission rate is actually higher than what Units 1 and 2 are currently emitting and worse, does not reflect the presumptive BART limits set forth in 40 CFR part 51, Appendix Y. Most significantly, it defies the statutory intent of Congress in establishing the regional haze program under the CAA.

According to EPA's CAMD Web site, both Units 1 and 2 already consistently achieve 30-day rolling average NO_X emissions lower than 0.20 lb/MMBtu. The data illustrates that Jim Bridger Units 1 and 2 consistently achieve NO_X emission rates below 0.20 lb/MMBtu on a monthly basis and have done so since 2010. To this end, the definition of BART explicitly states that it must represent a ''reduction'' in each pollutant that causes or contributes to visibility impairment. See 40 CFR 51.301 (setting forth definition of BART).

Furthermore, although a state must take into account the five factors set forth under 42 U.S.C. 7491(g)(2), nothing in the CAA or the EPA's regulations implementing the regional haze program suggest or remotely imply that a state could allow emission increases as BART. Accordingly, EPA must, at a minimum, disapprove of Wyoming's NO_X BART determinations for Jim Bridger Units 1 and 2 and adopt a FIP that establishes BART limits that are consistent with the CAA and that represent actual emission reductions.

Response: We disagree with the commenter that BART is an emission limit of 0.07 lb/MMBtu at Jim Bridger Units 1 and 2 within five years of our final action. As discussed previously, based on our weighing of the five factors, we do not find it reasonable to require SCR for BART on Jim Bridger Units 1 and 2 and instead we are approving the State's LTS for these units.

Comment: The need to promulgate a FIP is underscored by the EPA's own BART guidelines. According to those guidelines, tangentially fired boilers burning subbituminous coal, such as Jim Bridger Units 1 and 2, are presumed to be able to cost-effectively meet a NO_X emission rate of 0.15 lb/MMBtu on a 30-day rolling average basis. See 40 CFR part 51, Appendix Y, Table 1. EPA's claim that it would not be cost-effective to meet an emission rate below 0.28 lb/MMBtu as BART for Units 1 and 2 is therefore undercut by the Agency's own extensive analysis and conclusion that a 0.15 lb/MMBtu rate is presumed to be appropriate. Tellingly, the EPA nowhere in its proposed rule analyzes or addresses why a 0.28 lb/MMBtu rate is appropriate in light of the Agency's own presumptive BART limits for NO_X emissions from tangentially-fired boilers burning subbituminous coal.

Response: We disagree with the commenter's assertion that our approval of non-presumptive BART emission limits for Jim Bridger Units 1 and 2 is flawed. In the BART Guidelines EPA explained that:

> For coal-fired EGUs greater than 200 MW located at greater than 750 MW power plants and operating without post-combustion controls (i.e. SCR or SNCR), we have provided presumptive NO_X limits, differentiated by boiler design and type of coal burned. You may determine that an alternative control level is appropriate based on a careful consideration of the statutory factors. For coal-fired EGUs greater than 200 MW located at power plants 750 MW or less in size and operating without post-combustion controls, you should likewise presume that these same levels are cost-effective. You should require such utility boilers to meet the following NO_X emission limits, unless you determine that an alternative control level is justified based on consideration of the statutory factors.[231]

Therefore, the presumptive emission limits in the BART Guidelines are rebuttable, and the five statutory factors enumerated in the BART Guidelines provide the mechanism for establishing different requirements. Specifically, as explained in the preamble to the BART Guidelines:

> If, upon examination of an individual EGU, a State determines that a different emission limit is appropriate based upon its analysis of the five factors, then the State may apply a more or less stringent limit.[232]

Thus, the establishment of presumptive BART emission limits does not preclude states or EPA from setting limits that differ from those presumptions, even where the control technology is the same as that associated with the presumptive limits (in this case, combustion controls). The five-factor analysis performed by Wyoming demonstrates that, because of the nature of the coal fired at these units, the presumptive limit of 0.15 lb/MMBtu is not attainable. Wyoming supported this conclusion with information from an established vendor of combustion controls.[233] We concur with those conclusions and find that Wyoming's BART emission limits for Jim Bridger Units 1 and 2 were established in a manner consistent with the BART Guidelines.

Comment: EPA's proposal is fundamentally flawed because it makes a mockery of the CAA. Despite acknowledging that BART should be the installation of SCR and compliance with a 0.07 lb/MMBtu emission rate for Units 1 and 2, the EPA determined that, when considering the cost of such controls, they would not be reasonable. Certainly, the CAA allows the EPA to consider the ''cost of compliance'' in setting BART (42 U.S.C. 7491(g)(2)), but the CAA does not allow the EPA to completely avoid requiring BART based on cost considerations. Here, EPA's proposal to approve Wyoming's SIP with regards to BART for Jim Bridger Units 1 and 2 amounts to a proposal to require nothing (if not a proposal to allow an increase in emissions). In essence, EPA's proposal amounts to a determination that BART is not required for Jim Bridger Units 1 and 2, even though Congress clearly stated that these coal-fired EGUs are subject-to-BART. Although Congress allowed the EPA to consider costs in establishing BART, the EPA cannot use costs as a reason to completely forego requiring BART. Put another way, the EPA cannot defeat Congress' intent to require BART by cobbling together an interpretation of the CAA that effectively nullifies the regional haze BART requirements under the Act.

[231] 40 CFR Part 51, Appendix Y, section IV.E.5.

[232] 70 FR 39132.

[233] Wyoming Department of Environmental Quality Air Quality Division, BART Application Analysis AP–6040, May 28, 2009, pages 7–9.

Response: We disagree with the commenter. As discussed elsewhere, we are basing on approval of the State's SIP on a weighing of the five BART factors, including costs and visibility improvement.

Comment: EPA's proposal for Jim Bridger Units 1 and 2 ''does not meet a test for being 'better than BART'. . . [because] [t]he accelerated installation of BART at Bridger Units 3 and 4 does not offset the increased emissions from delaying SCR installation at Bridger Units 1 and 2 beyond the normal five-year BART window.'' To date, EPA has failed to make any demonstration that its 2013 Proposal would ''achieve greater reasonable progress than would be achieved through the installation and operation of BART.'' 40 CFR 51.308(2)(i). Moreover, EPA's proposal also fails to comply with the ''better than BART'' regulatory requirement mandating that ''all necessary emission reductions take place during the period of the first LTS for regional haze'' which concludes at the end of 2017. *Id.* section 51.308(b), (e)(2)(iii). Accordingly, EPA's proposal has not satisfied the regulatory requirements for a ''better than BART'' alternative.

Response: We agree that EPA's proposal does not meet a test for being better than BART but have not suggested such a concept in our proposed or final rulemaking actions.

Comment: EPA's proposed action on the Wyoming 308 regional haze SIP requested comments on whether to require installation of BART controls on Jim Bridger Units 1 and 2 by 2021–2022 rather than within the legally required five-year timeframe mandated by the regional haze regulations. 77 FR 33054. EPA is taking comment on the alternative timeline for SCR installation in response to PacifiCorp's claim that ''the schedule for installation of emission control devices envisioned in [EPA's BART proposal] would be excessively costly and would pose service interruption risks for electrical energy customers over a large part of the region.'' Recent admissions by a PacifiCorp official in a separate Wyoming Public Service Commission proceeding undermines PacifiCorp's arguments. PacifiCorp argued to the Wyoming Public Service Commission that procurement and installation of multiple SCRs creates both a cost and time savings, not an increase at Jim Bridger Units 3 and 4. This fact is also true for installation of SCRs at Jim Bridger Units 1 and 2. This PacifiCorp admission is further proof that EPA should not permit PacifiCorp to delay installation of SCRs at Jim Bridger Units 1 and 2 and instead must require compliance within five years as is required by the BART regulations.

Response: We have responded to this comment in other responses.

Comment: EPA is taking comment on the alternative timeline for SCR installation in response to PacifiCorp's claim that the schedule for installation of emission control devices envisioned in EPA's BART proposal would be excessively costly and would pose service interruption risks for electrical energy customers over a large part of the region. EPA acknowledges that BART for all the units at Jim Bridger is SCR when the units are considered individually based on the five factors. However, EPA suggests that a different BART determination under the alternative approach is lawful if the five factors are considered across all the units in the PacifiCorp system. Not so. BART is a source-by-source determination.

Response: We have responded to this comment in other responses.

Comment: Considerations of PacifiCorp's fleet size and cumulative costs are outside the five-factor analysis for BART. Furthermore, PacifiCorp's concern about the feasibility of installing BART controls over its large fleet is unfounded. With proper planning, there is no reason to expect excessive costs or service interruption due to BART requirements. Indeed, PacifiCorp's large number of EGUs would appear to give PacifiCorp the unique ability to avoid service disruptions by maintaining adequate capacity from operating units while other units are offline. Further, other utilities have installed SCR systems on multiple units within very short periods of time.

PacifiCorp's ability to install SCR on multiple units is also not constrained by the availability of SCR systems. In response to questioning of whether PacifiCorp has had any difficulties procuring or installing SCR systems, particularly an SCR for its Naughton Unit 3 facility, PacifiCorp stated it had received four proposals from SCR system suppliers and as such did not experience notable difficulties procuring and obtaining the SCR system. EPA should not modify its BART proposal for Jim Bridger Units 1 and 2 based on PacifiCorp's unsupported claims of hardship.

Response: We have responded to this comment in other responses.

Comment: The EPA's re-proposed Wyoming haze plan reiterates EPA's prior finding that BART is SCR for each Jim Bridger unit considered individually (78 FR 34756). Based on the EPA's five-factor NO_X BART analyses for Jim Bridger Units 1–4, the EPA *must* find that SCR is BART to meet a NO_X emission rate of 0.05 lb/MMBtu on all four units.

The EPA's cost-effectiveness analyses identified costs for SCR on all four Bridger Units that are within the range that EPA has identified as reasonable for other units, including in this same proposal. 78 FR 34754–57 (SCR cost-effectiveness of $2,393/ton on Jim Bridger Unit 1, $3,015/ton on Unit 2, $2,961/ton on Unit 3, and $2,492/ton on Unit 4) as compared with, e.g., 78 FR 34776 (finding cost-effectiveness of $3,600/ton to $3,900/ton for SCR on Laramie River Units 1–3 to be ''within the range of what EPA has found reasonable for BART in other SIP and FIP actions''). However, the EPA's estimate of costs is significantly inflated, and the true costs are even lower than EPA found because the EPA used unjustified ''retrofit factors,'' interest rate, and auxiliary power costs. The recalculation of costs using what the commenter believes are corrected inputs resulted in significantly lower SCR costs of $1,801 to $1,959/ton at all four Bridger units. On this basis, SCR is extremely cost effective on these units. SCR on these units would afford substantial visibility benefits. The EPA has no basis in the BART factors, including the important factors of compliance costs and visibility improvement, to reject SCR as BART on Bridger Units 1–4.

Response: As discussed elsewhere, we have responded to the commenter's points about how costs are calculated for the BART units. Regardless, we determined that SCR was not reasonable for BART based on our weighing of the five factors.

Comment: The EPA's 1st Proposal from its June 2012 Proposal/2013 Proposal in the Alternative, which would approve Wyoming's NO_X emission limits and SCR compliance timeframes for Jim Bridger Units 3 and 4 and would require Jim Bridger Units 1 and 2 to install SCR within five years of EPA's final action on the Wyoming regional haze plan, would result in lower NO_X emissions on an annual basis than any of EPA's other NO_X proposals at the Jim Bridger Power Plant. This schedule also likely reflects the most economical installation of SCR at all four of the Jim Bridger units because the engineering for SCR installation, including the design of the construction phase, can all be done during the same time frame, the construction equipment can remain on-site for the duration of the installations, and much of the installation work can be done

simultaneously, which will save on labor and construction equipment.

There are numerous examples of installations of multiple SCRs at numerous units at the same power plant site over short timeframes, including: (1) W.A. Parish Units 5–8 (SCRs installed over 2003–2004); (2) All four units of the Big Bend power plant (SCRs installed during 2007–2010); (3) Units 1–5 of the Clifty Creek power plant (SCRs installed 2002–2003); (4) Winyah Units 1–4 (SCRs installed in 2005); (5) Over the period of 2001–2006, TVA has installed SCRs at 18 units at four power plants. On this basis, the number and timing of SCR installations required at PacifiCorp plants as a result of NO_X BART determinations can be accomplished, as it has been done before.

Response: As stated above, we find that PacifiCorp has not presented sufficient evidence that the economic effects of installation of SCR on Jim Bridger Units 1 and 2 within five years would affect the viability of continued plant operations, but based on weighing of the five factors, we find that it is not reasonable to require SCR for BART.

Comment: We agree with EPA that Wyoming's proposal to require installation of SCR in 2021 and 2022 as part of Wyoming's LTS does not satisfy the CAA or its implementing regulations. Having determined that SCR plus LNBs/SOFA is the best system of continuous emission control, is cost effective, and will result in significant visibility improvement, EPA is required to find that the controls are BART. 40 CFR 51.308(e)(i)(2)(A). Under the RHR, BART must be installed ''as expeditiously as practicable, but in no event later than five years after approval of the implementation plan revision.'' 40 CFR 51.308(e)(iv). Thus, EPA lacks discretion to approve Wyoming's proposal to require PacifiCorp to install BART technology beyond the five-year time frame.

Response: See responses above.

Comment: PacifiCorp submitted comments in support of delaying controls on Jim Bridger Units 1 and 2 until 2022 and 2021 respectively. (EPA issued a Notice of Data Availability pertaining to this information on July 24, 2012. 77 FR 43205). The main points raised in their comments are as follows: [234]

- Because of the size and multi-state nature of its generation fleet, PacifiCorp and its customers are unreasonably impacted by the RHR. PacifiCorp provides regulated electric service to more than 1.7 million customers in California, Idaho, Oregon, Utah, Washington and Wyoming with a net system capacity of 10,597 megawatts. PacifiCorp operates 75 generating units across the western U.S. PacifiCorp owns and operates 19 coal-fueled generating units in Utah and Wyoming, and owns 100% of Cholla Unit 4, a coal-fueled generating unit in Arizona. In addition, PacifiCorp has an ownership interest in Craig Units 1 and 2 and Hayden Units 1 and 2 in Colorado.
- As evidenced by the emission reduction projects which PacifiCorp has already installed in accordance with the Utah and Wyoming regional haze SIPs, PacifiCorp is not opposed to making emission reductions that are cost effective for its customers and that achieve environmental benefits, as required by law. PacifiCorp has undertaken projects to comply with the Utah and Wyoming SIPs at a cost of approximately $1.3 billion (PacifiCorp's share of $1.4 billion of total project costs) between 2005 and 2011. Those projects, in conjunction with projects completed through 2012, have reduced emissions of SO_2 by approximately 58% and emissions of NO_X by approximately 46%.
- Just as modeled visibility improvements associated with PacifiCorp's emission reduction projects do not stop artificially at a state border, EPA's analysis of the impacts of its proposed FIP for a large, multi-state system like PacifiCorp's should not be limited to only those facilities and customers located within Wyoming's borders. EPA's actions impacting large, multi-state systems in one state must also consider the cumulative impacts of all of its actions in all other states that affect the same system.
- Given the number of facilities operated by PacifiCorp and the facilities in which the company has an ownership interest in and is required to pay costs for the installation of regional haze-related controls, accelerated and additional controls under the proposed FIP result in approximately $500 million of additional capital expenditures plus an incremental annual cost of $16–24 million to operate those controls in the next five years. In addition, an EPA proposal for stringent control requirements in Utah (i.e., SCR) within five years would add approximately $750 million in capital expenditures, plus approximately $7 million to $9 million annually in operating costs and approximately $4 million annually for catalyst replacement projects. All of these costs will be put on the backs of PacifiCorp and its customers in an extremely short-time frame.
- In addition to the regional haze requirements, PacifiCorp's coal-fueled generating fleet, including the BART-eligible units, must accommodate controls for compliance with the Mercury and Air Toxics Standards (MATS) during the same timeframe. While the scrubbers and baghouses already installed at many of the PacifiCorp facilities pursuant to the Utah and Wyoming regional haze SIPs position the company well to comply with the acid gas and non-mercury metals limits under the MATS requirements, additional work will be necessary to comply with the mercury emission limits by April 2015.
- PacifiCorp's customers cannot absorb increasing environmental costs. To accommodate, among other cost increases, the costs of the environmental controls already installed on PacifiCorp's coal-fueled generating facilities, PacifiCorp has filed with its utility regulatory authorities annual cases to increase customer rates. PacifiCorp's customers have consistently participated in these cases to express concerns regarding increases in electric rates. While EPA may view its proposal to accelerate the installation of controls and require additional controls at PacifiCorp's facilities as just another utility complaining to avoid the consequences of large investments in controls, EPA's proposal has a very real impact on customers.
- As a regulated utility, PacifiCorp has a legal obligation to supply reliable electric service at reasonable rates as set by state utility commissions; it also has a legal requirement to supply its customers as much electricity as they want, when they want it. While the installation of emissions controls on multiple units in a short period of time creates substantial challenges from a project management perspective, these challenges are exacerbated by increased risk factors that jeopardize PacifiCorp's ability to meet its underlying utility obligations and challenge the reliability of the system.
- When considered independently from other environmental requirements, the retrofits required under either regional haze compliance scenario are not anticipated to impose undue stress on the national supply chain for specialized labor, materials, and equipment. However, analyses of compliance with the MATS have raised concerns that requiring much of the U.S. coal fleet to retrofit or retire in a three to five year-time frame (partially overlapping the compliance time period under the regional haze program) will

[234] See July 12, 2012 comments from PacifiCorp in the docket.

challenge the equipment construction industry.

• Wyoming and EPA are legally required to consider the economic and system impacts on PacifiCorp and its customers. As EPA's BART Guidelines explain: ''There may be unusual circumstances that justify taking into consideration the . . . economic effects of requiring the use of a given control technology. These effects would include effects on product prices . . . Where these effects are judged to have a severe impact on plant operations you may consider them in the selection process, but you may wish to provide an economic analysis that demonstrates, in sufficient detail, for public review, the specific economic effects, parameters, and reasoning.'' 70 FR 39171. Given the large number of BART impacted units owned by PacifiCorp in different states, these unusual circumstances justify Wyoming's BART actions on PacifiCorp's facilities and PacifiCorp's customers.

Response: PacifiCorp argues that springtime scheduling of the unit outages and outage extensions needed for ''tie-in'' of retrofitted controls could challenge system reliability in certain years—in PacifiCorp's forecast, power demand plus reserves would temporarily exceed available supply. EPA believes that this forecast is unrealistic because PacifiCorp constrains itself almost entirely to use of its own generation supplies (ignoring other available generators in its region) and limits its assessment to springtime-only outages in its system-wide outage planning examples. PacifiCorp indicates that spring outages are economically preferred due to the historical availability of cheap hydro replacement power and the typically higher alternative costs of purchased replacement power at other times. However, PacifiCorp provides no information on the availability or net cost of replacement power to meet demand, nor does PacifiCorp identify any alternative retrofit outage schedules. This is a significant omission because alternative retrofit outage schedules that avoid reliability issues through non-coincident temporary uses of purchased power, even if such temporary power purchases may cost more than power typically provided by the facilities experiencing an outage, might have a very small levelized net retail cost impact when applied to customers system-wide. In short, PacifiCorp ties its own hands in its provided analysis, ignoring proven and cost-effective strategies for maintaining electric reliability to allow facility upgrades in a timely fashion.

EPA notes that PacifiCorp overstates the purported regulatory burden on its generating resources by claiming that the company ''has not yet identified a viable control suite that will allow it to comply with the [Mercury and Air Toxics Standards, or MATS] provisions at the Carbon plant in Utah. As a result, while not finally determined, it is anticipated that Carbon Units 1 and 2 will be required to be shut down in the 2015 timeframe, resulting in the loss of 172 megawatts of generation from PacifiCorp's system.'' Such an assumption is unfounded and ignores the EPA's clear explanation in the final MATS that under the CAA, state permitting authorities can also grant sources an additional year as needed for technology installation. EPA expects this option to be broadly available. EPA is also providing a pathway for reliability critical units to obtain a schedule with up to an additional year to achieve compliance. This pathway is described in a separate enforcement policy document.[235] As a result, the comment does not identify any specific conflict between MATS compliance planning at the Carbon facility and regional haze compliance planning at the Jim Bridger units at issue in this rule.

In developing their argument, PacifiCorp borrows a ''WetFGDeq'' concept that EPA used in its nation-wide analysis of the feasibility of retrofitting all controls that might be needed for timely compliance with MATS. PacifiCorp uses EPA's nationally applicable WetFGDeq concept to compare annual WetFGDeq MW amounts of the limited site-specific retrofit activity that PacifiCorp has actually conducted during the past two decades, and might conduct in the future under the SIP, to the annual amount that they might have to conduct in the future under the proposed FIP. Based on this comparison, PacifiCorp states the following (see page 20 of 23; also see Figure 8 of PacifiCorp's July 12, 2012 comments): ''The differences between the SIP Scenario and the Aggressive BART Scenario are fairly substantial on an equivalent Wet FGD basis. In the SIP Scenario, only one year exceeds the 2010–2011 levels of retrofit investment (of about 225 MW/year), while retrofits placed in service in 2017 (675 MW) substantially exceed the previous historic maximum of 475 MW by 200 MW and two years are above the 2010–2011 level. The control installation requirements under the EPA Aggressive BART Scenario would result in more work, less time, and increased costs.''

EPA does not disagree that the proposed FIP may entail more PacifiCorp project management and construction effort (in one year, 2017) than the SIP would require, or than PacifiCorp has actually experienced as an individual company in the past. However, EPA does not consider the relatively small absolute amounts of the differences (200–300 MW) to be a serious obstacle for any large utility, given a bevy of retrofit experience of this magnitude by like companies in the past, on similar schedules.

Comment: In making any BART determinations on a large, multi-jurisdictional system such as PacifiCorp's, the regulating agency must consider the broad scope of the impacts of its decisions on customers and generating system reliability as a whole. Wyoming considered these factors in developing its regional haze SIP: ''The Division believes that the size of PacifiCorp's fleet of coal-fired units presents unique challenges when reviewing costs, timing of installations, customer needs, and state regulatory commission requirements. Information has been supplied by PacifiCorp elaborating on additional factors to be considered in PacifiCorp's BART determination (see *PacifiCorp's Emissions Reductions Plan* in Chapter 6 of the Wyoming technical support document).''

Wyoming's consideration of these factors was appropriate. While PacifiCorp agrees with EPA's proposed conclusions regarding the reasonableness and timing of installation of controls at Jim Bridger Units 1 and 2, EPA's focus on affordability impermissibly fails to consider the unusual circumstances and broader impacts of its action on PacifiCorp's other BART Units. EPA's selection of SCR controls at Naughton Units 1 and 2 and at Dave Johnson Unit 3 will affect the viability of continued unit operations. Installation of SCR controls at these three units, particularly given the cost of controls and their remaining useful life, create such ''unusual circumstances'' that justify taking into consideration the conditions of the plant and the economic effects of requiring the use of a given control technology.

The timing and reasonableness of the eight SCR and two SNCR and LNBs required in EPA's proposed action must

[235] Memorandum from Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance, ''The Environmental Protection Agency's Enforcement Response Policy for Use of Clean Air Act Section 113(a) Administrative Orders in Relation to Electric Reliability and the Mercury and Air Toxics Standard'' (Dec. 16, 2011).

be considered in the context of the additional controls required at PacifiCorp's units in Arizona (Cholla Unit 4 with SCR required by 2017) and its share of units in Colorado (Hayden Unit 1 with SCR in 2015, Hayden Unit 2 with SCR in 2016, Craig Unit 1 with SNCR in 2017 and Craig Unit 2 with SCR required in 2016) and the potential for additional controls required at four of PacifiCorp's BART-eligible units in Utah within five years after final action. EPA's failure to consider the ''unusual circumstances'' contemplated under its Appendix Y Guidance means the agency acted in a manner that is arbitrary and capricious in its overall assessment (or lack thereof) of the effects of its actions on PacifiCorp's generation fleet.

Response: See our response to the comment above.

Comment: Pursuant to 40 CFR 51.308(e), the State included provisions in its 309(g) regional haze SIP to address BART. When evaluating each permit application, the State determined BART for each source by evaluating visibility control options presented in the applications using the methodology prescribed in 40 CFR part 51, Appendix Y.

The use of the BART guidelines contained in Appendix Y is only required for sources located at EGUs with a total capacity greater than 750 MW, which for Wyoming were Basin Electric's Laramie River Station and PacifiCorp's Jim Bridger and Dave Johnston plants. However, for consistency, the State chose to follow the guidelines for all BART sources, including those located at the trona facilities. By using the guidelines of Appendix Y for all sources, the State established a consistent framework for performing BART evaluations. Finally, when selecting the ''best alternative,'' the State considered additional impacts to both the plant and the State. Appendix Y affords the determining authority discretion to consider additional impacts. See 70 FR at 39171.

The State's BART analysis not only considered all statutory factors, but also considered the significant impact on energy costs to PacifiCorp's Wyoming rate payers if the controls, including SCR, were required to be installed in the BART timeframe of five years after SIP approval. While the State did not have the resources to perform a highly technical and complex analysis to quantify the potential cost impact of requiring installation of SCR controls on all of PacifiCorp's Wyoming fleet, additional information was provided by PacifiCorp for public review.

In addition to identifying costs in terms of capital expenditures, the State also considered the logistical challenges unique to PacifiCorp. The State is not aware of any other company faced with as many potential add-on control installations as PacifiCorp. Additionally, the State noted potential reliability issues related to the extended downtimes needed for the installation of SCR systems on multiple units within the BART timeframe. The impact of taking down large units, like Jim Bridger Units 1–4, each rated at a nominal 530 MW, for extended outages increases the possibility of power shortages, not to mention increased power cost if PacifiCorp must purchase additional power at spot market prices to meet demand.

Response: The commenter raises many of the same points that PacifiCorp raised in its July 12, 2012 comments on our third proposal in the alternative, and we have responded to the commenters points in our response above. EPA does not find the arguments for delaying controls put forth by PacifiCorp or the commenter to be compelling.

Comment: In making any BART determinations on a large, multi-jurisdictional system such as PacifiCorp's, the regulating agency must consider the broad scope of the impacts of its decisions on customers and generating system reliability as a whole. Wyoming considered these factors in developing its regional haze SIP: ''The State believes that the size of PacifiCorp's fleet of coal-fired units presents unique challenges when reviewing costs, timing of installations, customer needs, and state regulatory commission requirements.'' Information has been supplied by PacifiCorp elaborating on additional factors to be considered in PacifiCorp's BART determination (see *PacifiCorp's Emissions Reductions Plan* in Chapter 6 of the Wyoming Technical Support Document). Wyoming's consideration of these factors was appropriate. EPA's rejection of these factors was not appropriate.

Given the large number of BART impacted units owned by PacifiCorp in different states, these ''unusual circumstances'' justify Wyoming and EPA considering the impact of EPA's BART decision-making in the western U.S. on PacifiCorp and its customers.

Response: We have responded to the commenter's points in our responses above. As stated, EPA does not find the arguments for delaying controls put forth by the State or PacifiCorp to be compelling.

Comment: Congress has defined ''best available retrofit technology'' as ''an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter. . . .'' 42 U.S.C. 7479(3). Congress also narrowly defined which sources would be exempt from BART. Section 169A(c) of the CAA exempt fossil fuel power plants exceeding 750 megawatts only if the ''owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such power plant is located at such a distance from all areas . . . that such power plant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.'' *Id.* at section 7491(c)(2). Any such exemption must be agreed to by the FLMs. *Id.* at section 7491(c)(3). PacifiCorp has not submitted evidence demonstrating that the Jim Bridger coal plant—with a net generating capacity of 2,120 megawatts, 78 FR 34753—will not cause or contribute to significant visibility impairment in any Class I area. To the contrary, EPA's own visibility modeling shows that Bridger has significant visibility impacts at numerous Class 1 areas. 78 FR 34754–34758. As such, EPA may not exempt the Jim Bridger plant from BART.

Response: We agree with the commenter that PacifiCorp has not submitted any evidence that the Jim Bridger plant is located at such a distance from all Class I areas that the plant will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

Comment: EPA should require installation of SCR at each Jim Bridger unit within the five-year regulatory deadline because this approach offers the greatest visibility improvement.

Response: See responses above.

Comment: EPA proposes that Wyoming's determination of NO_X BART for Jim Bridger units 1 and 2 as new LNB plus OFA is reasonable and that it would be unreasonable of the EPA to require any further retrofits at these units within five years of EPA's final action. 78 FR 34756. The State supports EPA's proposed approval of NO_X BART as LNB plus OFA for Jim Bridger Units 1 and 2. EPA also proposes to approve the State's LTS of NO_X control for Jim Bridger Units 1 and 2 as the SCR-based emission rate of 0.07 lb/MMBtu with compliance dates of December 31, 2021, for Unit 2 and December 31, 2022, for Unit 1.

Based on facts PacifiCorp raised concerning the additional requirements

in the proposed FIP for Wyoming, the finalized FIP for Arizona, and the possibility of additional requirements in a future FIP or SIP for Utah, the additional time allowed PacifiCorp to install controls under the State's LTS on Jim Bridger Units 1 and 2 is warranted under the affordability provisions in the BART Guidelines. 40 CFR part 50, App. Y, section IV(E)(3); *see also* 78 FR 34756. Wyoming therefore supports EPA's proposed approval.

Response: We disagree with the points raised by the commenter in the second paragraph and have addressed their points in previous responses to comments. Nonetheless, we are approving the State's SIP for Jim Bridger Units 1 and 2.

Comment: Wyoming strongly urges EPA to stand by its proposed approval of Wyoming's SIP requiring Jim Bridger Unit 1 to meet the 0.07 lb/MMBtu emission rate prior to December 31, 2021 and Unit 2 to meet the 0.07 lb/MMBtu emission rate prior to December 31, 2022. However, Wyoming encourages EPA to approve Wyoming's LTS for Jim Bridger Units 1 and 2 as submitted, rather than approve only the SCR portion, in order to preserve future flexibility for ensuring adequate emission controls.

Response: We agree with this comment to the extent that the regulatory requirements we are adopting for monitoring, recordkeeping, and reporting only require that Jim Bridger Units 1 and 2 meet an emission limit of 0.07 lb/MMBtu on a 30-day rolling average. Our regulatory language does not require PacifiCorp to install SCR to meet these limits. EPA is approving Wyoming's LTS for Jim Bridger Units 1 and 2 as submitted.

Comment: EPA acted arbitrarily by not evaluating SNCR for the Jim Bridger units. EPA's proposed regional haze FIP is defective because EPA did not follow the BART Guidelines when conducting a five-factor analysis for potential BART NO_X controls. As the BART Guidelines explain, states (and EPA when it substitutes itself for the state) must evaluate ''the control effectiveness of all the technically feasible control alternatives. . . .'' Here, EPA failed to do so by not analyzing SNCR for the Jim Bridger plant. In fact, EPA admits it did not conduct a full BART analysis for SNCR for the Jim Bridger units: ''Because of our examination of the factors lead us to propose SCR as reasonable for BART, we have eliminated SNCR for further consideration.''

Response: We disagree with this comment. Our proposed rulemaking notice clearly shows that we considered SNCR in our analysis (see Table 9 and Table 11 of the proposed rulemaking action).

Comment: One commenter stated that our proposed rule creates unnecessary regulatory uncertainty by saying we propose to approve the State's compliance deadlines for Jim Bridger Units 1 and 2, but then go on to say we are seeking comment on a 2017 compliance deadline. They go on to say that EPA must state unequivocally that they approve of the State's existing compliance deadlines for Jim Bridger Units 1 and 2.

Response: We have responded to this comment in previous responses.

Comment: We received numerous general comments in favor of our proposed approval of the State's SIP for the Jim Bridger Units 1–4.

Response: See responses to other comments above.

Comment: PacifiCorp supports EPA's proposed action to afford ''considerable deference'' to the Wyoming SIP with respect to what controls are reasonable and when they should be implemented at Jim Bridger Units 1 and 2, and that it would be unreasonable to require any further retrofits at this source within five years of EPA's final action. This is especially true given the extremely limited visibility improvement that would be achieved if SCRs were installed within the BART time period at Jim Bridger Units 1 and 2.

Further, PacifiCorp does not believe EPA, having reached the conclusion that it would be unreasonable to require further retrofits at Jim Bridger within five years, can reverse its decision simply by inviting comment on an alternative proposal without further consideration of the broader impacts of forcing more aggressive controls within a five-year period.

Response: We have responded to this comment in previous responses.

Comment: We received numerous comments that an earlier compliance deadline for the installation of SCR at Jim Bridger Units 1 and 2 would be a significant burden and would be costly to PacifiCorp consumers.

Response: We have responded to this comment in other responses to comments.

Comment: We agree with EPA that SCR represents BART for all four Bridger units, but recommend a lower 30-day rolling average emission limit (e.g. 0.06 lb/MMBtu) to reflect the true capabilities of SCR.

Response: We have addressed the control effectiveness of SCR above in section V.C.3.

Comment: We received comments that BART for NO_X emissions at Jim Bridger Units 1–4 must be based on SCR and LNBs/SOFA, which represents the best system of continuous emissions reduction and that commenters agree with EPA's proposal to require this technology as BART. Commenters went on to state that EPA must revise its BART-based NO_X emission limit for Units 1–4 from 0.07 lb/MMBtu to no higher than 0.05 lb/MMBtu, which the selected technology can easily achieve.

Response: We have addressed the control effectiveness of SCR above in section V.C.3.

b. PM BART Determination

Comment: The fabric filter option discussed by Wyoming represents PacifiCorp's estimate that application of a Compact Hybrid Particulate Collector unit in addition to using flue gas conditioning with the existing electrostatic precipitators can reduce emissions an additional 50% resulting in a PM_{10} emission rate of 0.015 lb/MMBtu. Considering that EPA Region 9 proposed that the Desert Rock power plant meet 0.010 lb/MMBtu, we believe that the Compact Hybrid Particulate Collector option could achieve the same limit.

Response: See our response to a similar comment in section IV.C.6 of this rulemaking.

Comment: Neither Wyoming nor EPA completed the five-step BART process for PM_{10} emissions. EPA asserted that: ''The State did not provide visibility improvement modeling for fabric filters, but EPA is proposing to conclude this is reasonable based on the high cost effectiveness of fabric filters at each of the units. In addition, we anticipate that the visibility improvement that would result from lowering the limit from 0.03 lb/MMBtu to 0.015 lb/MMBtu would be insignificant based on the State's analysis.''

We have several concerns with these conclusions: (1) EPA cannot simply abort the five-step process once it has determined a technology to be technically feasible; (2) EPA has overlooked the environmental impact of SO_3 emissions that may be released as a result of PacifiCorp's FGC BART proposal; (3) Wyoming has underestimated the effectiveness of the fabric filter option; and (4) Wyoming's fabric filter costs are overestimated. For example, the cost estimates used by Wyoming contained escalation, extra contingencies, and AFUDC, which are not allowed by the CCM and have been rejected by EPA in other analyses. The total for these improper costs exceeds $7 million per fabric filter.

Even taken at face value, the cost/ton deemed ''high'' by EPA for Units 2 and

3 are similar to or lower than cost/ton values accepted as reasonable (for NO_X) by states and by EPA in other analyses. EPA should complete a proper five-step PM_{10} BART analysis by re-evaluating the Compact Hybrid option on the basis of its ability to achieve a lower limit (e.g., 0.010 lb/MMBtu), evaluating costs in accordance with the BART Guidelines, comparing its cost-effectiveness to other baghouse installations to properly assess the ''reasonableness'' of its cost, and determining the degree of visibility improvement that would result from a lower PM_{10} limit.

Response: See our response to a similar comment in section IV.C.6 of this rulemaking.

3. Dave Johnston Units 3 and 4

a. NO_X BART Determination

Comment: Wyoming has underestimated the ability of SCR to reduce emissions. In estimating the annual cost-effectiveness of the LNB+OFA+SCR option, Wyoming assumed 0.07 lb/MMBtu on an annual average basis. Based on the 0.28 lb/MMBtu NO_X emission rate predicted for the LNB+OFA option, and the 0.23 lb/MMBtu annual emission rates demonstrated by Johnston Unit 3 in 2011, outlet emissions at 0.07 lb/MMBtu represent only a 70%–75% SCR control efficiency as opposed to the generally-accepted 90%. Based on the 0.15 lb/MMBtu NO_X emission rate predicted for the LNB+OFA option, outlet emissions at 0.07 lb/MMBtu represent only a 53% SCR control efficiency on Unit 4. Wyoming has not provided any documentation or justification to support the higher emission rates used in its analyses. In other recent BART actions, EPA has determined that SCR can achieve 0.05 lb/MMBtu on an annual basis. Such an underestimate at Johnston biases the cost-benefit analysis against SCR and is inconsistent with other EPA analyses.

Response: The commenter has incorrectly assumed that a 90% control efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Regardless, we agree that SCR can in most cases achieve a performance rate of 0.05 lb/MMBtu on an annual basis. (See section IV.C.4 of this rulemaking for more information on the control effectiveness of SCR). We have revised the SCR costs for Dave Johnston Units 3 and 4 accordingly.

Comment: Wyoming has overestimated the cost of SCR. A survey of industry SCR cost data (conducted for the Utility Air Regulatory Group) and EPA IPM estimates show that typical SCR costs for units the size of the Johnston units would be $180–$300/kW. Wyoming's cost estimates for SCR on Units 3 and 4 are $488 and $436/kW, respectively, which exceed real-world industry costs ($50–$300/kW) and industry estimates, leading us to believe that capital and annual costs are overestimated.

Response: See our response regarding the cost of SCR in section IV.C.5 of this rulemaking.

Comment: Neither PacifiCorp nor Wyoming provided justification or documentation for their cost estimates. We were not provided with any vendor estimates or bids, and PacifiCorp and Wyoming did not use the CCM. For example, the cost estimates used by Wyoming contained AFUDC, which is not allowed by the CCM and has been rejected by EPA in other analyses. The total for these improper costs exceeds $13 million.

Response: In order to address the cost analysis deficiencies noted by the commenter, EPA has performed revised cost analyses for Dave Johnston Units 3 and 4. In our revised cost analyses, we have followed the structure of the CCM, though we have used the IPM cost models to estimate direct capital costs and O&M costs.

Comment: Dave Johnston Unit 4 could very likely achieve a NO_X rate as low as 0.03 lb/MMBtu, which reflects 80% NO_X control across the SCR. A lower NO_X emission limit would increase the cost of the total system, but the cost effectiveness of the system is actually improved because of the greater NO_X removal. The cost effectiveness of SCR plus LNBs/OFA at Dave Johnston Unit 4 to meet a 0.03 lb/MMBtu NO_X rate would be $1,803/ton of NO_X removed. EPA should require Dave Johnston Unit 4 to install SCR plus LNBs/OFA to meet a NO_X rate of 0.03 lb/MMBtu or, at worst, no higher than 0.05 lb/MMBtu.

Response: We have addressed the control effectiveness of SCR above in section V.C.3. Again, we have not selected LNBs with OFA and SCR for Dave Johnston Unit 4 due to the high incremental cost effectiveness, when considered within the context of the five factors.

Comment: EPA's use of undefined incremental cost effectiveness versus incremental visibility benefit threshold is arbitrary in concept and in its application. It is arbitrary in concept because EPA has not provided any reasoned basis for its approach let alone disclosed the threshold it applies. It is arbitrary in application, because in the case of Dave Johnston Unit 4, the visibility benefits of SCR do justify its cost, as EPA has found for other units.

Response: We disagree. We have made our determination based on a weighing of the five factors. One of the factors to be considered is cost-effectiveness, both average and incremental. For Dave Johnston Unit 4, we have determined that the incremental costs, when considered with the other BART factors, does not make the selection of SCR reasonable.

Comment: The EPA failed to support its conclusion that SNCR, rather than SCR, is BART for Dave Johnston Unit 4. The EPA's sole basis for rejecting SCR as BART for Dave Johnston Unit 4 was the incremental cost effectiveness of the control, which EPA estimated to be $11,951, but the EPA has not supported this line-drawing with reference to the statutory BART factors or purpose of the regional haze program. Without providing objective standards or rationale to support its determination, the EPA's judgment that the incremental cost effectiveness of SCR on Dave Johnston Unit 4 is too high appears arbitrary.

The EPA's analysis of incremental cost effectiveness for Dave Johnston Unit 4 also cannot drive the Agency's BART determination because EPA overestimated the cost of SCR for Unit 4. The EPA found the average cost effectiveness of SCR to be reasonable for the unit, but the costs are even lower than the EPA assumed because the EPA used unjustified ''retrofit factors,'' interest rate, and auxiliary power costs.

Response: As stated in our response above, we have made our determination based on a weighing of the five factors. One of the factors to be considered is cost-effectiveness, both average and incremental. For Dave Johnston Unit 4, we have determined that the incremental costs, when considered with the other BART factors, does not make the selection of SCR reasonable.

In addition, we have revised the costs of SCR for Dave Johnston Unit 3 in support of our final rulemaking. The revised costs are no longer based on a retrofit factor, but instead are based on a budgetary price from an equipment vendor submitted by PacifiCorp during the comment period. We feel that use of the vendor data for SCR provides a more accurate capital cost than when using a retrofit factor. For reasons described in separate responses, we continue to find that use of the social discount rate of 7% is appropriate for regulatory applications such as BART determinations. We have corrected the

auxiliary power costs to reflect busbar, and not market price of power; however this has a small affect on overall costs. Our cost methodology and assumptions are described in detail in the cost report that can be found in the docket.

Comment: SCR on Dave Johnston Unit 4 would likely result in even greater NO_X emission reductions than EPA assumed, further undermining the Agency's exclusive reliance on incremental cost effectiveness to reject SCR as BART. An emission rate lower than 0.05 lb/MMBtu on a 30-day average is achievable for Dave Johnston Unit 4 because this unit operates combustion controls that independently control NO_X emissions to a 30-day average of 0.13 lb/MMBtu (compared with the 0.22 lb/MMBtu NO_X-emission rate achieved at Unit 3). At this emission level, SCR would only need to remove 66.4 percent of NO_X emissions to achieve an emission rate of 0.05 lb/MMBtu, while SCR is capable of achieving NO_X reductions of 90 percent. The EPA should have evaluated the cost-effectiveness of SCR on Dave Johnston Unit 4 based on even greater NO_X emissions reductions that are readily achievable.

Response: We disagree. First, the commenter has incorrectly assumed that a 90 percent reduction in NO_X is achievable with SCR regardless of inlet rate or other parameters. In most cases, SCRs are designed for a performance emission rate, such as in lb/MMBtu, and not the anticipated percent reduction. In the case of Dave Johnston Unit 4, the low emissions currently being achieved with combustion controls are not an indication that the SCR would achieve greater reductions than estimated by EPA. In fact the exact opposite is true: the lower the inlet rate to the SCR, the less NO_X that will be removed as there are simply fewer tons to remove. Finally, we note that we have revised our cost calculations to support the determinations in today's final rule. In our revised analysis, we calculate that the incremental cost effectiveness of SCR is $13,312/ton, as opposed to $11,951/ton. This reinforces our conclusion that SCR is not appropriate for Dave Johnston Unit 4. Our cost methodology and assumptions are described in detail in the cost report that can be found in the docket.

b. Alternative Control Technology Proposal

Comment: Dave Johnston Unit 3 was retrofitted with LNB and separated OFA in the spring of 2010, and Unit 4 was retrofitted with the same technology in early 2009. EPA recognizes that Unit 3 has a current annual NO_X emission rate of about 0.22 lb/MMBtu, and Unit 4 has a rate of about 0.14 lb/MMBtu. The potential additional NO_X controls that may be added to these units include SNCR and SCR. Should an alternate control technology be considered by EPA for Dave Johnston Unit 3, SNCR is preferable to SCR for Dave Johnston Unit 3 when considering all currently available information and the current emissions performance of the unit.

Even though the cost of SNCR is unacceptably high for Unit 3 (approximately $5,500 per ton NO_X removed), it is still far less than the tremendously expensive cost of SCR ($15,769 per ton NO_X removed for Unit 3), particularly when taking into account the incrementally small modeled visibility improvement between the technologies.

Response: As described in section III.B of this document, we have re-evaluated the cost of compliance for Dave Johnston unit 3 to reflect a shorter remaining useful life (9 years as opposed to 20 years) because PacifiCorp has volunteered to install SNCR and retire the unit in 2027 in lieu of installing SCR under our proposed rule. As we explain there, our revised BART analysis shows that neither SNCR nor SCR is reasonable over this shorter remaining useful life. However, our analysis continues to support a conclusion that SCR is warranted if the costs of compliance are calculated over a 20-year remaining useful life. Therefore, we have also included an to give PacifiCorp the option to meet a 0.07 lb/MMBtu emission limit (assumes installation of SCR) within five years of today's action instead of shutting down the unit.

Comment: With respect to Dave Johnston Unit 4, EPA has concluded that SNCR is BART for that unit. As such, PacifiCorp has only provided updated SNCR information for Unit 4, considering all currently available information and the current emissions performance of the unit. The cost of SNCR for Unit 4 is unacceptably high and not cost effective (approximately $12,000 per ton NO_X removed). The alternate control technology for Dave Johnston Unit 4 would be LNB/OFA, as is currently installed today.

Response: We disagree with the cost effectiveness estimates provided by the commenter. Nonetheless, as described above, in consideration of comments received during the public comment period, we have re-evaluated our cost of compliance estimates for Dave Johnston Unit 4. Our revised costs, when taken along with the remaining BART factors, no longer show that SNCR is warranted for Dave Johnston Unit 4. Therefore, we agree that BART for Dave Johnston Unit 4 is the currently installed combustion controls (LNB/OFA).

4. Naughton Units 1–3

a. NO_X BART Determination

Comment: The EPA proposes to accept Wyoming's SIP proposal to identify SCR as BART on Naughton Unit 3 and to require SCR to reduce NO_X emissions from Naughton Unit 1 and 2. The EPA properly recognized that the costs of SCR on Naughton Units 1–3 are reasonable. However, the EPA's estimate of costs is significantly inflated, and the true costs are even lower than EPA found because the EPA used unjustified ''retrofit factors,'' interest rate, and auxiliary power costs. The recalculation of costs using what the commenter believes are corrected inputs resulted in significantly lower SCR costs of $1,501 to $1,788/ton at all three Naughton units. On this basis, SCR is very cost effective on these units and at the low end of the cost threshold when scanning NO_X reduction costs elsewhere. SCR also is justified by the visibility benefits it would afford, which additionally supports EPA's findings that SCR reflects BART for Naughton Units 1–3.

Response: EPA believes that the retrofit factors used in cost estimates were reasonable and has described in detail the reasoning for the retrofit factors in other responses. EPA also discussed the reasoning for the assumed interest rate in responses to other comments. EPA has revised its cost estimates and has made changes where EPA believed that input from commenters justified changes.

Comment: EPA should evaluate the feasibility and cost-effectiveness of further NO_X reductions that could be achieved by a more-efficient SCR. EPA is proposing that the FIP NO_X BART emission limit for Naughton Unit 1, Unit 2, and Unit 3 is 0.07 lb/MMBtu (30-day rolling average). While we are generally pleased with EPA's proposal, we note that EPA's analysis is based on only 76% NO_X control by the SCRs on Units 1 and 2, and 85% control by the SCR on Unit 3. This still results in Unit 2 contributing 0.5 deciviews and Unit 3 contributing 0.9 deciviews to visibility impairment at Badlands National Park.

Response: We have addressed the control effectiveness of SCR above in section V.C.3 above.

Comment: A NO_X limit of 0.07 lb/MMBtu on a rolling 30-boiler operating day basis would only require Naughton Units 1 and 2 to achieve 71 percent NO_X removal and Naughton Unit 3 to achieve 80 percent NO_X removal across the SCR system based on an evaluation of

available CAMD emissions data. A 0.05 lb/MMBtu NO_X emission limit applicable on a rolling 30-boiler operating day average basis would require 79 percent NO_X removal across the SCR at Naughton Units 1 and 2 and 85.7 percent NO_X removal at Naughton Unit 3, which is achievable.

Response: We have addressed the control effectiveness of SCR above in section V.C.3 above.

Comment: We received comments that Wyoming has underestimated the ability of SCR to reduce emissions. Commenters stated that in estimating the annual cost-effectiveness of the LNB+OFA+SCR option, Wyoming assumed 0.07 lb/MMBtu on an annual average basis. Based on the 0.026–0.37 lb/MMBtu NO_X emission rate predicted for the combustion control option, outlet emissions at 0.07 lb/MMBtu represent only 73%–81% SCR control efficiency as opposed to the generally accepted 90%. Commenters went on to point out that in other recent BART actions, EPA has determined that SCR can achieve 0.05 lb/MMBtu on an annual basis.

Response: The commenters have incorrectly assumed that a 90% control efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Regardless, we agree that SCR can in most cases achieve a performance rate of 0.05 lb/MMBtu on an annual basis. (See section IV.C.4 of this rulemaking for more information regarding the control effectiveness of SCR). We have revised the SCR costs for the Naughton units accordingly.

Comment: A survey of industry SCR cost data (conducted for the Utility Air Regulatory Group) and IPM estimates show that typical SCR costs for units the size of the Naughton units would be $280–$330/kW. Wyoming's cost estimates for SCR are $412–$531/kW, which exceed real world industry costs ($50–$300/kW) and industry estimates, leading us to believe that capital and annual costs are overestimated.

Response: See our response regarding the cost of SCR in the section V.B.2 of this rulemaking.

Comment: Neither PacifiCorp nor Wyoming provided justification or documentation for their cost estimates. We were not provided with any vendor estimates or bids, and PacifiCorp and Wyoming did not use the CCM. For example, the cost estimates used by Wyoming contained AFUDC which is not allowed by the CCM and has been rejected by EPA in other analyses. The total for these improper costs exceeds $17 million.

Response: In our revised SCR cost analysis for the Naughton units, we followed the framework of the CCM (although we derived direct capital costs and O&M costs using the more recent approach found in the IPM cost models). For example, we did not allow for owner's costs and AFUDC. Therefore, we have addressed the concerns raised by the commenter.

b. Alternative Control Technology Proposal

Comment: EPA requested additional information on the conversion of Naughton Unit 3 from a coal fired unit to a natural gas fired unit. 78 FR 34760. EPA must evaluate PacifiCorp's fuel conversion in accordance with Appendix Y as a ''better-than-BART'' alternative and not as a BART control technology option because EPA had made clear in its BART Guidance that ''it is not [EPA's] intent to direct States to switch fuel forms, *e.g.* from coal to gas,'' as part of the BART analysis. 70 FR 39104, 39164. PacifiCorp voluntarily submitted its permit application to convert Naughton Unit 3 to natural gas, the State issued a federally enforceable permit requiring such conversion. Compliance with the permit is therefore not voluntary.

The permitted NO_X performance level of Naughton Unit 3 after conversion to natural gas is 0.08 lb/MMBtu based on a 30-day rolling average and not 0.10 lb/MMBtu based on a 30-day rolling average as stated in PacifiCorp's permit application. Additionally, the permitted NO_X mass emission rate is 250 lb/hr based on a 30-day rolling average, which is protective of visibility and lower than the BART-determined NO_X rate of 259 lb/hr based on the same averaging period. Finally, annual NO_X emissions will be reduced from the BART level of 1,134 tons to 519 tons.

Response: We tentatively agree that the conversion of Naughton Unit 3 to natural gas is better-than-BART for that individual unit, however, the State has not provided a SIP for EPA's action on this option. EPA does not have the authority to approve the conversion without a SIP submittal, and is, therefore, approving the State's BART determination for SCR at Naughton Unit 3 without making a final determination on whether the conversion is better-than-BART for that unit. In lieu of our approval of the State's BART determination for Naughton Unit 3, EPA is committed to take expedited action on a future SIP revision for Naughton Unit 3 reflecting the conversion if the State submits such a revision. That action would constitute our final determination on the conversion.

Comment: Rather than install the control equipment required by the Wyoming SIP, PacifiCorp will convert the unit to fire natural gas by the end of 2017. A construction permit allowing the conversion has been issued by Wyoming, and PacifiCorp is moving ahead with a request for Wyoming to modify the Wyoming SIP to accommodate this change. The construction permit issued by Wyoming requires Naughton Unit 3 to cease burning coal by December 31, 2017 and to be retrofitted to natural gas as its fuel source by June 30, 2018. PacifiCorp requests that EPA's final FIP include this compliance alternative for Naughton Unit 3.

Response: See our response above.

Comment: The Conservation Organizations support the Naughton Unit 3 conversion to natural gas within the first five-year regional haze planning period as a better-than-BART alternative to installation of SCR on Unit 3. We recognize that a gas conversion will virtually eliminate SO_2 emissions as well as greatly reduce NO_X and PM emissions resulting in significant visibility benefits.

However, to the extent that EPA is considering whether the Naughton Unit 3 is better than BART as proposed for all three Naughton Units (i.e., whether the conversion may be approved ''instead of . . . BART as proposed'' for Naughton Units 1 and 2, 78 FR 34783), the Conservation Organizations object. The Conservation Organizations conducted visibility modeling to determine whether PacifiCorp's proposed natural gas conversion at Unit 3 (with LNB and OFA at Units 1 and 2) would result in greater visibility improvement than would EPA's re-proposed BART alternative of SCR at all three Naughton Units. The analysis shows that EPA's re-proposed SCR BART determination consistently results in greater visibility improvement over the gas conversion scenario. Thus, the conversion of Naughton Unit 3 to gas with LNB/OFA on Units 1 and 2 does not satisfy the ''better-than-BART'' standards of the regional haze regulations. Whether or not PacifiCorp converts Naughton Unit 3 to natural gas, EPA must require the installation of SCR to meet an emission limit of 0.05 lb/MMBtu to satisfy BART for Naughton Units 1 and 2.

Response: We acknowledge the support for a natural gas conversion as a better-than-BART alternative for Naughton Unit 3. If the State submits a SIP revision reflecting the conversion,

we will take expedited action on it. As discussed elsewhere, we are approving the State's SIP submittal for all Naughton Units based on our consideration of the five BART factors. The remainder of the comment is therefore not relevant.

5. Wyodak

Comment: Wyoming has underestimated the ability of SCR to reduce emissions. In estimating the annual cost-effectiveness of the LNB+OFA+SCR option, Wyoming estimated 0.07 lb/MMBtu on an annual average basis. Based on the 0.18 lb/MMBtu NO_X emission rate predicted for the LNB+OFA option, outlet emissions at 0.07 lb/MMBtu represent only a 61% SCR control efficiency as opposed to the generally-accepted 90%. Wyoming has not provided any documentation or justification to support the higher emission rates used in its analyses. In other recent BART actions, EPA has determined that SCR can achieve 0.05 lb/MMBtu on an annual basis. Such an underestimate at Wyodak biases the cost-benefit analysis against SCR and is inconsistent with other EPA analyses.

Response: The commenter has incorrectly assumed that a 90% control efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Regardless, we agree that SCR can in most cases achieve a performance rate of 0.05 lb/MMBtu on an annual basis. (See section IV.C.4 of this rulemaking for more information regarding the control effectiveness of SCR). We have revised the SCR costs for Wyodak accordingly.

Comment: A survey of industry SCR cost data and EPA IPM estimates show that typical SCR costs for units the size of Wyodak would be $180–$280/kW. Wyoming's cost estimates for SCR are $474/kW, which exceed real-world industry costs ($50–$300/kW) and industry estimates, leading us to believe that capital and annual costs are overestimated.

Response: See our response regarding the cost of SCR in section IV.C.5 of this rulemaking.

Comment: Neither PacifiCorp nor Wyoming provided justification or documentation for their cost estimates. We were not provided with any vendor estimates or bids, and PacifiCorp and Wyoming did not use the CCM. For example, the cost estimates used by Wyoming contained AFUDC, which is not allowed by the CCM and has been rejected by EPA in other analyses. The total for these improper costs exceeds $8 million.

Response: In our revised SCR cost analysis for Wyodak, we followed the framework of the CCM (although we derived direct capital costs and O&M costs using the more recent approach found in the IPM cost models). For example, we did not allow for owner's costs and AFUDC. Therefore, we have addressed the concerns raised by the commenter.

Comment: The addition of SCR at Wyodak should be required because it is consistent with the other BART determinations EPA has made. EPA is proposing that the FIP NO_X BART is new LNBs with OFA plus SNCR at an emission limit of 0.17 lb/MMBtu. EPA proposes to eliminate new LNBs with advanced OFA plus SCR. The cumulative cost effectiveness of adding SCR to Wyodak is equivalent to EPA's accepted values at Laramie River Unit 2. Based upon cost and visibility improvement, we believe that SCR is BART for Wyodak. As EPA stated in its notice, ''cost-effectiveness and visibility improvement are within the range of other EPA FIP actions.'' Even though cumulative visibility improvement is relatively low, so are SCR costs.

A NO_X limit of 0.07 lb/MMBtu on a rolling 30-boiler operating day basis would only require Wyodak to achieve 67 percent NO_X removal across the SCR system based on an evaluation of available CAMD emissions data. A 0.05 lb/MMBtu NO_X emission limit applicable on a rolling 30-boiler operating day average basis would require 76 percent NO_X removal across the SCR, which the commenter believes is achievable.

Response: As a result of other comments we have received, we are finalizing a NO_X BART determination of new LNBs with OFA plus SCR for Wyodak. We agree with the portion of this comment that states this is consistent with other EPA BART determinations. We disagree with the remainder of the comment. As we have discussed in other responses, we are not required, nor have we chosen to, use the $/deciview metric, let alone the same on a cumulative basis, when assessing BART.

We have addressed the control effectiveness of SCR above in section V.C.3.

Comment: For Wyodak, EPA is proposing that the FIP NO_X BART is new LNBs with OFA plus SNCR at an emission limit of 0.17 lb/MMBtu. EPA proposes to eliminate new LNBs with advanced OFA plus SCR because: ''Although the cost-effectiveness and visibility improvement are within the range of other EPA FIP actions, we find that the cumulative visibility improvement of 1.16 deciviews for new LNBs with OFA plus SCR is low compared to the cumulative visibility benefits that will be achieved by requiring SCR at Dave Johnston Unit 3 (2.92 deciview), Laramie River Unit 1 (2.12 deciview), Laramie River Unit 2 (1.97 deciview), Laramie River Unit 3 (2.29 deciview), Naughton Unit 1 (3.54 deciview), and Naughton Unit 2 (4.18 deciview).''

Because the cumulative visibility improvement from EPA's proposed control strategy is barely half of the visibility improvement that EPA rejected as ''low,'' then visibility improvement cannot be the only factor relied upon by EPA in making its BART determination. We can only conclude that EPA is somehow relating visibility improvement to another factor. For example, after correcting for the unsupported 1.3 retrofit factor at this relatively simple, single-EGU facility, the cost-effectiveness of adding SCR is $16 million/deciview at Wind Cave National Park, and $10 million/cumulative deciview. By comparison, based upon EPA estimates, addition of SCR to Laramie River Unit 3 results in $28 million/deciview at the most-impacted Class I area, and addition of SCR to Laramie River Unit 2 yields $10 million/cumulative deciview. The cumulative cost effectiveness of adding SCR to Wyodak is equivalent to EPA's accepted values at Laramie River Unit 2.

Response: We disagree with the suggested use of the $/deciview metric. As we have discussed in other responses, we are not required, nor have we chosen to, use the $/deciview metric, let alone the same on a cumulative basis, when assessing BART. Even if we had, the commenter's position is predicated on their assertion that EPA inappropriately applied a retrofit factor for SCR at Wyodak. As we have discussed in other responses, we disagree that it was inappropriate to apply a retrofit factor of 1.3. However, as explained below, we agree that we should not have relied on the basis stated in our proposal to reject SCR. For Wyodak, we find that the visibility improvements at two Class I areas, when weighed with the other BART factors, makes SCR reasonable as BART.

Comment: Based upon cost and visibility improvement, we believe that SCR is BART for Wyodak. Under the EPA proposal, Wyodak would still contribute over 0.7 deciview impairment at Wind Cave National Park (and exceed 0.5 deciviews at Badlands National Park). With the addition of SCR, impairment would drop to less

than 0.5 deciviews at all Class I areas. As EPA stated in its proposal, ''cost-effectiveness and visibility improvement are within the range of other EPA FIP actions.'' Even though cumulative visibility improvement is relatively low, so are SCR costs. Addition of SCR at Wyodak should be required because it is consistent with the other BART determinations EPA has made here.

Response: After further consideration, we agree that it was inappropriate for EPA to reject SCR as BART for Wyodak based on the rationale that Wyodak's emissions affect fewer Class I areas than Wyoming's other BART-eligible sources. Where consideration of the five factors demonstrates that a control is reasonable in light of the visibility improvement that will occur at the most impacted Class I area, as was the case here for Wyodak and Wind Cave, the fact that additional Class I areas will also experience visibility improvement can only bolster the case for that control's selection, not undermine it. In other words, the fact that Wyodak's emissions affect two Class I areas instead of six or seven is irrelevant if the improvement at just one Class I area is sufficient to warrant a control's selection as BART. Consequently, we have reassessed the five factors for Wyodak and now conclude, even after taking into account our revised cost estimates and visibility modeling, that LNB/OFA + SCR is NO_X BART for Wyodak Unit 1.

Comment: SCR with an emission limit of 0.05 lb/MMBtu should be required as NO_X BART for Wyodak, rather than an SNCR-based limit of 0.17 lb/MMBtu as EPA proposes. EPA properly recognized that the cost-effectiveness and incremental cost-effectiveness of SCR to reduce Wyodak's NO_X emissions are reasonable, but nonetheless proposed to reject SCR on the basis of purportedly insufficient cumulative visibility benefits. EPA's proposed determination is improper, because EPA has failed to justify why incremental visibility benefits over the large number of Class I Areas impacted by Wyodak's NO_X emissions should not be required to achieve reasonable progress toward the national visibility goal, particularly in light of the fact that none of the Wyoming Class I areas affected by Wyodak's NO_X emissions are projected to achieve the Uniform Rate of Progress (URP) in 2018. Moreover, while EPA evaluated the impacts of Wyodak's NO_X emissions only at Wind Cave and Badlands National Parks, our supplemental modeling shows that SCR to control Wyodak's NO_X emissions will nearly eliminate the plant's perceptible visibility impacts at 18 Class I areas. EPA's visibility justification for rejecting SCR as BART was improper because Congress has directed EPA to require BART ''for the purpose of eliminating or reducing any [visibility] impairment'' caused by the source. 42 U.S.C. 7491(b)(2)(A). Installing SCR at Wyodak would resolve this impairment.

Response: See our response to the previous comment. While we do not agree with the commenter's assertion that Wyodak's emissions have perceptible visibility impacts at 18 Class I areas or that the URP is relevant for purposes of a BART determination, we do agree that our decision to eliminate SCR based on cumulative visibility improvement was improper.

Comment: EPA properly recognized that the cost-effectiveness and incremental cost-effectiveness of SCR to reduce Wyodak's NO_X emissions are reasonable, but nonetheless proposed to reject SCR on the basis of purportedly insufficient cumulative visibility benefits. EPA's estimate of costs is significantly inflated, and the true costs are lower than EPA found because the EPA used unjustified ''retrofit factors,'' interest rate, and auxiliary power costs. On these bases, the EPA should require SCR at Wyodak as BART.

Response: See our previous two responses.

6. Trona Mines

a. FMC Westvaco and General Chemical Green River

Comment: EPA should reconsider whether SCR plus combustion controls is BART for the FMC Westvaco Units NS–1A and NS–1B. At $3,493/ton, as presented by EPA, SCR may be a cost-effective option. Furthermore, EPA should evaluate whether the cost of SCR for FMC Westvaco Units NS–1A and NS–1B were calculated correctly.

Response: Although EPA has not re-evaluated the cost of SCR at the FMC Westvaco Units, we note the relatively low visibility improvement from SCR for each unit (0.24 deciviews). Because of the low visibility improvement from SCR, we do not find that a reconsideration of costs would necessarily have led EPA or the State to a different conclusion regarding the selection of SCR.

Comment: At a minimum, EPA must require SNCR and LNB + SOFA as BART for NO_X at the Westvaco plant. EPA determined that this enhanced technology could achieve a 0.21 lb/MMBtu NO_X emissions rate. This would result in a 70% reduction in NO_X emissions from current levels, rather than just a 50% reduction that would result from the 0.35 lb/MMBtu emission rate currently proposed. Requiring SNCR would lead to NO_X emissions reductions of 1,903 tpy. SNCR in addition to LNB+SOFA is highly cost effective at $673/ton. This is well within the range of BART costs that EPA has found reasonable for SNCR at other facilities, including facilities in Wyoming. For example, EPA proposes to reject Wyoming's NO_X BART proposal for Wyodak Unit 1, and instead to require LNB+OFA+SNCR as BART, finding the technology cost effective at $958/ton, a higher cost than the same technology at the Westvaco boilers.

Response: We disagree with this comment. First, SNCR at each of the units would achieve a 0.19 deciview improvement, with an incremental visibility improvement of 0.06 deciviews. The cost effectiveness for LNBs compared to LNBs with SNCR is more than double ($304/ton compared to $673/ton). Based on this information, we find it reasonable for the State not to determine SNCR is BART for these units based on a consideration of the five factors, including the visibility improvement.

Comment: Requiring SNCR at the FMC Westvaco plant would improve visibility at affected Class I areas. EPA states that Wyoming's visibility modeling for this facility demonstrated a 0.19 deciview improvement at the Bridger Wilderness Area from the installation of SNCR on each boiler. In fact, Wyoming's modeling demonstrated a 0.198 deciview visibility improvement for the maximum 98th percentile impact at Bridger Wilderness Area. The combined visibility improvement due to SNCR at both Westvaco boilers is nearly 0.4 deciviews at the Bridger Wilderness Area alone. EPA found it appropriate to consider the combined visibility impact of pollution controls on multiple units at a single facility in determining that BART is SNCR for Units 1 and 2 of the Colstrip facility in Montana and should likewise consider the combined visibility impact of SNCR on the two Westvaco boilers.

Response: We have addressed a similar comment above in section V.B of this rulemaking. We recognize that there may be some efficiencies in installing SNCR on two units (e.g., a common reagent supply system), but expect that this would provide only a modest reduction in annual costs. We do not find that the combined benefit for the two FMC Westvaco boilers, 0.4 deciviews, is a basis for requiring SNCR.

Comment: Wyoming's modeling also showed that SNCR could virtually eliminate the visibility impairment at the Bridger Wilderness Area caused by

the FMC Westvaco Units NS–1A and NS–1B, reducing the number of days of noticeable visibility impairment caused by each boiler from eleven to just one. Visibility in the Bridger Wilderness Area is presently diminished by 4.6 deciviews from natural conditions and, under EPA's proposed action, it will not achieve natural conditions until 2165. A 0.4 deciview visibility improvement at the Bridger Wilderness Area is particularly significant in light of new sources of haze-causing pollution from the oil and gas industry that will affect this area. NO_X emissions from Wyoming oil and gas development are expected to more than double in the current regional haze planning period, from 14,725 tpy in 2002 to 34,142 tpy in 2018, yet EPA does not propose any NO_X emissions reductions from this sector. Accordingly, it is imperative for Wyoming and EPA to reduce NO_X emissions from every other source to the greatest extent possible, including by requiring SNCR to be installed at the FMC Westvaco Units NS–1A and NS–1B.

Response: We disagree with this comment. BART is a source-by-source analysis taking into consideration the five factors. The BART Guidelines and RHR do not require states or EPA to take into consideration the state being able to achieve the URP for a Class I area in its determination of BART for individual BART units.[236]

Comment: Wyoming's modeling, upon which EPA relied, excluded all Class I areas beyond 300 km from the Westvaco facility. However, there is no demonstration that Class I areas further afield are not impacted by the Westvaco facility. As a comparison, EPA recently approved the South Dakota regional haze SIP which includes BART limits for the Big Stone facility, for which the nearest Class I area is over 400 km away.

Response: We explained in response to another comment the reasons why we did not evaluate visibility impairment at Class I areas at distances greater than 300 km. Regarding the South Dakota regional haze SIP, there are no Class I areas within 300 km of the Big Stone Facility. Therefore, it was reasonable for the state to evaluate visibility impacts at the nearest Class I area even though the distance was greater than 300 km. We note that the BART rule provides some flexibility to the states in the approach used to evaluate visibility impairment. The fact that South Dakota chose to evaluate visibility impacts at a distance greater than 300 km does not impose a similar requirement on other states.

Comment: Considering just the two Class I areas modeled, the installation and operation of SNCR would result in a cumulative maximum 98th percentile visibility improvement of 0.304 deciviews from each unit, or 0.608 from both units combined. This cumulative visibility improvement at two Class I areas is significant and amply justifies SNCR, at a minimum, as BART.

Response: In the proposed rule, we did focus on the visibility benefits at the most impacted Class I area. We considered the visibility benefits at the other Class I areas, but did not consider the benefits sufficient to warrant a change in our determination as to the appropriate level of control.

Comment: Although the cost effectiveness and visibility improvements due to SNCR and LNB+SOFA standing alone justify a determination that this combination of technologies is BART, EPA apparently agreed with Wyoming that the incremental costs of requiring SNCR were not justified by the resulting visibility improvement. EPA's consideration of incremental cost effectiveness and visibility benefit is arbitrary given the lack of any objective criteria and in any event, must not be viewed in a vacuum.

Response: We disagree with this comment. As stated above, we find it reasonable, based on a consideration of the five factors, including the low visibility improvement, for the State to find that SNCR and LNBs was not reasonable for BART.

Comment: Although the State and EPA determined that addition of combustion controls is BART for the three BART boilers at these two facilities, it is unclear how they arrived at these conclusions. The visibility improvement from EPA's proposed controls for the trona plants are less than the visibility improvement that EPA rejected as ''low'' in the EGU BART analyses, so it appears that EPA is using different criteria for these facilities or relating visibility improvement to another factor, which we assume to be some combination of cost and visibility improvement. (Otherwise, one would always choose the control strategy with the greatest visibility improvement.)

However, it appears that EPA did not evaluate the cost analyses presented by the companies and the State, so we are concerned that the cost analyses for these two trona plants may suffer for the same problems that we pointed out to EPA before regarding the EGUs. For example, although Boiler D at Green River is the same size as the FMC boilers: (1) FMC evaluated addition of new combustion controls in combination with SNCR or SCR, Green River did not. (2) The capital cost of adding SNCR at Green River Boiler D is more than four times FMC. (3) EPA presented cost-effectiveness of SNCR as $3,176/ton at Green River Boiler D. The actual cost-effectiveness, based on EPA's annual cost and emission reduction, is $1,637/ton. (4) FMC assumed that SCR could reduce NO_X by 31% to 0.10 lb/MMBtu, Green River assumed 80% NO_X reduction to 0.14 lb/MMBtu. (EPA typically assumes that SCR can achieve 0.05 lb//MMBtu on an annual basis.) (5) SCR capital cost is $43 million at FMC, $19 million for Green River Boiler D. (6) EPA presented cost-effectiveness of SCR as $3,510/ton at Green River Boiler D. The actual cost-effectiveness, based on EPA's annual cost and emission reduction, is $2,339/ton.

It is apparent that EPA must have been considering the costs of controls, but, in view of the substantial discrepancies noted above, those costs are questionable. In view of these discrepancies, we question how EPA rejected the more-effective control technologies (SNCR and SCR) that produce greater visibility improvements for the proposed controls.

Response: We disagree with this comment. Even if the cost of SNCR and SCR were reduced, we find that the visibility improvement (Boiler C—0.08 deciviews for SNCR and 0.14 deciviews for SCR; Boiler D—0.12 deciviews for SNCR and 0.17 deciviews for SCR) would not warrant the selection of post-combustion controls for BART.

b. FMC Granger Trona Mine

Comment: EPA proposes to approve Wyoming's determination that the FMC Granger trona mine, while BART-eligible, is not subject-to-BART. The basis for EPA's proposed approval is that the visibility impact of this facility at the Bridger Wilderness Class I area would be 0.39 deciviews, and EPA proposes to ''agree with Wyoming that 0.5 deciviews is a reasonable threshold for determining whether its BART-eligible sources are subject-to-BART.'' EPA should reconsider its determination that the Granger facility is not subject-to-BART. In making the

[236] In determining the measures necessary to make reasonable progress and in selecting RPGs for mandatory Class I areas within Wyoming, the State took into account the following four factors into consideration: Costs of compliance; time necessary for compliance; energy and non-air quality environmental impacts of compliance; and remaining useful life of any potentially affected sources. CAA section 169A(g)(1) and 40 CFR 51.308(d)(1)(i)(A). 40 CFR 51.308(d)(1)(ii) allows for a slower rate of improvement in visibility than the URP, as long as it is demonstrated that based on these four factors, it is not reasonable to achieve the URP and that the selected RPG is reasonable. CAA section 169A(g)(1) and 40 CFR 51.308(d)(1)(i)(A).

subject-to-BART determination at least three considerations must be incorporated pursuant to EPA's BART guidelines: Whether the source causes or contributes to visibility impairment in a Class I area, the number of emissions sources affecting a Class I area, and the magnitude of the individual source impacts. Wyoming determined that the Granger plant was not subject-to-BART because its visibility impairment level at the Bridger Wilderness was predicted to be 0.39 deciviews—below the 0.5 deciview threshold. Wyoming's determination was flawed however because it apparently did not consider the other factors essential to a subject-to-BART determination, i.e., the number of emissions sources affecting the Class I area and the magnitude of the individual sources' impacts.

There are a large number of pollution sources affecting visibility in the Bridger Wilderness Area, including significant impacts from thousands of operating oil and gas wells that are not BART-eligible. This fact highlights the need for maximum feasible emissions from each source contributing to impairment at the Bridger Wilderness Area, particularly sources like the FMC Granger trona mine, which is eligible for BART controls.

Response: We disagree with this comment. Wyoming used a contribution threshold of 0.5 deciviews for determining which sources are subject-to-BART. By using a contribution threshold of 0.5 deciviews, Wyoming exempted seven of the fourteen BART-eligible sources in the State from further review under the BART requirements. Based on the modeling results, the State determined that P4 Production, FMC Granger, and OCI Wyoming had an impact of .07 deciviews, 0.39 deciview, and 0.07 deciview, respectively, at Bridger Wilderness. Black Hills Neil Simpson 1, Sinclair Casper Refinery, and Sinclair—Sinclair Refinery have an impact of 0.27 deciview, 0.06 deciview, and 0.12 deciview, respectively, at Wind Cave. Dyno-Nobel had an impact of 0.22 deciview at Rocky Mountain National Park. These sources' modeled visibility impacts fell below the State's threshold of 0.5 deciview and were determined not to be subject-to-BART. Given the relatively limited impact on visibility from these seven sources, we continue to agree with Wyoming that 0.5 deciviews is a reasonable threshold for determining whether its BART-eligible sources are subject-to-BART. In addition, the commenter points to the impacts from oil and gas at Class I areas. The BART Guidelines do not require states to consider the impacts from sources other than BART-eligible sources when defining the threshold for determining what sources are subject-to-BART. While the Guidelines first say that, in setting a contribution threshold, states should consider the number of ''emissions sources'' affecting the Class I area at issue, the Guidelines then go on to clarify that states may use a lower contribution threshold based on the location of a large number of ''BART-eligible'' sources within the State that are proximate to the Class I area at issue.

E. Reasonable Progress

1. RPGs

Comment: 40 CFR 51.308(d)(1) of the RHR requires states to establish goals (in deciviews) that provide for reasonable progress towards achieving natural visibility conditions for each Class I area of the state. These are goals, not standards. Goals are typically understood as levels aimed for but not necessarily met. Early on in the process, EPA considered setting ''presumptive targets'' but eliminated them before the final rule. EPA also says that the RPGs established by the state are not directly enforceable. In spite of this, EPA has proposed to FIP the Wyoming RPGs.

EPA does not specifically define the word ''goal,'' but the RHR does describe what must be considered when the goals are set. Wyoming has set six reasonable progress goals and every one of them met that criteria. EPA does not even argue with this basic fact. When setting the goals, the state must do a reasonable progress analysis. The State of Wyoming complied with this requirement as well.

Response: EPA disagrees with this comment. Wyoming's selected RPGs do not meet the requirements of the RHR. In establishing RPGs, Wyoming must make two demonstrations. First, the State must demonstrate how the four statutory reasonable factors, as applied to potentially affected sources, were taken into consideration in selecting the goals. 40 CFR 51.308(d)(1)(i). In addition, if Wyoming establishes an RPG that provides for a slower rate of improvement than the URP, the State must demonstrate, based on the four statutory reasonable progress factors, that achieving the URP is not reasonable and that the selected RPG is reasonable. 40 CFR 51.308(d)(1)(ii). In determining whether the selected RPGs in fact provide for reasonable progress towards natural visibility conditions, EPA must evaluate these two demonstrations. 40 CFR 51.308(d)(iii).

EPA's interpretation of the statute and the RHR is that BART sources should also be identified as anthropogenic sources of visibility impairment for purposes of developing the long-term strategy. 40 CFR 51.308(d)(3)(iv). Correspondingly, BART sources should be considered ''potentially affected sources'' and evaluated for controls using the reasonable progress factors. See 40 CFR 51.308(d)(1)(i)(A). However, due to the similarity of the reasonable progress and BART factors, it is reasonable for states to rely on their BART determinations to fulfill the requirements of 51.308(d)(1)(i)(A) and 51.308(d)(1)(ii) (if applicable), in other words to demonstrate that the reasonable progress factors were reasonably considered for those sources for the first planning period. This interpretation is consistent with guidance EPA has issued for states regarding meeting reasonable progress requirements.[237] However, the Wyoming submittal states that the reasonable progress ''four factor analysis . . . is a method for evaluating potential control strategies for facilities that are not eligible for Best Available Retrofit Technology (BART) or better-than-BART programs.'' Wyo. 309(g) Submittal at 115. Thus, the Wyoming submittal on its face fails to meet the requirements of the statute and the RHR. To the extent that Wyoming can be said to have relied on its BART determinations to establish that the State reasonably considered the reasonable progress factors for those sources, that reliance fails for those sources for which we are disapproving the BART determinations. In addition, as the State's RPGs fall short of the URP, the State failed to adequately demonstrate, based on the four statutory reasonable progress factors, that achieving the URP was not reasonable and that, the selected RPG is reasonable. Given our evaluation of these demonstrations, we have determined that the selected RPGs do not provide for reasonable progress towards natural visibility conditions.

In addition, although we are not disapproving the State's ultimate determination to not impose controls on non-BART sources, we note that (as explained in more detail below) the State unreasonably relied on impermissible factors to reach those determinations. Thus, the State failed to demonstrate that it was reasonable, based on consideration of the statutory reasonable progress factors, to not meet the URP. In other words, although we are approving the State's decision as part of its long-term strategy to not

[237] US EPA, Office of Air Quality Planning and Standards, Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program (June 1, 2007).

impose controls on the non-BART sources the State listed, we are still disapproving the State's RPGs.

Because the State failed to meet the requirements of 51.308(d)(1)(i) and (ii) when the State selected its RPGs as part of the State's Regional Haze SIP, EPA is obligated to promulgate a regional haze FIP to meet those requirements. That the RPGs are named ''goals,'' not standards, and are not directly enforceable is irrelevant to this obligation.

Comment: Wyoming explained to EPA that Wyoming could not compel these reasonable progress sources to put on controls without a State rule, and that rule would have to include a visibility impact analysis. Wyoming was willing to commit to developing such a rule in the next planning period, but it did not have the time or resources left to complete that task and get the SIP submitted to the EPA for the first planning period. Wyoming's administrative rulemaking process requires about nine months to a year to develop and finalize rules. Wyoming believes that it has taken an important first step in the process, and it appears to be more than many other states were making.

Wyoming also believes that it made more sense to develop a comprehensive State reasonable progress rule that could be used for the next SIPs to address regional haze. That rule would take extra time that EPA was not willing to give the State. EPA told the State repeatedly that ''The Regional Haze Rule does not allow for commitments to potentially implement strategies at some later date that are identified under reasonable progress.'' The State is still dumbfounded by this kind of response for a rule that goes out to 2064, especially where EPA itself has recognized the one-step-at-a-time doctrine.

Response: EPA disagrees with this comment. While we understand the State's position on its limits on its authority, time, and resources, EPA first promulgated the reasonable progress requirements under the RHR on July 1, 1999, and we issued our guidance on setting RPGs in September 2007. Wyoming submitted its Regional Haze SIP on January 12, 2011. Wyoming does not explain why the State did not have an adequate amount of time to develop a regional haze SIP that meets the requirements for reasonable progress.

In any case, the State's limits on its authority, time, and resources are not permissible factors for EPA to take into account when assessing the State's Regional Haze SIP. Instead, we must assess whether it meets the requirements of the RHR, and in particular the requirements for reasonable progress towards natural visibility conditions. We note that we are approving certain portions of Wyoming's Regional Haze SIP with respect to reasonable progress requirements.

To the extent that the notion of ''one-step-at-a-time'' is relevant in this context, as explained elsewhere, Wyoming's Regional Haze SIP fails to adequately make the very first step towards natural visibility conditions: Achieving reasonable progress during the first planning period. A commitment to completing that first step in a future planning period cannot substitute for actually completing the first step within schedule. Wyoming cites no authority to the contrary; conditional approval under CAA section 110(k)(4) does not apply as Wyoming has made no commitment to adopt specific enforceable measures within one year to remedy the deficiencies. Again, whatever the constraints imposed on the State by time, resources, and authority, those constraints cannot be taken into account in assessing whether the State has met the requirements for the first planning period. In this case, Wyoming has not met those requirements with respect to reasonable progress.

Comment: States are required, when setting RPGs, to determine the rate of progress needed to attain natural visibility conditions by 2064. The State did that and included it in the SIP. EPA's RHR also requires that if the rate is slower than the rate established by drawing a straight line between baseline visibility and natural conditions, that it must be explained why. The data clearly show that the primary reason that the State will not reach natural conditions by 2064 is that smoke from wildfires controls the slope of the line.

Response: EPA disagrees with this comment, which understates the requirements of the RHR for setting RPGs. We agree that Wyoming did appropriately determine the URP needed to attain natural visibility conditions by 2064 and we are approving that determination. However, when a state selects an RPG that provides for a slower rate of improvement in visibility than the URP, it is not the case that all the state must do is ''explain why.'' Instead, the state must demonstrate, based on the statutory reasonable progress factors as applied to potentially affected sources, that the URP is not reasonable and that the selected RPG is reasonable. 40 CFR 51.308(d)(1)(ii). Under the RHR, 40 CFR 51.308(d)(1)(iii), and under section 110 of the Act (as discussed elsewhere) we are required to evaluate the state's demonstration.

As discussed elsewhere, the State did not reasonably consider the statutory reasonable progress factors for potentially affected sources. As a result, the State also failed to adequately demonstrate, based on the four statutory reasonable progress factors as applied to potentially affected sources, that achieving the URP was not reasonable and that the selected RPG is reasonable. We therefore are disapproving Wyoming's selected RPGs.

With respect to the comment's reference to wildfires, we provide a detailed response to comments relating to wildfires and natural conditions in the modeling section of this response to comments.

Comment: EPA cannot remove the reasonable progress goals for the State. Wyoming followed the process outlined in the RHR. EPA is not following the RHR by proposing a control requirement for a specific source to replace six RPGs for an entire state. The RHR does not allow for the substitution of RPGs with control strategies. EPA's proposed disapproval is contrary to law.

Response: EPA disagrees with this comment. As discussed above, we are disapproving the State's selected RPGs because they do not meet the requirements of the RHR. In addition, the commenter is mistaken in stating that EPA is ''replacing'' RPGs with control requirements for a specific source. This statement conflates two separate but related requirements of the RHR. First, states must set RPGs in accordance with 40 CFR 51.308(d)(1). Second, states must submit a LTS, including enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs. 40 CFR 51.308(d)(3).

We are disapproving Wyoming's RPGs because they do not meet the requirements of 51.308(d)(1), as detailed above. Separately, we proposed to disapprove Wyoming's determination to not impose enforceable emissions limitations at Dave Johnston Units 1 and 2. Thus, we did not propose to ''replace'' the RPGs with control requirements; instead, we proposed to provide both. However, as explained elsewhere, on the basis of the cost and visibility information that EPA developed, we are now approving Wyoming's determination (although not the State's rationale) to not impose enforceable emissions limitations at Dave Johnston Units 1 and 2. We nonetheless continue to disagree with the comment.

Comment: There is no way Wyoming can control the impacts from wildfire

smoke on visibility. Therefore, it will be a very long time, 126 to 161 years, before controlling manmade sources can ever overcome the smoke impacts, and that is assuming that smoke impacts never increase. The length of time for other western states is even longer, and EPA has approved those SIPs. Wyoming included this explanation along with identifying other sources that impact visibility, but EPA disagreed with the Wyoming assessment, saying not all reasonable controls were implemented during the first planning period. Specifically, EPA disagreed with Wyoming's determination to not impose controls on Dave Johnston Units 1 and 2. Because Wyoming did not impose controls on Dave Johnston Units 1 and 2, EPA has proposed to disapprove Wyoming's RPGs.

Wyoming believes that EPA's reasoning for disapproving the State's RPGs is flawed and arbitrary. First, the State set goals based on regional modeling projections done for the entire western U.S. To the best of our knowledge, that is the same process that every other state in the western U.S. used and many of them now have approved RPGs in spite of the fact that it will take hundreds of years in all of the western Class I areas to reach ''natural conditions.'' In North Dakota, for example, it will take between 156 and 232 years to reach natural conditions at affected Class I areas. It would be impossible to set deciview goals without regional modeling, unless the State wanted to wildly guess at it.

Response: EPA disagrees with this comment. We are not disapproving Wyoming's RPGs solely on the basis that they fall short of achieving the URP. Instead, as explained above, we are disapproving them on the basis that the State has failed to demonstrate that the four statutory reasonable progress factors were appropriately considered. The State has also failed to demonstrate, again based on the four statutory reasonable progress factors, that achieving the URP is unreasonable and that the State's selected RPGs are reasonable. The comment's reference to wildfires is beside the point, as the existence of wildfires does not relieve the State of all responsibility to reasonably consider the statutory reasonable progress factors for potentially affected sources. We elsewhere provide a detailed response to comments relating to wildfires and natural conditions in the modeling section of this response to comments.

Comment: While EPA ''anticipates'' that controls at Dave Johnston Units 1 and 2 would result in measurable visibility improvement in regional modeling demonstrations, and that ''anticipation,'' not modeling, therefore justifies dispensing with Wyoming's RPGs, Wyoming does not. When the WRAP modeled all of the emission reductions from the entire western U.S. (including Wyoming emission reductions for all of the pollutants) for this first planning period, Wyoming saw an improvement of 0.6 deciviews at the Yellowstone site, and a 0.5 deciview improvement at the North Absaroka and Bridger sites on the worst days. The numbers are even smaller or zero for the best days. These improvements from much larger emission reductions for multiple pollutants are almost imperceptible. Therefore, it is highly unlikely that emission reductions for NO_X from two units would make enough difference to show up as an ''improvement'' in regional scale modeling, and thereby justify setting different RPGs.

Response: We disagree with the approach suggested in this comment. Below, we discuss the use of CALPUFF (instead of the regional scale modeling the comment suggests) to determine visibility improvement from controls on Dave Johnston Units 1 and 2. We also respond to comments regarding regional scale modeling in section V.B.

Comment: The EPA proposes to impose reasonable progress controls on Dave Johnston Units 1 and 2, more stringent NO_X BART controls on Dave Johnston Unit 3, Jim Bridger Units 1 and 2, Wyodak Unit 1, and Laramie Units 1, 2, and 3. These EPA proposed controls are more stringent than what was assumed by the WRAP in modeling Wyoming's RPGs. Wyoming established its RPGs based on the regional modeling projections completed in the WRAP process. In proposing these reasonable progress controls, EPA is also proposing RPGs that are consistent with the controls, thereby rejecting Wyoming's proposed RPGs.

In rejecting Wyoming's RPGs and imposing its own, EPA did not re-run the WRAP model; instead, the agency essentially guessed ''that the additional controls would result in an increase in visibility improvement during the 20% worst days,'' thereby warranting the more stringent controls at these units.

EPA's proposal to reject Wyoming's RPGs is not warranted. First, the mere assumption that additional controls will result in greater visibility improvement cannot reasonably be supported without modeling data. EPA admits that it ran no modeling that would support its best guess that visibility would improve with the installation of more stringent controls. Second, EPA's proposal to place controls on the Dave Johnston Units 1 and 2 is flawed. The Dave Johnston Units 1 and 2 are not BART-eligible units. When Wyoming considered the WRAP model data, it concluded that putting controls on the Dave Johnston Units 1 and 2 would not result in an improvement in visibility. Without any improvement in visibility coming from placing controls on these non-BART units, Wyoming reasonably concluded that there was no reason to change its RPGs.

Response: We disagree with this comment. WRAP performed regional photochemical modeling using both the CMAQ and CAMx air quality models to evaluate progress toward attaining visibility goals using all projected emission changes from all source categories throughout the United States. WRAP did not perform regional photochemical modeling to evaluate the visibility impacts of individual BART sources. While WRAP did make assumptions regarding the level of emissions control that would be adopted by BART sources, no state or EPA region has re-run the WRAP's regional photochemical models to assess individual BART source contributions to visibility impairment. Instead, the BART sources, the states, and EPA have used the CALPUFF model to evaluate contributions to visibility impairment from individual BART sources. As discussed earlier in this rulemaking and the docket for this final action, EPA modeled visibility impairment from individual sources in making its determination of BART and reasonable progress controls. Thus, the comment is inaccurate in stating that EPA ran no modeling to assess whether controls on Dave Johnston Units 1 and 2 would improve visibility. With respect to the assertion that Wyoming considered the WRAP model data and decided that the data showed controls on Dave Johnston Units 1 and 2 would not improve visibility, the Wyoming SIP submittal does not reflect that. In evaluating the reasonable progress factors for Dave Johnston Units 1 and 2 (which was selected by the State as a potentially affected source) the SIP submittal states: ''LNB or LNB w/OFA seem to be the most reasonable choice[s] for the Dave Johnston Electric Generating Station boilers BW41 and BW42 based on the four factor analysis. The implementation of new control technologies on the two boilers are discussed in further detail in Chapter 8 (Section 8.3.4), Long-Term Strategy.'' Nonetheless, in section 8.3.4, the SIP stated: ''The Air Quality Administrator cannot, per Wyoming Statute 35–11–202, establish emission control

requirements except through State rule or regulation. Furthermore, the Wyoming statute requires the Administrator to consider the character and degree of injury of the emissions involved. In this case, visibility modeling would be required to assess the degree of injury caused by the emissions. Modeling is not available at this time to determine impacts from emission reduction.'' As we explain elsewhere, these are not permissible reasons to ignore the four statutory reasonable progress factors. Nonetheless, our revised visibility modeling leads us to the conclusion that it was not unreasonable for the State to not impose controls on Dave Johnston Units 1 and 2, even though the State's basis for doing so was inadequate.

Comment: Wyoming's adoption of an alternative SO_2 program, even if it were valid, does not relieve Wyoming of its obligation to develop and implement a LTS that includes measures necessary to reduce visibility-impairing emissions of SO_2, PM, and NO_X to achieve RPGs for non-Colorado Plateau Class I areas. Accordingly, EPA must determine whether Wyoming's RPGs for its non-Colorado Plateau Class I areas are adequate.

Response: We agree that Wyoming must develop a LTS to address reasonable progress for non-Colorado Plateau Class I areas. As our proposed notice indicates, we proposed to disapprove the State's RPGs. We also proposed to implement additional controls under reasonable progress. We are completing the action to disapprove the State's RPG's today, and as explained elsewhere in this section, we are not finalizing requirements for additional controls under reasonable progress.

Comment: With the exception of the controls required on Naughton Unit 3, PacifiCorp has installed all of the BART controls required by the Wyoming BART permits and the regional haze SIP. These controls were installed from 2005 through 2012. The actual monitored visibility impairment demonstrates that Wyoming has made significant progress in reducing nitrate concentrations and further demonstrates that the RPGs are on track through the 2008–2017 planning period. EPA's FIP is not ''necessary'' to meet RPGs for nitrates in these Class I areas. As a result, EPA should withdraw its FIP.

Response: EPA disagrees with this comment. As explained above, the State was required to assess the four statutory reasonable progress factors for potentially affected sources and reasonably determine potential controls, and we are required to evaluate the State's determination. The State did not demonstrate reasonable progress for those determinations that we are disapproving. As a result, we must disapprove the State's RPGs and promulgate a FIP for them. We also note that the comment does not explain the relationship between the State's RPGs and changes in monitored visibility impairment as the result of installed controls, as the State's RPGs were not remodeled to reflect the controls selected by the State.

Comment: Any discussion of the appropriate NO_X control levels required under the RHR should include an assessment of the existing visibility levels to understand what pollutants are driving visibility impairment in Wyoming. Measured visibility impairment at Wyoming's IMPROVE monitoring stations shows that the contribution from nitrates, which are visibility impairing pollutants that result from NO_X emissions, play a lesser role in visibility impairment in Wyoming than particulate organic mass or sulfates. The latest available IMPROVE data (2000–2009) from the WRAP Technical Support System reveals the following about the two Class I areas that were most closely examined for impacts from Wyoming BART sources: (1) Currently, the air in those Class I areas is very clear, with overall visibility among the best in the entire country; (2) When visibility is not good, i.e., when you can't see across the vista, it is likely because of smoke from wildfires; (3) The contribution to visibility impairment from nitrate particles, which are as a result of emissions of NO_X, is small.

The State believes it has made a good case that fire contributes more to visibility impairment than nitrates at Class I areas most affected by Wyoming sources. The State has made great progress in reducing the manmade contribution to visibility impairment from power plants, even when the manmade contribution has much less impact to visibility impairment than other components. EPA's proposed disapproval and FIP are not supported by a record that demonstrates small visibility improvements predicted by a CALPUFF model replete with uncertainty when the actual, measured levels of nitrates at Class I areas affected by those sources is so small. Wyoming's SIP is adequately supported because Wyoming considered these and other factors in arriving at the selected levels of NO_X controls for Wyoming sources and the schedule for the installation of those controls.

Response: We disagree with this comment. Regardless of the considerations presented in the comment, the State was required, at a minimum, to evaluate the four statutory reasonable progress factors for potentially affected sources and to reasonably determine controls, and we are required to evaluate the State's determination. In evaluating the factors for Dave Johnston Units 1 and 2, which was selected in the State's SIP as a potentially affected source, the SIP submittal states: ''LNB or LNB w/OFA seem to be the most reasonable choice[s] for the Dave Johnston Electric Generating Station boilers BW41 and BW42 based on the four factor analysis. The implementation of new control technologies on the two boilers are discussed in further detail in Chapter 8 (Section 8.3.4), Long-Term Strategy.'' Nonetheless, in section 8.3.4, the SIP stated: ''The Air Quality Administrator cannot, per Wyoming Statute 35–11–202, establish emission control requirements except through State rule or regulation. Furthermore, the Wyoming statute requires the Administrator to consider the character and degree of injury of the emissions involved. In this case, visibility modeling would be required to assess the degree of injury caused by the emissions. Modeling is not available at this time to determine impacts from emission reduction.''

As explained above, it is unreasonable and impermissible for the State to disregard its four factor analysis on the basis that the State lacked the necessary modeling and that reasonable progress requirements could be postponed until the next planning period. The considerations presented by the comment do not change this.

In addition, section 110(a)(2)(E)(i) of the Act requires that SIPs provide necessary assurances that, among other things, the State has adequate authority and resources to carry out the plan. The SIP language we quote above instead denies that the State has the proper authority and resources to meet the requirements of the RHR, in particular the requirement that the long-term strategy ''include enforceable emissions limitations . . . and other measures as necessary to achieve the reasonable progress goals.'' 40 CFR 51.308(d)(3). As a result, Wyoming's Regional Haze submittal fails to meet the requirements of section 110(a)(2)(E)(i), which is applicable to ''[each] implementation plan submitted by a State under [the CAA],'' including the Regional Haze submittal.

Comment: An area of the RHR that is unusual is in the timing of the implementation of the rule. It is the most forward looking of all the rules

with requirements to be carried out by the grandchildren of the people who are currently working on the rule, with an end date of 2064. While EPA has established long-term targets through the acid rain program and ozone attainment requirements in a 10–20 year time frame, they have never set goals that were 60 years down the road. This is significant because EPA recognized that the problem was complicated and that it would take at least this much time to solve it.

EPA's strategy included breaking up the long-range goal of achieving natural conditions by 2064 into many smaller pieces. EPA included a requirement for states to submit comprehensive SIP revisions in 2018 and every ten years thereafter. In addition to the comprehensive SIP revisions, states will also be required under 40 CFR 51.308(g) to submit progress reports in the form of a SIP revision every five years, with the first revision due in 2013. Between both the comprehensive SIP revisions and the progress report SIP revisions, states will be working on 16 more SIP revisions, at a minimum, to address regional haze. The State views these upcoming SIP revisions on regional haze as opportunities to build on the first SIP, and that the current rush by the EPA to get so many reductions procured in the first time period as unnecessary. It is unnecessary because the State has submitted a plan to reduce NO_X from BART sources by 45,153 tons, and an additional 19,677 tons through the LTS in the first planning period. There are few states in the country that can demonstrate this magnitude of emission reductions Wyoming has secured.

EPA recognized in the RHR preamble that many factors will change over time and that it may be possible to procure emission reductions in the future that cannot be accomplished during an earlier period. EPA expected reductions to occur over time and did not expect states to front end load this program with emission reductions.

The RHR provides states with the time necessary to intelligently address the very complicated problem of regional haze. Wyoming asks EPA to recognize their own intentions to roll out this program step by step and approve the State's decision to require SCR on PacifiCorp Units 1 and 2 of the Jim Bridger Power Plant in 2021 and 2022 as part of the LTS. The State also asks that EPA give the State the time it needs to create a rule to address reasonable progress, which would include reductions at the PacifiCorp Dave Johnston Plant, Units 1 and 2. Wyoming plans to create a general reasonable progress rule in the next planning period to address future reductions.

Response: While we recognize the emission reductions achieved by the State for the first planning period and that the regional haze program is a long-term program, the State must still meet the requirements of 40 CFR 51.308 for the first planning period. As we stated in our proposal notice, the State's plan does not fully meet the requirements for BART and reasonable progress. Because we have found that the State's SIP submission did not adequately satisfy the RHR requirements in full, we have not only the authority, but a duty to promulgate a FIP that meets those requirements. The EPA disagrees that the additional emission reductions required by our proposed FIP are unnecessary, as we have demonstrated that the State's SIP does not meet the requirements of 40 CFR 51.308. Our FIP action is only intended to ensure that CAA requirements are satisfied in accordance with our authority under the CAA.

Comment: We received numerous comments that monitoring data shows that the worst visibility days are due to wildfires and that EPA should be focusing on these emissions and not on nitrate emissions from stationary sources, which have little impact on poor visibility days. One commenter pointed out data from Class I areas in Wyoming that show organic carbon and elemental carbon, which are indicators of wildfire, are major contributors on poor visibility days compared to nitrates. Another commenter stated that the only EPA policy to address fires is the *Interim Air Quality Policy on Wildland and Prescribed Fires* which has not been updated since 1998 and that the EPA is not taking action on this core issue.

Response: While we agree that industrial facilities are not the only causes of haze, we disagree with the thrust of this comment. We provide a detailed response to comments relating to wildfires and natural conditions in the modeling section of this response to comments. Regardless of the contribution from wildfire emissions, 40 CFR 51.308(d)(3)(iv) states, ''The State must identify all anthropogenic sources of visibility impairment considered by the State in developing its long-term strategy. The State should consider major and minor stationary sources, mobile sources, and area sources.'' As discussed elsewhere, in its submittal the State identified a number of stationary sources as potential contributors to visibility impairment (i.e. potentially affected sources). The State was required, at a minimum, to evaluate the five statutory BART factors and four statutory reasonable progress factors for potentially affected sources and to reasonably determine controls, and we are required to evaluate the State's determination. 40 CFR 51.308(e) and 40 CFR 51.308(d)(3)(iv), respectively. The requirements of 40 CFR 51.308(d)(3)(iv) and 40 CFR 51.308(e) are not dependent on the showing of a certain amount of impairment from point sources.

Comment: The CAA and the RHR require SIPs to set forth goals, expressed in deciviews, that assure ''reasonable progress toward meeting the national goal'' of ''natural visibility conditions [in Class I areas] by the year 2064.'' 42 U.S.C. 7491(a)(4), (b); 40 CFR 51.308(d)(1)(i)(A). The goals ''must provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period.'' 40 CFR 51.308(d)(1). To establish these goals, a state must also ''[a]nalyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064,'' by ''compar[ing] baseline visibility conditions to natural visibility conditions [in Class I areas] and determin[ing] the uniform rate of visibility improvement'' necessary to achieve natural conditions by 2064. 40 CFR 51.308(d)(1)(i)(B).

Wyoming's SIP meets these requirements. *See* SIP, at 114–31. The SIP calculates and compares baseline and natural visibility conditions, *Id.* at 114–15, analyzes the rate of progress needed to attain natural visibility conditions by 2064, *Id.,* and establishes a uniform rate of progress, *Id.* Wyoming also ensured improvement in visibility on the most impaired days and no degradation on the least impaired days. *See Id.* at 115 (Table 7.2.1). And, most importantly, the SIP establishes reasonable progress goals. *Id.* at 127–131. The CAA and the RHR also require states to make reasonable progress determinations for particular sources by ''[c]onsider[ing] the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, and includ[ing] a demonstration showing how these factors were taken into consideration in selecting the goal.'' 40 CFR 51.308(d)(l)(i)(A).

Wyoming also met this requirement. The SIP clearly explains how Wyoming considered these factors and identified sources impacting visibility in Class I areas. *See* SIP, at 116–17. Wyoming then

explained in its SIP how it applied the factors to each individual source. *See Id.* at 117–27. The SIP therefore meets the requirements of the Act and the RHR.

Response: As discussed elsewhere, we have evaluated Wyoming's BART and reasonable progress determinations and we are disapproving them for Dave Johnston Unit 3, Wyodak Unit 1, and Laramie River Station Units 1–3. Because the State did not reasonably consider the statutory BART factors for these sources, the State also failed to adequately demonstrate (to the extent that the State relied on its BART determinations to demonstrate the required consideration of the reasonable progress factors) that the reasonable progress factors were appropriately considered in establishing the RPGs. The State also failed to adequately demonstrate, based on the statutory BART and reasonable progress factors, that achieving the URP was not reasonable and that the selected RPG is reasonable. Given our evaluation of these two demonstrations and the comments received, we have determined that the selected RPGs do not provide for reasonable progress towards natural visibility conditions.

In making this determination, we are not limited to merely noting whether the State has submitted an analysis that purports to consider the BART and reasonable progress statutory reasonable progress factors. Instead, we evaluate whether the State reasonably assessed the statutory BART and reasonable progress factors as applied to potentially affected sources and, based on those factors, reasonably determined whether controls were required for this planning period. In this case, the State did not do so.

As discussed earlier, because the State failed to meet the requirements of § 51.308(d)(1)(i) and (ii) when the State selected its RPGs as part of the State's Regional Haze SIP, EPA is obligated to promulgate a regional haze FIP to meet those requirements.

We do agree that the State did correctly calculate and compare baseline and natural visibility conditions, analyzed the rate of progress needed to attain natural visibility conditions by 2064, and established a URP. We agree that Wyoming's SIP ensured improvement in visibility on the most impaired days and no degradation on the least impaired days, as does our FIP.

Comment: EPA acknowledges that Wyoming evaluated the requisite four factors in its reasonable progress determinations. 78 FR 34785. But, EPA asserts that Wyoming incorrectly calculated costs in those determinations. *Id.* EPA, however, does not explain how Wyoming incorrectly calculated costs. EPA asserts first that ''EPA's rationale for disapproving the State's reasonable progress determination[s] . . . can be found in Section VIII.B of [the proposal].'' *Id.* at 34763. Section VIII.B—the location of EPA's supposed ''rationale''—only reiterates EPA's general allegation of deficiencies in the control cost estimates. *Id.* at 34785. EPA therefore has not described with any meaningful degree of specificity the supposed errors that justify rejecting the State's reasonable progress determinations. EPA's failure to provide an intelligible justification for its action is unlawful and arbitrary, and precludes Wyoming from offering a more meaningful response.

Response: We disagree. First, the commenter fails to fully disclose EPA's proposed rationale for disapproving the State's reasonable progress determination for Dave Johnston Units 1 and 2. The commenter cites language related to our finding of deficiencies with the State's cost analysis (at 78 FR 34785), but fails to cite our fuller explanation for disapproving the State's determination a few pages later (at 78 FR 34787): ''We disagree with the State's reasoning for not adopting reasonable progress controls for Dave Johnston Unit 1 and Unit 2. If the State determined that it needed to adopt a rule or perform modeling to adequately assess and, if warranted, require reasonable progress controls, the State should have completed these steps before it submitted its regional haze SIP. The RHR does not allow for commitments to potentially implement strategies at some later date that are identified under reasonable progress or for the State to take credit for such commitments.''

We offered this rationale in response to the State's argument that no controls were reasonable because: (1) the State's four factor analysis was limited, in that no guidance was provided by EPA for identifying significant sources and EPA did not establish contribution to visibility impairment thresholds (a potential fifth factor for reasonable progress determinations), (2) the State cannot, per Wyoming Statute 35–11–202, establish emission control requirements except through State rule or regulation, (3) the Wyoming statute requires the State to consider the character and degree of injury of the emissions involved—information that State claimed not to have, and (4) the State believes it has taken a strong and reasonable first step in identifying potential contributors to visibility impairment, and that the next step of creating an appropriate rule or regulation will be accomplished in the next SIP revision. 78 FR 34786. Therefore, our proposed rationale for disapproving the State's reasonable progress determination for Dave Johnston extended beyond our concerns with the cost analysis.

Even so, contrary to the commenter's assertions, and though perhaps not to the level of detail desired by the commenter, we did sufficiently explain our concerns with deficiencies in Wyoming's cost analyses, including those for Dave Johnston Units 1 and 2. Most notably, as described in Section VII.C of the proposed rule, we recognized that Wyoming had understated ''the ability of SCR to reduce NO_X.'' This was most pronounced at Dave Johnston Units 1 and 2 where the State assumed that SCR would only reduce NO_X to an emission rate of about 0.09 lb/MMBtu (equivalent to an 80% reduction from 2001–2003 baseline). As we have established elsewhere in response to comments, in this instance SCR has the ability to reduce NO_X to an emission rate of 0.05 lb/MMBtu or less. Therefore, it is clear that the State underestimated the emission reductions that can be achieved with SCR, and thereby miscalculated the cost effectiveness. And while EPA did not find that SCR was warranted for Dave Johnston Units 1 and 2, it was nonetheless necessary to correctly calculate the cost effectiveness of all of the technically feasible controls in order to rationally evaluate the State's decision to not impose any controls and to (had we been compelled to impose a FIP) select from among competing control options.

Comment: The RHR clearly states that every implementation plan must include reasonable progress goals. 40 CFR 51.308(d)(l). Those goals must be expressed in deciviews and must provide for visibility improvement on the most impaired days and no degradation on the least impaired days during the planning period. *Id.* In EPA's own words, RPGs are ''[t]he vehicle for ensuring continuing progress towards achieving the natural visibility goal,'' 78 FR 34743, which is the focal point of the regional haze program, *see* 42 U.S.C. 749l(a)(l).

EPA proposes to disapprove the State's reasonable progress goals. 78 FR 34767. In the same sentence, EPA claims to be proposing a FIP to replace those goals, which EPA asserts can be found in Section VIII.C of the notice. Section VIII.C reveals, however, that EPA has in fact failed to establish replacement RPGs. *See Id.* at 34788.

EPA does not set forth RPGs in deciviews, nor does it provide for visibility improvement on the most impaired days with no degradation on the least impaired days. *See Id.* Instead, EPA merely ''anticipates'' that its FIP would lead to improved visibility. *Id.* EPA's anticipation falls far short of the plain requirements of the RHR—concrete, deciview-based reasonable progress goals that provide for improved visibility on the worst days and no degradation on the best days. EPA's failure to establish RPGs to replace the SIP goals EPA proposes to disapprove is therefore unlawful.

EPA justifies its failure to establish the requisite RPGs by explaining that it ''could not re-run the modeling due to time and resource constraints [.]'' *Id.* This excuse stands in stark contrast to EPA's response to similar claims the State raised in the context of reasonable progress. For example, the State explained to EPA that the State could not complete its evaluation of the impacts to visibility from oil and gas sources until the WRAP completes its emission inventory study. *Id.* at 34764–34765. EPA responded that ''If the State determined that additional information was need . . . the State should have developed the information.'' *Id.* at 34765. Similarly, the State explained to EPA that it needed to conduct additional modeling before it could justify controls for the Mountain Cement kiln. *Id.* at 34765–34766. Again setting forth its dual standard, EPA responded that ''If the State determined that it needed to adopt a rule or perform modeling . . . the State should have completed these steps before it submitted its regional haze SIP.'' *Id.* at 34766.

Response: EPA disagrees with this comment to the extent it argues that we should approve the State's RPGs. We note that the State did not, in setting its RPGs, re-run its modeling to reflect the State's selected controls. Instead, the State relied on WRAP modeling that reflected certain generic assumptions about the level of controls. See Wyo. 309(g) SIP, pages 53 and 127. As we have explained elsewhere, regardless of how the State quantified its RPGs, they cannot be approved, as the State failed to appropriately consider the four statutory reasonable progress factors for the sources the State selected as potentially affected sources. See 40 CFR 51.308(d)(1)(i)(A). In addition, the State cannot rely on the BART determinations that we are disapproving to show reasonable progress for those sources. Because we must disapprove the State's RPGs, and RPGs are a required component of a regional haze SIP, we must promulgate our own. We note that the RPGs are not directly enforceable. 40 CFR 51.308(d)(1)(v). The elements that directly impact sources and visibility are the emissions limitations in the long-term strategy, including those for BART and those for the reasonable progress sources.

Comment: When determining the responsibility for regional haze, Sweetwater County strongly believes that the DEQ and EPA need to investigate the contribution to Wyoming's haze problem by sources located outside of the United States, especially from countries like China that do not appreciate the necessity for strong environmental regulations. If we do not consider the effects of air pollution contributing to our nation's and our State's air quality issues, we open the door for unfair competition. To assign the entire cost of Wyoming's haze and air pollution to Wyoming industries without considering the effects of offshore sources is unfair to our industries, and it would cause unnecessary impacts to the economy of Wyoming and the United States.

Response: While sources outside Wyoming do contribute to haze in the Class I areas within Wyoming, that does not preclude the State's or our obligation to evaluate sources within the State according to the five BART factors and the four reasonable progress factors and to require additional controls where necessary. In addition, we note that the State did evaluate the sources of contribution to Class I areas in the State (see e.g., Chapter 5 of the SIP).

Comment: One commenter stated that EPA must re-evaluate its method for assessing visibility impacts from wildfires or states will never be able to achieve natural background goals. The commenter went on to say that EPA should (1) eliminate the impacts from fire from the annual contribution to the deciview analysis or (2) properly incorporate it into the natural background equation to establish a glide path states can achieve. The commenter provided graphical data from the IMPROVE network to show the contributions to light extinction from organic carbon, elemental carbon, and nitrate.

Response: EPA does recognize this issue and has taken it into consideration in this action on the Wyoming SIP and in our final FIP. We agreed that Wyoming did appropriately determine the URP needed to attain natural visibility conditions by 2064 and we are approving that determination. We are not disapproving Wyoming's RPGs solely on the basis that they fall short of achieving the URP. Instead, as explained above, we are disapproving them on the basis that the State has failed to demonstrate that the four statutory reasonable progress factors were appropriately considered. As stated previously, regardless of the contribution from wildfire emissions, 40 CFR 51.308(d)(3)(iv) states, ''The State must identify all anthropogenic sources of visibility impairment considered by the State in developing its long-term strategy. The State should consider major and minor stationary sources, mobile sources, and area sources.'' As discussed elsewhere, in its submittal the State identified a number of stationary sources as potential contributors to visibility impairment (i.e. potentially affected sources) and was required, at a minimum, to evaluate the five statutory BART factors and four statutory reasonable progress factors for potentially affected sources and to reasonably determine controls, and we are required to evaluate the State's determination. 40 CFR 51.308(e) and 40 CFR 51.308(d)(3)(iv), respectively.

2. Reasonable Progress Sources

a. Oil and Gas Sources

Comment: We received comments that volatile organic compound (VOC) emissions from the oil and gas industry must be controlled under reasonable progress. Commenters asserted that EPA acknowledged that oil and gas sources emit haze-causing VOCs but inexplicably failed to analyze whether reducing such VOC emissions is reasonable. One commenter pointed out that EPA has just designated Sublette County (and portions of Sweetwater and Lincoln Counties) in nonattainment with the 8-hour ozone national ambient air quality standard, so there is no doubt the ozone levels in Sublette County are of great concern. Commenters pointed out that ozone severely impairs visibility; the failure to consider strategies to limit oil and gas industry VOC emissions was a significant oversight on both the part of the State and EPA. Thus, commenters concluded that EPA must correct this problem by analyzing and imposing reasonable progress controls on oil and gas industry VOC emissions.

Commenters pointed out that there are numerous opportunities to reduce VOC emissions from the oil and gas industry. These include requiring all oil and gas fields in the State to control VOC emissions to the same extent currently required in the Pinedale Anticline and Jonah fields pursuant to the State's BACT guidelines, implementing recommendations from the Upper Green River Basin Air Quality

Citizens Advisory Task Force, and adoption of a statewide offset program.

Response: We disagree with this comment. The commenters did not provide any evidence of the impact of VOC emissions on visibility in Class I areas.

Comment: Wyoming claims that regulation of drilling rigs is problematic because drilling rigs are mobile sources over which states have limited CAA authority. EPA is not similarly constrained and may require emissions reductions from drilling rigs in a FIP. Replacement of Tier 2 engines with Tier 4 engines on drilling rigs has a cost effectiveness value as low as $900/ton, which is very reasonable.

Response: EPA disagrees with this comment. The costs noted by the commenter for controls for drill rig engines are the lower end of the costs presented by the State. For replacement of Tier 2 engines with Tier 4 engines, the State presented costs of $900 to $2400 per ton of NO_X removed, but the commenter cited only the $900 per ton figure. To the extent that drill rig engines could be regulated under the RHR, this range of costs is not so low that we are prepared to disapprove the State's determination in the reasonable progress context.

Comment: EPA states it disagrees with the State's reasoning for not adopting reasonable progress controls for the for oil and gas sources. It is our view that, having made this finding, it is inappropriate for EPA to then propose approval of the State's control plan, a plan which would involve no new controls on the oil and gas sector. Having found that the State's RPGs were not justified, the EPA must put in place a FIP establishing RPGs for the oil and gas sector or ask the State to revise its plan.

There are numerous available means for controlling NO_X from the oil and gas sector, which is the primary focus that EPA has. For example, the State has begun regulating NO_X emissions from drill rigs on the Pinedale Anticline and Jonah Field. The State has put in place a number of regulations on those drill rigs. We believe there is no reason this could not be extended to other fields in other portions of the state.

Response: We disagree with this comment. First, we did not propose approval of the State's control plan in its entirety. Instead, we proposed to disapprove the State's reasonable progress determination for Dave Johnston Units 1 and 2; we also proposed to disapprove the State's RPGs. We then proposed a FIP for the RPGs. While we are approving the State's reasonable progress determination for Dave Johnston Units 1 and 2, we are still finalizing a FIP for the RPGs, as we have disapproved some of the State's BART determinations. Second, as we stated in our proposal, although we disagree with the State's reasoning with respect to the oil and gas sector, after considering the costs presented by the State, we find that they are not so low that we are prepared to disapprove the State's determination in the reasonable progress context. With respect to NO_X emissions generally from the oil and gas sector, as discussed elsewhere, Wyoming applies minor source BACT to these sources. For drill rig engines in particular, see our response above. Finally, with respect to visibility impacts of NO_X emissions from oil and gas sources on Class I areas, this comment provided no particular data. We respond below to other comments on visibility impacts of oil and gas sources.

Comment: The State provided sound reasoning for not adopting reasonable progress controls for oil and gas sources. Wyoming is an oil and gas production state, along with Colorado, North Dakota, New Mexico, Montana, and Utah. One of the biggest challenges faced by these WRAP states has been to inventory the emissions from this industry. At the beginning of the regional haze process, a comprehensive emission inventory of oil and gas production operations in the western region that covered both point and area sources had not been developed. No methodology had been developed to produce an inventory of this scope. The WRAP oil and gas states collaborated to develop and implement a uniform procedure for estimating area source emissions from oil and gas operations. WRAP initiated a study to focus on estimating emissions of pollutants with the potential to impair visibility near Class I areas in the West, particularly NO_X emissions.

Developing this inventory has been one of the most important tasks that needed to be completed before any of the western states could begin to look at imposing controls for improving visibility. In addition to developing these critical inventories, the State has also been very active in identifying and controlling emissions from the oil and gas industry. Wyoming has been ahead of the curve when it comes to controlling emissions from this industry to protect health standards. The EPA's recently finalized national oil and gas regulations to reduce air pollutants from the oil and gas production industry were patterned in large part after what Wyoming has been doing since the early 1990's. Since 2005, the State has been spending more time and resources to study and control emissions from natural gas production than any other sector.

When it came time to address visibility impacts associated with the oil and gas industry for the RHR, Wyoming completed the required reasonable progress analysis. Wyoming also laid out reasons for why the time was not right for requiring additional controls on the industry to reduce visibility impairment, including lacking the very critical information to be supplied by the WRAP inventory study. In spite of Wyoming's diligent efforts, EPA disagrees with the State's reasoning for not adopting reasonable progress controls for the industry during the first planning period.

EPA has completely misunderstood the purpose of the collaborative study to develop and implement a uniform procedure for estimating area source emissions from oil and gas operations. Wyoming could not have developed such a procedure on their own, and it continues to make no sense for each state in the West to develop independent emission inventories that cannot be compared to neighboring state inventories for a regional effort. EPA should understand this better than any individual state, since it relies on consistency in comprehensive national inventories to develop sound national rules. While Wyoming waits for the WRAP inventory study to be completed, it has not been idle with respect to developing information on the oil and gas industry. The State has invested huge resources in understanding emissions from this industry and EPA's suggestion that the State ''just develop the information'' shows a total lack of understanding of the problem.

EPA's whole issue is about substituting its view regarding timing in place of Wyoming's reasoned judgment. Wyoming is hopeful that as it addresses ozone nonattainment it can also demonstrate the co-benefits to improving visibility just as EPA has done in the East by developing an ozone control strategy that also demonstrates adequate visibility improvement. Wyoming's effort goes beyond the first planning period, and is in accordance with the RHR. Wyoming respectfully requests that EPA acknowledge that Wyoming participation in the regional inventory development process satisfies reasonable progress for this first planning period.

Response: We do commend the State for the work it is doing on developing more comprehensive information on oil and gas emissions although we disagree with this comment. As we stated in our

proposed notice, we disagree with the State's reasoning for not adopting reasonable progress controls for oil and gas sources. If the State determined that additional information on emission data from oil and gas sources was needed to potentially control oil and gas sources, the State should have developed the information in time for incorporation into their SIP.

Comment: Wyoming's booming oil and gas industry has a significant and growing impact on visibility in the State's national parks and wilderness areas. Given the close proximity of some of Wyoming's largest planned oil and gas fields to the Bridger and Fitzpatrick wilderness areas—between just 10 and 200 miles—these magnificent lands in western Wyoming suffer the greatest visibility impairment due to oil and gas activities. The 4,399 additional approved wells in the Pinedale Anticline Oil and Gas Exploration and Development Project alone are projected to degrade visibility in the Bridger Wilderness by up to 6.1 deciviews, and to cause impacts greater than 1.0 deciview on 45 days of each year. This impact is in addition to the impairment caused by the existing 1,819 wells in the Pinedale Anticline area, and the impacts from the numerous other existing and planned oil and gas fields in the region.

Wyoming and EPA are obligated to reduce haze-causing emissions from the State's oil and gas industry to achieve ''reasonable progress'' toward the national goal of eliminating human-caused visibility impairment in Class I areas, 42 U.S.C. 7491(b)(2)(B), and doing so by a target year of 2064, 40 CFR 51.308(d)(1)(i)(B), (ii). See also 42 U.S.C. 7491(b) (requiring ''measures as may be necessary to make reasonable progress toward meeting the national [visibility] goal''). Under Wyoming's Regional Haze SIP, natural visibility conditions would not be reached in Wyoming's Bridger and Fitzpatrick Wilderness Areas until 2165—more than 100 years past the 2064 goal set by EPA. Wyo. 309(g) SIP at 115. Although EPA's proposed FIP includes additional measures that would hasten visibility improvement, EPA projects that Wyoming Class I areas still will not achieve the URP necessary to restore natural visibility by 2064. 78 FR 34788. Thus, EPA must demonstrate the reasonableness of its decision not to require emissions reductions from oil and gas activities that could make greater progress toward restoring natural visibility. 40 CFR 51.308(d)(1)(ii).

Both Wyoming and EPA have failed to demonstrate that regulating emissions from Wyoming oil and gas development activities is not reasonable, in light of the facts that pollution-control technologies are technologically feasible, cost effective, and would improve significantly visibility across several affected Class I areas. EPA properly ''disagree[s] with the State's reasoning for not adopting reasonable progress controls for oil and gas sources.'' 78 FR 34765. Specifically, EPA rejects the State's view that it needs more time to collect information before it regulates the industry, stating ''[i]f the State determined that additional information was needed to potentially control oil and gas sources, the State should have developed the information.'' *Id.* EPA also rejects Wyoming's claim that it needs up to two years to develop necessary regulations, because ''[i]f regulations are needed to implement reasonable progress controls, the State must develop them as part of the regional haze SIP.'' See also *id.* at 34764 n.43. The Conservation Organizations agree that Wyoming is not excused from regulatory requirements to commit reasonable emissions reductions from the oil and gas industry in the current planning period simply because Wyoming thinks more information about oil and gas activity emissions would be desirable. See 78 FR 34765. As we pointed out in previous comments, ample information about oil and gas industry emissions and their visibility impacts has already been developed and published in numerous state and federal environmental impact statements.

Response: EPA disagrees with the portions of this comment that take issue with our proposed action. We acknowledge the comment's support for our statement that Wyoming could not rely on the lack of data for the State's determination for oil and gas sources. With respect to the projected visibility impacts of future oil and gas production, we note that the analysis cited by the commenter relied on a background ammonia level of 1 ppb to determine visibility impacts on the Bridger Wilderness. Elsewhere, we explain why we reconsidered use of a background ammonia level of 2 ppb for modeling visibility impacts to the Bridger Wilderness; as a result we remodeled using both a monitored monthly varying concentration and an IWAQM default of 0.5 ppb for background ammonia. Thus, the analysis cited by the commenter may overstate visibility impacts. Furthermore, modeling of the visibility impacts alone does not quantify the potential visibility benefits of the controls the commenter supports.

The comment cites 40 CFR 51.308(d)(ii), which requires states (or EPA in this instance) to demonstrate, when the RPGs fall short of the URP, that the RPGs are reasonable and achieving the URP is unreasonable. As we stated in our proposal, we found this to be the case due to the results of the four-factor analyses along with emissions from sources outside the WRAP domain. The commenter does not take issue with the latter, and we explain elsewhere that we continue to think that the controls considered by Wyoming are not so cost-effective that it was necessarily unreasonable for Wyoming to require them.

Comment: Although Wyoming's January 2011 SIP identified in particular a need for the WRAP to complete its ''Phase III'' inventory of Wyoming oil and gas emissions before requiring additional regulations of the industry, that inventory was completed in November 2012. WRAP prepared technical memorandums specific to three areas in Wyoming—the Powder River Basin, the Wind River Basin, and the Greater Green River Basin—identifying both baseline emissions in 2006 and projected emissions in 2015. Indeed, WRAP even has completed ''Phase IV'' of its emissions inventory project, updating oil and gas industry baseline emissions as of 2009 for specific regions, including all three regions of Wyoming that were evaluated in Phase III. Thus, Wyoming has no justification based on incomplete data for refusing to identify oil and gas emissions control technology to satisfy reasonable progress requirements. And there should be no reason for EPA to accept Wyoming's invalid and outdated claim that more emissions information is needed when that information was available for more than six months prior to EPA's most recent Wyoming regional haze proposal.

Response: We disagree with this comment to the extent that it argues we should not approve Wyoming's decision to not impose controls on oil and gas sources. We did state in our proposal that the lack of emissions data was not an appropriate justification for Wyoming's decision to not impose controls on oil and gas sources. Instead, we proposed to approve Wyoming's decision based on the cost of controls and on the application of minor source BACT. The comment does not identify anything in the November 2012 data that affects that rationale and does not explain how emissions data would change the cost of controls or the application of the SIP-approved minor source BACT provisions. Thus the comment does not give a reason for us to change our decision.

Comment: While EPA rejects Wyoming's rationale for refusing to limit haze causing pollutants from this

booming industry, EPA provides insufficient rationale of its own to justify the omission. EPA provides two reasons for proposing to accept the State's plan not to require NO_X emissions reductions from Wyoming oil and gas sources. First, ''the most reasonable controls are for compressor engines, which the State already controls through its minor source BACT requirements.'' 78 FR 34765 & n.25 (citing Wyoming Air Quality Standards and Regulations, Chapter 6, Section 2). Second, ''while the costs of some controls are within the range of cost effectiveness values Wyoming, other states, and we have considered as reasonable in the BART context, they are not so low that we are prepared to disapprove the State's conclusion in the reasonable progress context.'' *Id.* at 34765. Neither contention is supportable.

EPA is wrong that compressor engine NO_X emissions are regulated through Wyoming's minor source BACT requirements. Wyoming's minor source BACT guidelines for the oil and gas industry only regulate VOC and hazardous air pollutants, not NO_X. The guidelines make no provisions for NO_X controls at all. See *State of Wyoming, Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance* (presenting controls that apply to VOC and hazardous air pollutants, but not NO_X).

Moreover, EPA's singular focus on compressor engines overlooks the numerous other opportunities to significantly reduce haze-causing emissions from oil and gas operations. As even Wyoming's analysis demonstrates, cost-effective options are available to achieve high control efficiency of NO_X emissions from drill rig engines, turbines, and process heaters. See 78 FR 34764 (Table 26).

Response: We disagree with this comment. Chapter 6, Sections 2 and 4, which are approved into the State's SIP, both require BACT for new source compressor engines for regulated pollutants, which includes NO_X and VOC. These regulatory requirements should not be confused with the State's oil and gas permitting guidance, which is not part of the SIP. The State guidance document provides additional compliance information for select sources of oil and gas VOC emissions, such as dehydration units, pumps and tanks. There are many sources which are regulated by the State's SIP and required to apply controls that are not included in the oil and gas permitting guidance.

We also explained the reason we discussed compressor engines in particular: the cost of controls for those sources was the most reasonable. For other oil and gas sources, the costs were generally higher. As we stated in our proposal, those costs were not so low that EPA could find it necessarily unreasonable for the State to not have adopted them. The comment gives us no reason to think otherwise.

Comment: EPA's justification that the costs of available controls are reasonable, but not so low that EPA is willing to require them, is both arbitrary and factually flawed. See 78 FR 34765 (''the costs of some controls are within the range of cost effectiveness values Wyoming, other states, and we have considered as reasonable in the BART context''). EPA's justification is arbitrary because it has not identified any objective threshold or rationale for reaching the determination that costs, although low, are still too high to justify modifying Wyoming's SIP determination.

Indeed, EPA rejected Wyoming's determination not to require reasonable progress controls for Dave Johnston Units 1 and 2, where the controls would cost approximately $1,000/ton of NO_X removed. See *id.* at 34788 (''Given predicted visibility improvement of approximately 0.30 deciviews per unit at the most impacted Class I area and the fact that Wyoming's RPGs will not meet the URP, we find that it was unreasonable for the State to reject these very inexpensive controls.''). EPA's statement that control technologies with similar—and even lower—costs were not justified for the oil and gas industry cannot be squared with this determination for Dave Johnston Units 1 and 2. See *id.* at 34765. As shown in Table 26 (of the proposed FIP), emissions controls for compressor engines are available in the $16 to $1,200/ton range. *Id.* at 34764. Enhanced NO_X-control technologies for drill rigs have cost-effectiveness values of $900 to $1,000/ton. *Id.*

Controls for NO_X emissions from turbines are very cost effective at around $560/ton. *Id.* All of these costs are at or below the costs that were deemed ''very reasonable'' at the Dave Johnston power plant and which led to EPA rejecting the State's reasonable progress control proposal. If finalized, EPA's contrary proposal for the Wyoming oil and gas industry would be arbitrary.

Response: EPA disagrees with this comment. The comparison with the costs of controls at Dave Johnston Units 1 and 2 is not apropos. First, as explained elsewhere, certain oil and gas sources are subject to the State's SIP-approved construction permit program, including the requirement for minor source BACT. On the other hand, as explained below in response to PacifiCorp's comments, PacifiCorp did not identify (nor is EPA aware of) any NO_X control measures for Dave Johnston Units 1 and 2. Second, we did not propose to reject the State's determination for these units solely on the basis of the cost-effectiveness of controls. In addition, the State relied on impermissible factors to disregard the results of its own four-factor analysis. Third, to assist in determining whether the state's determination for Dave Johnston Units 1 and 2 was reasonable or not, we have quantified the visibility benefits of controls and decided that the State's determination was not so unreasonable that we were prepared to disapprove it. Neither the commenter nor EPA has equivalent data for the oil and gas sources that the commenter mentions. The visibility benefits of the commenter's suggested controls would of course vary considerably depending on the location of the source and other factors, and the data the commenter cites elsewhere regarding the bulk visibility impacts of oil and gas development do not address visibility benefits. Thus, the comparison with Dave Johnston gives no reason to change our decision. Finally, the RHR does not require EPA to establish a hard-and-fast dollar per ton threshold or other numeric criteria for determining when a State's decision to not impose controls on reasonable progress sources is unreasonable; rather all four factors are to be considered under the reasonable progress provisions of the RHR.

Comment: Control technologies to reduce oil and gas industry NO_X emissions are inexpensive and justified. Wyoming did not identify the cost of available controls as an impediment to their implementation, and Wyoming's own analysis demonstrated that cost-effective controls to reduce oil and gas industry emissions are available. See Wyo. 309(g) SIP at 123–26. In addition to Wyoming's generic analysis, the Conservation Organizations have identified available control technology. For example, the Bureau of Land Management (BLM) recommended basic pollution-reduction strategies such as replacing internal combustion engines for compressors with gas turbines, installing SCR on drilling rig engines, using electric or natural gas-powered drilling rigs, and centralizing production facilities to reduce truck traffic. The cost-effectiveness of such technologies is a reason for requiring them as reasonable progress measures; costs are not a basis for allowing Wyoming to avoid requirements to

reduce the large impact of the State's oil and gas industry on Class I-area visibility.

Response: EPA disagrees with this comment. First, the commenter incorrectly suggests that a ''generic'' analysis, rather than a source-specific analysis, of the cost of controls for oil and gas sources violates the RHR. In the reasonable progress context, the cost-of-compliance factor can be interpreted to encompass either the cost of compliance for individual sources or the cost of compliance for source categories. The language of 40 CFR 51.308(d)(1)(i)(A), cited by the commenter, does not explicitly require a source-specific analysis of the costs of compliance, contrary to the commenter's assertion. With respect to the control measures identified by BLM and referred to by the commenter, neither the comment, nor the letter cited in the comment, nor the records of decisions by the BLM cited by the letter, provide any data on the cost-effectiveness of these measures. The comment has no basis to describe the control measures identified by BLM as cost-effective.

Comment: When a SIP fails to establish an emissions reduction strategy that would achieve natural visibility conditions by 2064, as is the case in Wyoming, the state must demonstrate that the underlying ''uniform rate of progress'' is ''not reasonable[,] and that the progress goal adopted by the State is reasonable.'' 40 CFR 51.308(d)(1)(ii); see also EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program,* at 2–3 (June 1, 2007) (demonstration should ''identify and analyze the measures aimed at achieving the uniform rate of progress and . . . determine whether these measures are reasonable''). EPA proposes RPGs that leave visibility impaired in Wyoming's affected Class I areas well beyond the 2064 goal set by EPA. See 78 FR 34788. In light of EPA's rejection of every one of Wyoming's justifications for its conclusion that reasonable progress controls on the oil and gas industry are not reasonable, and EPA's lack of any valid rationale of its own to conclude that such measures are not reasonable, the failure to adopt any measures to reduce haze-causing emissions from the oil and gas industry cannot be supported and must be changed in the final rule.

Response: EPA disagrees with this comment. In our proposal we specifically stated our rationale for agreeing with Wyoming's determination to not impose controls on oil and gas sources during this planning period. We respond elsewhere to the commenter's disagreement with that rationale. Because we are disapproving the State's RPGs, as part of our FIP we are imposing RPGs that are consistent with the controls in our FIP and the controls that we are approving in the State's SIP. We stated in our proposal that it was reasonable for the RPGs to fall short of the URP based not only on our consideration of the four statutory reasonable progress factors, but also based on emissions from sources outside the WRAP domain, which the commenter does not take issue with.

Comment: EPA proposes to approve Wyoming's reasonable progress determinations for oil and gas sources. 78 FR 34765. However, EPA states that it ''disagree[s] with the State's reasoning for not adopting reasonable progress controls for oil and gas sources.'' *Id.* Wyoming explained in its SIP that it required additional information before it can determine whether and to what extent additional controls are necessary for oil and gas sources. *Id.* EPA thinks Wyoming should have obtained the additional information before submitting its SIP, though, EPA does not hold itself to this same standard. Nonetheless, EPA has previously recognized Wyoming's expertise and leadership in regulating the air quality impacts of oil and gas development. 76 FR 52738, 52757 (Aug. 23, 2011). In light of Wyoming's leadership in regulating air pollution from oil and gas development, EPA should approve Wyoming's reasonable progress determination for oil and gas sources.

Response: EPA disagrees with this comment. We are approving Wyoming's reasonable progress determination for oil and gas sources, although not on the State's basis. The notice cited in the comment relates to EPA's development of new source performance standards for oil and gas sources, which is not relevant to this action. As we explained in our proposal and elsewhere in these responses, the RHR sets certain requirements for reasonable progress for the first planning period and does not provide for deferring those requirements to later planning periods; thus, the State's basis for its reasonable progress determination for oil and gas sources is invalid. Finally, while we did not re-run the WRAP modeling to quantify our RPGs, the State did not modify its RPGs or re-run the WRAP modeling to reflect the controls the State selected.

Comment: We received numerous comments urging EPA to require pollution controls on the oil and gas industry.

Response: There are a number of provisions in the CAA that potentially apply to oil and gas sources. With respect to the requirements of the RHR for those sources, we have evaluated Wyoming's submittal and we are approving it.

b. Dave Johnston Units 1 and 2

Comment: Wyoming did not evaluate the effectiveness of the LNB+OFA+SCR option. Instead, Wyoming assumed addition of SCR to these currently uncontrolled EGUs would only reduce NO_X emissions by 79% down to 0.12 lb/MMBtu on an annual average basis, although it is generally assumed that SCR can reduce NO_X emissions by 90% or down to 0.05 lb/MMBtu (or lower). Wyoming has not provided any documentation or justification to support the higher emission rates used in its analyses. Such an approach at Johnston adversely biases the cost-benefit analysis and is inconsistent with other EPA analyses.

Response: The commenter has incorrectly assumed that a 90% control efficiency can be achieved in all SCR applications regardless of the input NO_X emission rate or other parameters. In addition, we note that the emission rate analyzed by Wyoming, 0.07 lb/MMBtu, was on a 30-day rolling average basis, not an annual basis. Regardless, we agree that SCR can in most cases achieve a performance rate of 0.05 lb/MMBtu on an annual basis. (See section IV.C.4 of this rulemaking for more information on the control effectiveness of SCR.) We have revised the SCR costs for Dave Johnston Units 1 and 2 accordingly. However, as explained elsewhere, the revised costs for SCR have not led us to change our determination that the State was reasonable in not selecting SCR for Units 1 and 2.

Comment: Wyoming has assumed that Dave Johnston Unit 1 and Unit 2 emitted at 0.57 lb/MMBtu on an annual basis and used this as the baseline condition from which to calculate the control efficiency it used for each control option. However, our review of CAMD data back to 2000 shows that the highest annual NO_X emission rate for Unit 1 was 0.474 lb/MMBtu (2002) and 0.460 lb/MMBtu for Unit 2 (2006). For the 2001–2003 baseline period, annual NO_X emissions were 0.46 and 0.44 lb/MMBtu for Johnston Unit 1 and Unit 2, respectively. Thus, Wyoming's proposal to reduce NO_X to 0.20 lb/MMBtu with LNB+OFA represents a 56% reduction instead of 65% assumed by Wyoming.

Response: In our revised cost analysis, we used baseline emissions for Dave Johnston Units 1 and 2 that reflect annual average emissions between 2001 and 2003, as found in the CAMD emissions system. These baseline rates

are 0.45 lb/MMbtu and 0.41 lb/MMBtu, respectively. This corresponds to a 56.0% and 54.6% reduction, respectively.[238] Therefore, our revised cost analysis has addressed the concern raised by the commenter. As explained elsewhere, our revised costs have been taken into account, along with our revised visibility modeling, in our decision to approve the State's determination to not impose controls at Units 1 and 2.

Comment: The Conservation Organizations agree with EPA that reasonable progress controls for NO_X emissions are needed for Dave Johnston Units 1 and 2. EPA correctly found that it was unreasonable for Wyoming to reject cost effective NO_X controls that would improve visibility. EPA proposes to require only LNBs/OFA to achieve a NO_X emission limit of 0.20 lb/MMBtu (30-day rolling average). While we commend EPA for proposing a FIP to reduce NO_X emissions from Dave Johnston Units 1 and 2, we urge EPA to require SCR plus LNBs/OFA to meet a NO_X emission limit of 0.05 lb/MMBtu to achieve reasonable progress. Although EPA concluded that the cost of SCR is not justified by the projected visibility improvement, EPA's analysis unreasonably assumed that SCR would only achieve a NO_X emission rate of 0.12 lb/MMBtu, even though an emission rate of 0.05 lb/MMBtu is readily achievable. Correcting for this error, it appears that SCR at Dave Johnston Units 1 and 2 is very cost effective at $2,001 and $1,987/ton of NO_X removed, respectively. Accordingly, EPA should reconsider requiring SCR at Dave Johnston Units 1 and 2 to meet reasonable progress requirements.

Response: As discussed in our proposed rulemaking, we have revised the SCR cost analysis for Dave Johnston Units 1 and 2 to reflect the installation of LNB and OFA. However, our revised cost effectiveness values of $3,496/ton and $3,672/ton, respectively, are much higher than those suggested by the commenter. We also note that the incremental costs for this option are high, at $9,798 and $9,588 per ton, respectively. In light of this, and our revised modeling results, we do not find it unreasonable for the State to not have imposed SCR on these units.

Comment: EPA's conclusion that the addition of SCR is not justified due to the ''small incremental visibility improvement'' is based upon a flawed visibility analysis that over-values the addition of LNB + OFA and under-values the addition of SCR. Furthermore, the degree of visibility improvement is not one of the four statutory factors to be considered under the reasonable progress provisions of the RHR. Incremental visibility improvement is not mentioned anywhere in the reasonable progress provisions or BART Guidelines and EPA cannot create a new criterion for the sole purpose of eliminating a control option that is reasonably cost-effective and would yield a significant visibility improvement.

Response: As discussed elsewhere in this rulemaking, we have corrected the modeling analysis for Dave Johnston Units 1 and 2, and the commenter's concerns regarding our methodology have been addressed. Our revised modeling analysis shows that the visibility improvement associated with SCR with LNB and OFA at Units 1 and 2 is 0.18 deciviews and 0.18 deciviews, respectively. The visibility improvement associated with LNB and OFA is 0.12 deciviews and 0.11 deciviews, respectively. We continue to find that the additional visibility improvement is not significant enough to warrant selection of SCR with LNB and OFA for these reasonable progress sources. As discussed earlier, we also find that the visibility improvement from LNBs and OFA does not justify us requiring reasonable progress controls on these two units. While it is true that incremental visibility improvement is not among the four statutory reasonable progress factors, the RHR does not prohibit EPA from assessing visibility improvement, in addition to the four statutory reasonable progress factors, when considering controls at potentially affected sources. We did not create a new criterion for the sole purpose of eliminating SCR at Dave Johnston Units 1 and 2; instead, we think it appropriate to consider visibility improvement when assessing control options for reasonable progress, especially when taking into account the purposes of the RHR. In comparing control options and selecting one, it is appropriate to compare the visibility improvement (that is, to compute the incremental visibility improvement) for each option.

Comment: EPA is proposing that the FIP NO_X BART for Dave Johnston Units 1 and 2 is LNBs with OFA at an emission limit of 0.22 lb/MMBtu (30-day rolling average). EPA provided no reason for rejecting addition of SCR even though: (1) Cost/ton was $3,300–$3,400, which is less than the $3,900/ton accepted at Laramie River Unit 3; (2) Visibility at the most-impacted Class I area would improve by more than 0.4 deciview (which is greater than the 0.3 deciview improvement for EPA's proposal; (3) Cumulative visibility improvement would exceed 0.6 deciviews (versus EPA's proposed 0.43 deciview improvement for Dave Johnston Unit 2 at Wind Cave and Badlands); (4) Cost-effectiveness is $15 million/deciview at Wind Cave (versus $27,798,246/deciview at Badlands due to application of SCR to Laramie River Unit 3); (5) Cumulative cost-effectiveness is less than $10 million/deciview (versus $10,140,825/cumulative deciview due to application of SCR to Laramie River Unit 2.)

We believe that SCR is Reasonable Progress for Dave Johnston Units 1 and 2. Under the EPA proposal, Dave Johnston Units 1 and 2 would each contribute over 0.9 deciview impairment at Wind Cave National Park (and 0.7 deciviews at Badlands National Park). With the addition of SCR, impairment would drop to less than 0.5 deciviews for each unit.

Response: We disagree with this comment. We have responded in detail to the use of a $/deciview metric in section V.D.1.b of this final rulemaking action. In addition, as stated above, our revised modeling analysis shows that the visibility improvement associated with SCR with LNB and OFA is 0.18 deciviews and 0.18 deciviews, respectively. By contrast, the visibility improvement associated with LNB and OFA, is 0.12 deciviews and 0.11 deciviews, respectively. We continue to find that the additional visibility improvement is not significant enough to warrant selection of SCR with LNB and OFA for these reasonable progress sources, and as discussed earlier in our response to comments, we do not find the visibility improvement, when considered with the other reasonable progress factors, from LNBs and OFA warrants the implementation of reasonable progress controls. In addition, as we discuss above, the revised incremental costs for SCR that we present above are sufficiently high for us to conclude that it is reasonable to not impose SCR on Dave Johnston Units 1 and 2.

Comment: EPA acknowledged that, for a reasonable progress analysis, only four factors must be analyzed. Indeed, the CAA clearly requires only four factors be analyzed. 42 U.S.C. 7491(g)(1). EPA employed the four-factor reasonable progress analysis for the other two Wyoming reasonable progress sources: oil and gas sources and the Mountain Cement Company plant. EPA has approved other regional haze SIPs where the state employed this same four-factor analysis, including Nevada. For both the oil and gas sources and the Mountain Cement Company

[238] Staudt memo, Tables 2 and 3.

plant, EPA disagreed with Wyoming's reasonable progress analysis and found ''cost effective'' NO_X controls could be employed, but EPA did not require those NO_X controls because the costs were ''not so low that we are prepared to disapprove the State's conclusion in the reasonable progress context.'' If EPA found the NO_X controls ''cost effective'', then PacifiCorp is unclear what additional cost analysis was performed, or what the statutory or regulatory basis for EPA's additional cost analysis may be. EPA does not differentiate PacifiCorp's Dave Johnston Units 1 and 2 from the oil and gas sources or the Mountain Cement Company plant.

Also, EPA has approved other reasonable progress SIPs where the state is not meeting the URP, but has determined that no reasonable progress controls are required for the initial planning period. (See 77 FR 30248, 30256–30257; SIP Approval for Idaho). Here, EPA admitted that Wyoming ''provided a four factor analyses that adequately evaluated the required factors'' for Dave Johnston Units 1 and 2, but then arbitrarily concluded ''it is also appropriate for this facility to consider a fifth factor for evaluating potential reasonable progress control options—the degree of visibility improvement that may reasonably be anticipated from the use of reasonable progress controls.''

EPA justified its decision by citing to EPA guidance on states setting reasonable progress goals. However, the referenced guidance does not support EPA's position for several reasons:

- The guidance concedes it is ''merely guidance and that States or the . . . [EPA] may elect to follow or deviate from this guidance, as appropriate.'' EPA cannot find Wyoming acted ''unreasonably'' when it chose not to apply discretionary guidance.
- The guidance identifies several factors that EPA did not include in its proposed regional haze FIP, such as the ''control measures and associated emission reductions that are expected to result from compliance with existing rules.'' EPA cannot criticize Wyoming for not following the guidance when EPA itself chose not to apply part of the same guidance in the EPA regional haze FIP.
- The guidance suggests that air quality models be used to estimate ''the improvement in visibility that would result from the implementation of the control measures you have found to be reasonable and compare this to the uniform rate of progress.'' Here, EPA has no ''modeling results'' demonstrating the alleged improvement in visibility from the suggested NO_X controls and the impact on the URP.
- The States, not EPA, are to determine the ''reasonableness'' of RPGs and are given flexibility to do so.
- The guidance clearly indicates that a state must support its RPGs ''based on the statutory factors,'' which EPA admits Wyoming did.
- Finally, the guidance explains that no additional reasonable progress controls may be needed for the first planning period.

Response: EPA disagrees with this comment. With respect to the reasonable progress determination for the Mountain Cement facility, the cost effectiveness of potential controls is generally higher than the controls we proposed for Dave Johnston Units 1 and 2. As we stated in our proposal, although the costs for potential controls for the Mountain Cement facility might be considered reasonable in the BART context, in the reasonable progress context those costs were not so low that we were prepared to disapprove the State's determination to not impose controls. That was not the case for Dave Johnston Units 1 and 2, for which combustion controls were significantly more cost-effective. Similar reasoning applies to the cost-effectiveness of controls for the oil and gas sources; in addition, as we noted in the proposal, Wyoming generally applies minor source BACT to these sources.

As a result, EPA determined that we should perform visibility modeling to assess the visibility benefits of controls on Dave Johnston Units 1 and 2. As explained elsewhere, we considered it appropriate to assess, in addition to the four statutory reasonable progress factors, the visibility improvement from potential controls at these units, particularly in light of the purposes of the RHR. In this instance, the revised visibility modeling has confirmed that the State's decision to not impose controls on Dave Johnston Units 1 and 2 (although not the State's rationale) was not so unreasonable that EPA is compelled to disapprove it.

EPA also disagrees that EPA's proposal was inconsistent with the cited notice proposing action on the Idaho Regional Haze SIP. In that notice, EPA stated, ''EPA agrees with Idaho's conclusion that additional controls of non-BART point sources for reasonable progress purposes are not reasonable at this time, because even though there are cost effective controls identified, *visibility improvement is anticipated to be relatively small.''* (77 FR 30248, 30256, May 22, 2012) (emphasis added). To derive that conclusion, EPA examined the modeled visibility impacts for the BART eligible sources and noted that, in Idaho's case, the sources with a Q/d of less than 26 had visibility impacts of less than 0.5 deciviews. EPA conservatively inferred from this that other potentially affected sources in Idaho with a Q/d of less than 20 would likely also have visibility impacts of less than 0.5 deciviews. In contrast, our original proposal showed modeled benefits at each unit of 0.3 deciviews from combustion controls. As a result, we reject the comparison with the notice proposing action on the Idaho Regional Haze SIP. Nonetheless, based on our revised modeling we have reconsidered our proposed determination to require LNBs and OFA on these two units, and now do not find the State's decision to not impose controls to be unreasonable.

Furthermore, we are not disapproving the State's determination of which sources should be considered potentially affected sources. Wyoming reasonably used a Q/d threshold of 10 for determining the set of potentially affected sources, and the State selected (among others) Dave Johnston Units 1 and 2. That Idaho used a different threshold does not show that Wyoming's choice was unreasonable. However, even if EPA in the first instance was selecting potentially affected sources, we might also consider it reasonable to select Dave Johnston 1 and 2 based on a Q/d threshold.

We disagree that we cited our reasonable progress guidance as part or whole of our basis for proposing to disapprove the State's reasonable progress determination for Dave Johnston Units 1 and 2. Instead, we briefly cited the guidance for the unremarkable proposition that the State must at a minimum consider the four statutory reasonable progress factors but could also take into account other relevant factors. Our proposed disapproval was not based on that proposition, but was based on the State's inadequately supported determination to not impose controls, which relied on impermissible factors. Although the commenter argues that it is the State, and not EPA, that should determine reasonable progress, as explained above we are required to evaluate the State's reasonable progress determinations. 40 CFR 51.308(d)(1)(iii).

We disagree with the commenter's other statements regarding the guidance. While the State did assess the four statutory reasonable progress factors for Dave Johnston Units 1 and 2, the guidance does not suggest that a state may ignore the results of that assessment for impermissible reasons such as a claimed lack of authority. The

guidance also does not suggest that a state may *per se* choose to impose no reasonable progress controls regardless of the state's assessment of the four statutory factors.

Guidance aside, both the Act and the RHR explicitly require the state to consider the four factors for potentially affected sources. CAA section 169A(g)(1) (''shall be taken into consideration''); 40 CFR 51.308(d)(1)(i)(A). Assessing the four factors but ignoring the results of that assessment for invalid reasons such as lack of authority to impose controls does not amount to considering the factors and violates the explicit requirements of the Act and the RHR.

With respect to control measures expected to result from compliance with existing rules, the commenter did not identify any such NO_X control measures for Dave Johnston Units 1 and 2, nor are we aware of any. Finally, we did independently run CALPUFF to model the visibility improvement from potential controls at Dave Johnston Units 1 and 2 and it is part of the basis for our final decision.

F. General Comments

1. Replacement of FIP Elements With SIP

Comment: EPA has proposed to disapprove the monitoring, recordkeeping, reporting, and RAVI portions of Wyoming's SIP. 78 FR 34788. Wyoming acknowledges these deficiencies in its SIP and commits to making the necessary revisions. However, Wyoming will revise its SIP in a manner that comports with statutory and regulatory processes. Unlike EPA, Wyoming will not shortcut legal processes designed to ensure FLM consultation and public participation to meet an arbitrary deadline EPA has established with special interest groups in litigation to which Wyoming was not a party. Such arbitrary deadlines defeat the cooperative federalism Congress intended to guide CAA implementation by needlessly expediting the process, tying EPA's hands, and precluding the State from an opportunity to revise its SIP. In this context, EPA's promise—to ''propose approval of a SIP revision as expeditiously as practicable if the State submits such a revision and the revision matches the terms of our proposed FIP,'' *id.* 34738—rings hollow.

Response: We appreciated the State's willingness to make the SIP revisions necessary to correct the deficiencies with the monitoring, recordkeeping, reporting, and RAVI requirements. Once EPA receives the SIP revisions from the State, EPA will work as expeditiously as practicable to review such revisions and approve the State's revisions if they meet the terms of our FIP. We have responded to other comments elsewhere in this document.

2. Public Comment

Comment: DEQ and Governor Mead requested that EPA defer its hearing until sixty days after the date EPA first released its proposal, with an additional thirty days of comment after the hearing. *See, e.g.,* Letter from Todd Parfitt, Director, DEQ, to Shaun McGrath, Region 8 Administrator, EPA (June 14, 2013). Although EPA agreed to hold two additional public hearings and provide an additional thirty days for public comment, EPA did not provide the time for public participation that Wyoming requested, evidently because EPA wanted to meet the deadline for final action it established with the special interest groups. Thus, while EPA did not hesitate to extend that deadline on multiple occasions when it benefitted EPA and the special interest groups, EPA refused to provide the additional time Wyoming requested for the benefit of the State.

We also received comments from other parties that we should extend the public comment period so that there is more time to review and comment on our action. Some commenters specifically requested a 60-day extension of the comment period. One commenter noted that if the driving force for the short timeframe in this instance is a consent decree to which the EPA is a party, that no agreement between an agency and any interested party, whether as part of litigation or not, should or can modify requirements of law for a meaningful opportunity for public comment.

Response: EPA took several steps to provide the opportunity for meaningful public comment. In addition to the initial 60-day public comment period, we extended the public comment period from August 9, 2013, until August 26, 2013. In doing so, we took into consideration how an extension might affect our ability to consider comments received on the proposed action and still comply with the terms of the consent decree deadline,[239] which at the time required our final action signed by the Administrator on or before November 21, 2013. Additionally, we could not extend the comment period any further and still have time to respond to the immense amount of public comments we anticipated receiving. As the commenter notes, EPA also added two public hearings and we received substantial comments at these additional hearings. We find that the comment period provided for the Wyoming Regional Haze SIP and FIP exceeds CAA requirements and is reasonable and consistent with what the Agency has provided on other FIP and SIP actions. For example, EPA provided a 60-day comment period for both the Montana and North Dakota regional haze actions (see 77 FR 23988 and 76 FR 58570, respectively.) In addition, in our first proposal on Wyoming regional haze (77 FR 33022), we provided a 60-day comment period with no objections from interested parties.

Finally, the State and impacted sources have had many years to prepare and submit an approvable SIP to EPA. As detailed in the Docket for this action, the State received numerous detailed comment letters from EPA on many issues and also participated in meetings with EPA. Indeed, the fact that the State was able to prepare an extensive 33-page document and provide extensive comments at the various public hearings, all within the allotted time period, supports EPA's contention that the 77-day time period for this proposed rulemaking was reasonable.[240]

3. Economic Concerns

Comment: We received numerous comments that the FIP will cost anywhere from an additional $300 million to $1 billion more than the State's SIP, but provide no perceptible improvement in visibility when compared with the SIP. We received numerous comments that EPA's FIP would lead to higher electricity costs to consumers and job losses at a time when the economy and people cannot afford an additional burden.

Response: We disagree with these comments. We have addressed the issue of perceptible visibility improvement in section V.C.5 of this final rulemaking. In addition, it is not EPA's intention to endanger the economic viability of or to place an undue burden on PacifiCorp or Basin Electric's customers. EPA has considered the comments on these issues very carefully. Regarding the legal basis for our decision, neither the CAA nor the RHR requires states or EPA to consider the affordability of controls or ratepayer impacts as part of a BART analysis. Rather, the CAA and RHR require consideration of the following factors, which as detailed elsewhere in

[239] *WildEarth Guardians* v. *McCarthy,* Case No. 1:11–cv–0001–CJA–MEH.

[240] In fact, the State received the proposed notice on May 28, 2013, two business days after the proposal was signed, and the proposed notice was posted on the Region's Internet site on May 28, 2013, well in advance of the **Federal Register** publication on June 10, 2013.

our notice, we have fully considered: ''The costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.''

Comment: One commenter noted that visitors to Wyoming's parks notice when the air is dirty, which can have a direct impact on tourism, the second largest business in the State. According to Wyoming's Office of Tourism, the travel and tourism industry in Wyoming creates 30,000 jobs and generates $730 million in employment earnings and $2.8 billion in travel expenditures annually. Over 3.5 million people visit Yellowstone National Park each year. The Commenter also indicated that the proposed plan will also reduce health care costs in the State. Combined, coal plants in Wyoming emit over 60,000 tons of NO_X pollution and almost 65,000 tons of SO_2 pollution annually. The Clean Air Task Force estimates that coal plant pollution in the State results in over $850 million in preventable health care costs.

Response: We acknowledge the commenter's points.

Comment: We received a comment that EPA failed to calculate the costs of the proposed rule that will be passed on to residential and business customers.

Response: Explained elsewhere in this document, we have taken these costs into consideration.

Comment: We received numerous comments that EPA's action could have the potential to shift the energy balance in favor of gas, rather than coal, and that this shift may force utilities to convert their power plants from coal to natural gas. Commenters expressed particular concern over the potential conversion of Naughton Unit 3, and possibly Naughton Units 1 and 2. Commenters expressed concern over the potential impacts natural gas conversion could have on local economies.

Response: As stated above, the CAA and RHR require consideration of the five statutory factors. Based on our consideration of these factors, EPA determined the appropriate emission limit for BART for each unit. Sources have the choice of how to meet that limit, including conversion to natural gas. EPA's action does not require any source to convert to natural gas, as all of the requirements in our FIP can be met with combustion and post-combustion control technology.

Comment: One commenter stated that coal-fired plants in Wyoming have installed over one billion dollars in additional air quality controls and that, according to EPA standards, Wyoming has better visibility than virtually any other state in the country. Therefore, it seems unreasonable, illogical and, frankly, irrational that the EPA would demand Wyoming businesses and homeowners foot the bill for another one billion dollars in emission controls that have little probability of improving the quality of lives or the livelihoods of our citizens and, in fact, has a great potential to harm our people and our state.

Response: EPA disagrees with this comment. EPA carefully considered the five statutory factors and determined that there are additional, cost-effective controls that will result in significant visibility improvement in Wyoming's Class I areas, and that these controls represent BART.

Comment: One commenter was concerned that the investments mandated under the FIP will have significant adverse impacts on the quality and reliability of service provided to Wyoming ratepayers. The SIP is a well vetted plan by the State and its stakeholders that, in association with other regulatory requirements such as the construction authority process, assures that Wyoming utilities will be able to comply with its requirements with the least amount of impact to customers. The FIP, on the other hand, with its more stringent control requirements and accelerated compliance deadlines, will assure not only that compliance is needlessly expensive, but that it is also rushed, that scheduled outages cannot be timed to minimize the cost of replacement power, and that third party vendors will have free reign in determining how much a particular project costs. To the extent that schedules cannot be met, non-compliant plants will be forced out of service until the work is done. Such outages will necessitate the purchase of replacement power in the market and will result in diminishing system reserves, all of which will jeopardize system reliability and increase costs for ratepayers.

Response: We appreciate the commenter's concerns, but note that the commenter has provided no data to support these assertions.

Comment: The companies working with Wyoming have scheduled shutdown and installation on a schedule that will allow them to maintain service to their customers. The new timeline demanded in the re-proposal would threaten both service interruptions and an increased risk of having to spot purchase energy which would be an additional increase of costs to residential, business, manufacturing, and agricultural customers.

Response: We appreciate the commenter's concerns, but note that the commenter has provided no data to support these assertions. Additionally, CAA section 169A(b)(2)(A) requires subject-to-BART sources to install BART and comply with any applicable emission limits ''as expeditiously as practicable.'' The Act defines this term to mean ''as expeditiously as practicable but in no event later than five years after . . . the date of promulgation.'' CAA section 169A(g)(4). Consequently, the final rule appropriately provides that the BART units must comply with the emission limits as expeditiously as practicable but in no event later than five years after the date of promulgation of the final rulemaking.

4. National Ambient Air Quality Standards (NAAQS)

Comment: The EPA is duty-bound to ensure that the proposed SIP does not interfere with attainment and maintenance of the NAAQS, in accordance with section 110(l) of the CAA. Thus, the EPA must ensure that the proposed SIP and the proposed FIP adequately limit air pollution in order to safeguard public health.

In this case, we are concerned that in proposing to approve portions of Wyoming's regional haze plan, the EPA has not demonstrated that the proposal adequately safeguards the 2008 8-hour ozone NAAQS (see 40 CFR 50.15), the newly promulgated 1-hour nitrogen dioxide (''NO_2'') NAAQS (see 40 CFR 50.11(b)), the newly promulgated 1-hour SO_2 NAAQS (see 40 CFR 50.17), the 2006 24-hour $PM_{2.5}$ NAAQS (see 40 CFR 50.13), and the 2012 annual $PM_{2.5}$ NAAQS (see 78 FR 3086 (Jan. 15, 2013)).

We are particularly concerned that the EPA overlooked its 110(l) obligations under the CAA given that, although the Proposed Rule may lead to emission reductions, no analysis or assessment has been prepared to demonstrate that even after these emission reductions, the recently promulgated NAAQS will be met. In this case, we are particularly concerned that the recently promulgated 1-hour NO_2 and SO_2 NAAQS could be jeopardized, as well as the recently promulgated 2012 $PM_{2.5}$ annual NAAQS. Indeed, many, if not most, of the proposed emission rates are based on 30-day rolling averages. There is no indication that meeting emission rates on a 30-day rolling average will ensure that 1-hour NAAQS will be sufficiently protected. Indeed, a source could comply with a 30-day rolling average limit, yet still emit enough pollution on

an hourly basis to cause or contribute to violations of the NAAQS, thereby interfering with attainment or maintenance. Further, there has been no analysis at all as to whether the recently promulgated revisions to the annual $PM_{2.5}$ NAAQS will be protected.

In this case, the EPA must either disapprove the Wyoming SIP over the State's failure to perform a 110(l) analysis or prepare its own 110(l) analysis to demonstrate that the SIP will not interfere with attainment or maintenance of the NAAQS. Furthermore, the EPA must demonstrate that its FIP will not interfere with attainment or maintenance of the NAAQS. The EPA has not done so, rendering its proposed rule substantively flawed.

Response: CAA section 110(l) provides that EPA ''shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . ., or any other applicable requirement of'' the CAA. The commenter has not provided any evidence that the Wyoming Regional Haze SIP will interfere with any applicable requirement concerning attainment and reasonable progress or any other applicable requirement of the CAA, or that further analysis under 110(l) is necessary. To the contrary, the commenter acknowledges that the Regional Haze SIP revision will lead to emission reductions.

The commenter asserts that it is not enough that the SIP will lead to emission reductions and that EPA must determine that the SIP will ensure the NAAQS are met. We disagree. The CAA and EPA's regulations require regional haze SIPs to address visibility impairment in mandatory Class I areas; attainment of the NAAQS is provided for through a separate SIP process. It is EPA's consistent interpretation of section 110(l) that a SIP does not interfere with attainment and maintenance of the NAAQS if the SIP at least preserves the status quo air quality by not relaxing or removing any existing emissions limitation or other SIP requirements. EPA does not interpret section 110(l) to require a full attainment or maintenance demonstration for each NAAQS for every SIP revision. *See, e.g., Kentucky Resources Council, Inc.,* v. *EPA,* 467 F.3d 986 (6th Cir. 2006); *see also,* 61 FR 16050, 16051 (April 11, 1996) (actions on which the *Kentucky Resources Council* case were based).

Thus, in this action, we need not determine whether a 30-day limit is adequate to protect a shorter-term NAAQS because the regional haze SIP is not required to ensure attainment of the NAAQS. The fact that the regional haze SIP specifies 30-day limits will not preclude Wyoming from adopting limits with a shorter averaging time, if at some future date such limits are found to be necessary and required by the CAA to protect the NAAQS.

5. Other

Comment: We received over 250 comments in a general mass mailer campaign in support of our action. We received over 220 mass mailer comments on behalf of National Parks Conservation Association in support of our action. We also received numerous general comments from individuals and organizations in support of our action.

Response: We acknowledge the commenters' support of our proposed action.

Comment: We received over 850 mass mailer comments opposed to our action. We also received numerous general comments from individuals and organizations in opposition to our action.

Response: We note the commenters' opposition to our proposed action.

Comment: We received numerous general comments in opposition to our action that stated that the State's plan was good enough, that it would achieve appropriate emission reductions, and that it represented a balanced approach.

Response: We note the commenters' opposition to our proposed action.

Comment: We received numerous general comments in opposition to our FIP that stated that the visibility in Wyoming is not hazy and that Wyoming has some of the best air quality in the country.

Response: We note the commenters' general qualitative observations, but note that the commenters did not provide any quantitative information to substantiate their comment.

Comment: We received numerous comments that we should approve Wyoming's SIP because it represents collaboration between the State, industry, local governments, and the public.

Response: We note the commenters' points, but as stated earlier, EPA can only approve a state's SIP if it meets the requirements of the CAA and EPA's implementing regulations.

Comment: We received numerous comments that EPA's FIP will only reduce NO_X by 2,900 tpy more than the Wyoming's SIP, which reduces NO_X by 63,000 tpy. Other commenters went on to say that EPA's FIP will basically achieve the same emission reductions the State's SIP would by 2022.

Response: We disagree with this comment. EPA's calculations show that our proposed FIP will result in approximately 17,000 tpy more NO_X reductions than the State's SIP, through 2022 and beyond.

Comment: We received numerous comments that the proposed FIP, along with other EPA regulations, are in support of EPA's hidden agenda to kill the coal industry and shut down coal-fired power plants.

Response: As stated earlier, EPA's proposed action was based on its careful consideration of the five statutory factors in the CAA and related statutory and regulatory requirements.

Comment: We received numerous comments that the State's SIP was created through coordination with PacifiCorp and other Wyoming industries and that it is based on sound science that complies with the CAA and provides a balance between achieving compliance with the RHR while ensuring reliable, affordable electricity.

Response: We note the commenters' points, but as stated earlier, EPA can only approve a state's SIP if it meets the requirements of the CAA and EPA's implementing regulations.

Comment: We received a comment that it is generally more hazy now than it was ten years ago and that the commenter was supportive of reducing haze.

Response: We note the commenter's support.

Comment: We received a comment that provided data that showed voters in Wyoming were supportive of continued implementation of the CAA and environmental protections for our environment. The commenter went on to say that the majority of voters thought environmental protection and a good economy were compatible and encouraged EPA to finalize its proposed action. The commenter urged EPA to ignore negative media attention its action has drawn, stating that the negative publicity was being driven by economic interests.

Response: We note the commenter's support of our proposed rule.

Comment: EPA has applied selective comment response to the development of its re-proposal and the public comment process, which is inappropriate. EPA's process has lacked transparency, particularly to the State. EPA has not acknowledged the Governor's comments submitted last year. The EPA has not acknowledged the DEQ's comments submitted last year. DEQ was not consulted in the re-proposal process. It would appear that EPA only considered select comments that support its predetermined agenda.

Response: Consistent with our statutory obligations, we have evaluated all written and oral comments on the proposal rulemaking (placing all the comments received in the docket for this action at *www.regulations.gov*); determined whether any revisions to the proposed rule are warranted; and prepared the final rulemaking and supporting information. The final rulemaking decisions are accompanied by the bases for the decisions, explanations of major changes from the proposals, and a response to each of the significant comments submitted in written or oral presentations during the comment period, which includes responses to such comments submitted by the Governor and DEQ.

Comment: For years, Wyoming has pursued developing a collaborative and professional relationship with the EPA, but with the regional haze SIP process, the EPA has not reciprocated the same cooperative effort. This lack of effort on the part of the EPA does not represent the intent of what performance partnership agreements are put in place to accomplish.

Wyoming is a leader in collaboration. Whether it is hydraulic fracturing, Sage Grouse Core Area Development, or carbon sequestration, Wyoming has demonstrated a willingness, and really eagerness, to work with federal agencies, local government, and industry to create solutions that not only minimize detrimental impact, but may actually do the opposite: Encouraging sustainable economic growth in Wyoming.

EPA's imposition of the FIP would pour a bucket of cold water on the solutions resulting from this type of collaboration. In its place, EPA risks disenfranchising ratepayers when industry has little choice but to transfer the costs associated with retrofitting the EGUs. Moreover, because EPA failed to consider the primary cause of regional haze in Wyoming and the Interior West—smoke from wildfires—it risks alienating local government and state cooperating agencies who will perceive EPA as being out of touch with the regulated community.

Response: We disagree with this comment. EPA values its relationship with the State of Wyoming and prior to our proposed action had numerous meetings with State and industry representatives to explore ways in which the State could have addressed our long standing concerns with the approvability of the State's Regional Haze SIP. Regrettably, we were unable to find a path forward during those discussions that could have resulted in the submission of a fully approvable regional haze SIP. Nevertheless, we remain committed to working collaboratively with the State on future regional haze actions and encourage the State to submit a SIP revision that could potentially replace all or a portion of our FIP. We do note that in a previous action we finalized full approval of the State's 309 (SO_2) portion of the Regional Haze SIP. In this action we will also be finalizing approval of many aspects of the State's 309g (NO_X and PM) portion of the regional haze plan.

Comment: We received numerous comments that the regulation of regional haze is focused on improving visibility, not public health.

Response: We agree with the commenter that the CAA's visibility program and the RHR are focused on improving visibility and not public health.

Comment: The Conservation Organizations submitted comments on July 23, 2012 urging EPA not to finalize its proposal to approve Wyoming's participation in a Western Backstop Trading Program in lieu of satisfying BART requirements for SO_2. Under 40 CFR 51.309, states within the Grand Canyon Visibility Transport region, including Wyoming, may adopt a BART-alternative for the state's SO_2 emissions provided that, among other things, the program is shown to provide for greater reasonable progress than would be achieved by application of BART pursuant to 40 CFR 51.308(e)(2). Wyoming's alternative program does not satisfy this requirement. Accordingly, Wyoming must comply with BART requirements for all haze-causing pollutants, including SO_2.

Response: We finalized approval of the State's 309 SIP that includes the requirements for the Western Backstop Trading Program on December 12, 2012 (77 FR 73926). Because this comment pertains to that final rulemaking, it is not germane to this final rulemaking action.

Comment: Unlike other programs, the regional haze program requires regular updates and reviews to ensure that reasonable progress is being made towards the ultimate goal ending in 2064. In fact, the State will be required to submit a progress report to EPA in 2013 and a new regional haze SIP in 2018. EPA should approve the Wyoming Regional Haze SIP, and reserve most of its arguments and concerns expressed in its regional haze FIP for consideration in Wyoming's 2018 regional haze SIP submittals. In the meantime, EPA can be assured that the significant emission reductions required under the Wyoming Regional Haze SIP, nearly all of which already have been installed, will continue to contribute to visibility improvement.

Response: Because we have found that the State's Regional Haze SIP did not adequately satisfy the RHR requirements in full, we have a duty to promulgate a FIP during this planning period that meets those requirements.

Comment: EPA pays undue attention to the ''health'' issues in its FIP. For reasons it does not explain, EPA's FIP discusses the asserted health impacts of fine particulates, when health impacts are not part of the BART analysis. The regional haze program is not a health-based program; rather, it is focused on aesthetics.

Response: We disagree with this comment. In our proposed notice, we stated that ''$PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.'' 78 FR 34741. The commenter suggests that this brief informational statement somehow means that we based our BART determinations in part on the health impacts of $PM_{2.5}$. This is not the case, as we clearly based our BART determinations on the five statutory factors, as required by section 169(a) of the CAA and the RHR.

Comment: In light of EPA's apparent coordination with the special interest groups and the particular influence those groups seemed to be exerting over EPA's regional haze program, Wyoming and eleven other states submitted to EPA a Freedom of Information Act (FOIA) request seeking communications between EPA and the special interest groups related to EPA action on regional haze SIPs. *See* Letter from P. Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General, to FOIA Officer, EPA (Feb. 6, 2013) (FOIA Request). EPA denied the states' public records request on the ground that the states' fee waiver request was invalid because the states ''have not expressed a specific intent to disseminate the information to the public.'' Letter from Larry F. Gottesman, National FOIA Office, EPA, to Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General (Feb. 22, 2013). *But see* FOIA Request, at 5–9 (Feb. 6, 2013) (describing in detail the states' intent to disseminate the information to the public).

The states appealed that plainly erroneous decision. *See* Letter from P. Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General, to National FOIA Officer, EPA (March 15, 2013) (Exhibit 4). On May 2, 2013, EPA's Office of General Counsel informed the states that it needed ''a

brief extension of time''—until May 15, 2013—to respond to the states' appeal. Electronic mail from Lynn Kelly, Attorney-Advisor, EPA Office of General Counsel, to P. Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General. Two weeks later, EPA again informed the states that it needed more time to review the appeal, promising a decision by May 31, 2013. Electronic mail from Lynn Kelly, Attorney-Advisor, EPA Office of General Counsel, to P. Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General (May 15, 2013).

On that date, EPA denied the states' FOIA request, claiming the states' request ''fails to adequately describe the records sought[.]'' Letter from Kevin M. Miller, Assistant General Counsel, EPA Office of General Counsel, to P. Clayton Eubanks, Deputy Solicitor General, Office of Oklahoma Attorney General, at 1 (May 31, 20 13). *But see* FOIA Request, at 1–3 (describing in detail the records sought). In the face of EPA's blatant attempts to frustrate the states' right to access public records directly related to matters of great importance to the states and the public, the states sued EPA in federal court. Compl., *Oklahoma* v. *EPA,* No. 5:13-cv-00726–M (W.D. Okla. July 16, 2013).

In related litigation seeking the documents that the states requested, as well as others, a federal judge has questioned EPA's truthfulness and concluded ''that leaders in EPA may have purposefully attempted to skirt disclosure under the FOIA.'' Mem. Op., at 13, *Landmark Legal Found.* v. *EPA,* No. 12–1726 (D.D.C. Aug. 14, 2013). One cannot help but to similarly question EPA's honesty and wonder what EPA is trying to hide.

Response: EPA disagrees with this comment. EPA has not coordinated with environmental organizations regarding the outcome of this action. As we explain elsewhere, nothing in the consent decree requires any particular substantive outcome concerning Wyoming's Regional Haze SIP. With respect to the allegations made relating to FOIA litigation, EPA has fully responded to those claims in federal court. In any case, the issues in the FOIA litigation mentioned by the commenter, such as whether the FOIA requester reasonably described the records sought, are unrelated to the commenter's unsupported allegations of coordination with environmental organizations.

With respect to the commenter's insinuations of bias, EPA firmly rejects them. We have given careful consideration to all comments and views submitted, regardless of their origin. In response to some comments—both from industry and from environmental organizations—we have acknowledged the merits of the comments and accordingly adjusted not only our technical analyses, but also our final determinations. We have also, at our discretion, considered comments from both industry and from environmental organizations that were submitted after the close of the comment period. It is hard to imagine what better evidence there could be that EPA is willing and able to rationally consider arguments and does not have an unalterably closed mind on the issues in this action. *See Air Transp. Ass'n of Am., Inc.* v. *Nat'l Mediation Bd.,* 663 F.3d 476, 487 (D.C. Cir. 2010) (standard for prejudgment of rulemaking issues) (citing *Ass'n of Nat'l Advertisers, Inc.* v. *FTC,* 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921 (1980)).

VI. Non-Relevant Comments From EPA's Original Proposal

The following is a summary of the significant comments, criticisms, and new data we received on our initial June 4, 2012 proposed rulemaking, which we are not responding to because they are no longer relevant to the action we proposed on June 10, 2013, or the specific regional haze related action we are taking in this final rulemaking.

A. General Comments

Comment: EPA is proposing to calculate compliance with tons per year (tpy) BART emissions limits on a rolling 12-month basis. Based on EPA's proposal, the owner/operator is to calculate and record a new 12-month rolling average emission rate from the arithmetic average of all valid hourly emission rates from the continuous emissions monitoring systems for the current month and the previous 11 months, and to report the result in tons. The calculation and compliance determination shall be performed at the end of each calendar month.

Wyoming established BART emissions limits based on a 30-day rolling average in accordance with 40 CFR part 51 Appendix Y. Wyoming also established annual emissions limits for units with BART limits. For all units with BART limits, except Units 1 through 3 at Basin Electric's Laramie River Station, Wyoming based the annual emissions limits on the 30-day averaged lb/hr emissions limit and full-time operation for 8,760 hours per year.

Wyoming deliberately established these limits on a calendar year basis to reduce recordkeeping and reporting burdens, without being any less stringent than what was prescribed under Appendix Y. Every year, when the Title V emissions inventory is submitted for each of these facilities, the reported annual emissions can be compared to the annual BART limits established in the State permits to determine compliance. Requiring compliance with a 12-month rolling average will result in unnecessary monitoring, recordkeeping, and reporting, as the 12-month rolling emissions limit would be based on full-time operation of the unit and the more stringent 30-day averaged lb/hr value.

Comment: We received a comment from a coalition of physicians that expressed concerns over the health impacts from air pollution, particularly particulate matter and ozone.

Comment: We received a comment from a member of the public that points out the amount of coal production in Wyoming and its contribution to carbon dioxide and climate change.

B. Basin Electric Laramie River

Comment: Wyoming has overestimated the ability of SNCR to reduce emissions. EPA is basing its BART determination on the assumption that LNB+OFA+SNCR can achieve 0.12 lb/MMBtu on a 30-day rolling average. This means that addition of SNCR must reduce NO_X emissions from the LNB+OFA strategy by another 48%. Given the sensitivity of SNCR to boiler operation, size, and configuration, we are concerned that SNCR may not be able to achieve the proposed level of performance on a consistent basis. For example, our query of CAMD data for 2011 found no EGUs with SNCR (out of 3,621 coal-fired EGUs) that met 0.12 lb/MMBtu each month.

Comment: EPA should ensure that SNCR plus LNBs/OFA are capable of meeting the proposed NO_X limit of 0.12 lb/MMBtu, which would reflect a 43% NO_X removal efficiency for SNCR. This level of removal is approximately twice that considered for other Wyoming facilities, as well as facilities in other state BART analyses. Further, in commenting on EPA's BART proposal for Montana's Colstrip Units 1 and 2, the NPS researched 3,621 coal-fired EGUs with SNCR and found only two units that could meet 0.15 lb/MMBtu consistently on a monthly basis. Accordingly, we question whether SNCR plus combustion controls can achieve a 0.12 lb/MMBtu NO_X limit at Laramie River Station Units 1–3. Should EPA find that this level of control with SNCR is achievable, and fail to impose adequate BART limits reflective of SCR capabilities; we request the EPA ensure the proposed NO_X limits are made

enforceable as a backstop and that if greater removal efficiencies are achievable, rates be revised downwards within a 12-month period from the date the technology becomes operable. We also request that level of ammonia slip not exceed 5ppm, and such limit likewise be made enforceable.

Comment: EPA's BART analysis for Laramie River Station Units 1–3 improperly relied on cost estimates from Basin Electric that overestimated capital costs and significantly underestimated operation and maintenance costs for SNCR. Particularly, Basin Electric underestimated the cost of reagent. We corrected these errors in our revised cost calculation using the Sargent & Lundy SNCR cost module from the IPM, and evaluated the cost of SNCR to reduce NO_X from the 0.21 lb/MMBtu Wyoming BART limit for LNBs/OFA down to EPA's proposed FIP limit of 0.12 lb/MMBtu which reflects a NO_X reduction across the SNCR of 43%. We also evaluated the cost effectiveness for an SNCR system designed to achieve 20% NO_X removal, which would equate to a NO_X rate of 0.17 lb/MMBtu. Our revised estimates show the cost effectiveness of SNCR plus combustion controls is between $2,435/ton and $2,623/ton to meet a 0.12 lb/MMBtu NO_X rate (or between $2,062/ton and $2,368/ton to meet a 0.17 lb/MMBtu NO_X rate). These corrected cost effectiveness values for meeting a 0.12 lb/MMBtu NO_X rate with SNCR are higher than the cost effectiveness values, between $2,056/ton and $2,109/ton, assumed by EPA.

Comment: EPA relied on SCR cost estimates provided by Basin Electric that failed to include LNBs/OFA and therefore assumed unreasonably high construction and operation costs for the SCR.

Comment: A comparison of SCR to EPA's preferred LNB+OFA+SNCR option shows incremental costs less than $4,000/ton which are well below values EPA typically accepts. For example, in its proposal to disapprove part of the North Dakota plan, EPA cited the ''. . . relatively low incremental cost effectiveness between the two control options ($4,855 per ton) . . .'' For Laramie River Station, the National Park Service (NPS) estimates of incremental costs of SCR are only slightly greater than SCR's average costs, which are reasonable when compared to costs accepted by other states and EPA.

Comment: Although Basin Electric opposes EPA's SIP disapproval and FIP, it supports the agency's decision not to require SCR at Laramie River Station in its proposed FIP. EPA eliminated the option of LNBs/OFA plus SCR from consideration as BART for the Laramie River Station because ''the cost effectiveness value is significantly higher than LNBs with OFA and there is a comparatively small incremental visibility improvement over LNBs with OFA.'' Basin Electric agrees with and supports the EPA on this issue.

Comment: EPA's analysis for Basin Electric's Laramie River Station acknowledged that additional emissions reductions from LNB and OFA were proposed in the SIP, but did not assess the benefit of these lower emissions rates. The short term mass emissions rate was reduced to 1,220 lb/hr for Laramie River Station on Units 1 and 2, and reduced to 1,254 lb/hr for Laramie River Station Unit 3. EPA explained that since the State did not provide additional cost information for the lower limits, revised modeling based on 0.21 lb/MMBtu was not performed, nor did EPA perform a revised cost analysis.

The reduced mass emissions are based on a performance level of 0.19 lb/MMBtu, which will be achieved by the installation of LNB with OFA at no additional cost. Accounting for additional reduction in emissions, without changing the control costs, yields a significantly higher incremental cost, approximately $3,300, between LNB with OFA and SNCR. If EPA had accounted for additional reduction from LNB and OFA and resulting smaller incremental visibility improvement (less than 0.23 delta deciviews), the State anticipates that SNCR would not have been BART. This conclusion is based on EPA's determination in the proposed FIP for Montana that ''. . . the cost of SOFA+SCR ($3,195/ton) [lower than the incremental cost of SNCR] is not justified by the visibility improvement of 0.404 deciviews at Theodore Roosevelt National Park and 0.378 deciviews at UL Bend.'' 77 FR 24027.

When evaluating Wyoming's 309(g) Regional Haze SIP, EPA should have considered the additional NO_X emissions reductions achieved in the SIP before making a final determination on the approvability of the SIP.

Comment: EPA's comparison of annual emissions from the installation of SNCR to the annual emissions cap established in a settlement is not consistent. Operation of SNCR on Laramie River Station Units 1 through 3 is anticipated to result in annual emissions of 8,468 tons per year. The State established an annual facility emissions cap of 12,773 tons per year in a permit. The 8,468 tons per year value is based on an average of 2001–2003 actual heat input for each boiler, while the 12,773 tons of NO_X is a facility cap on potential emissions. Typically, actual emissions are notably less than potential emissions in order to maintain a margin of compliance. It is the State's expectation that the emissions difference between EPA's SNCR determination and the State's reduced facility emissions cap will be less than the calculated 4,305 tons per year. A more direct comparison would be to base the difference on the potential to emit for each of the three Laramie River Station units (0.12 lb/MMBtu times the maximum heat input rate times 8,760 hours of operation) which yields an annual facility NO_X emission rate of 10,218 tons per year, and a difference from the State's emission cap of 2,555 tons.

Comment: EPA states ''We find it was unreasonable for the State not to determine that LNBs with OFA plus SNCR was NO_X BART for LRS Units 1–3.'' This statement provides no insight into the agency's reasons for disapproving the State's NO_X BART for Laramie River Station.

C. Jim Bridger Units 1–4

Comment: In its regional haze FIP, EPA identifies the relatively high incremental cost effectiveness of SCR ($5,721 per ton) for the Bridger units. Nevertheless, EPA does not account for this number in its own BART decision making. EPA also fails to accord any deference to Wyoming's consideration of these same costs. Such action is arbitrary and contrary to EPA's actions in other states. Here, EPA erred by not considering any incremental costs for Bridger, and by not honoring Wyoming's consideration of costs for the Bridger units.

Comment: In response to EPA's request for comment on alternative approaches for the Jim Bridger BART determination, EPA received general comments in favor of our third proposal in the alternative. Although these commenters supported our third proposal in the alternative, the commenters did not provide quantitative information to support their position.

Comment: EPA is seeking comment on an alternative that would allow PacifiCorp to install SCR at Jim Bridger Units 3 and 4 within 5 years from the date of EPA's final action. EPA's reasoning is that this alternative would allow PacifiCorp the flexibility to determine the implementation schedule for BART controls on all four Jim Bridger units. Because EPA's initial proposal to require BART installation by 2016 best complies with the statutory requirement that BART be installed and operated as expeditiously as practicable, 42 U.S.C. 7491(b)(2)(A), we support EPA's proposal over the alternative.

Comment: EPA likely underestimated the visibility benefits attributable to SCR to control NO_X emissions in other ways. First, EPA failed to follow its BART guidelines in estimating pre- and post-control emissions. EPA's baseline for modeling included the PM and SO_2 limits that will be established by the regional haze plan, rather than using a pre-SIP baseline (typically from the time period of 2001–2004) as required by EPA's BART guidelines. This approach resulted in an understatement of visibility improvement from NO_X BART controls. Further, EPA deviated from its BART guidelines by modeling baseline emissions that were based on allowable emission rates rather than actual maximum 24-hour rates. As a result, EPA's baseline is based on long-term average emissions that mask actual maximum visibility impairment. Further, EPA greatly overestimates the ammonia slip (SO_4 emissions) associated with SCR. For example, actual increases in SO_4 emissions due to operation of SCR at each of the Jim Bridger units are 7.89 lb/hr per unit, far lower than EPA's assumed increase in SO_4 emissions of 54.0 lb/hr per unit. This error, too, likely caused EPA to understate the visibility benefits of SCR.

The Conservation Organizations conducted modeling analyses to examine how widespread the impacts from each BART-subject source were and to analyze the widespread visibility improvements that would result if all units were required to install SCR along with combustion controls at 0.05 lb/MMBtu limits routinely achieved to meet NO_X BART. The Conservation Organizations did not attempt to address all of EPA's errors in their supplemental modeling of visibility impacts. Had the Conservation Organizations done so (i.e., changed baseline to reflect pre-SIP emissions of SO_2, PM as well as NO_X, and reduced the projected increase in sulfates to more reasonable levels), we assume that even greater visibility benefits would have been demonstrated with SCR required as BART at all BART-subject units.

D. Dave Johnston Units 3 and 4

Comment: EPA relied on Wyoming's cost-effectiveness analysis of SCR plus LNBs/OFA at Dave Johnston Unit 3, which significantly overestimates the cost of this technology. While EPA presented a cost effectiveness of $3,243/ton, our revised cost-effectiveness calculation using the Sargent & Lundy SCR cost module shows that SCR plus LNBs/OFA at Dave Johnston Unit 3 to meet a NO_X limit of 0.05 lb/MMBtu is much lower: $1,632/ton.

Comment: EPA relied on Wyoming's dramatic underestimation of the cost for SNCR at Dave Johnson Unit 3. Wyoming's BART analysis used costs provided by PacifiCorp, which greatly underestimated reagent costs for SNCR. Further, although PacifiCorp's SNCR cost analysis was based on achieving a NO_X rate of 0.22 lb/MMBtu, Wyoming stated that SNCR was assumed to meet a NO_X rate of 0.19 lb/MMBtu. This skewed the cost-effectiveness results by making SNCR appear less costly and more effective. Our revised analysis using the Sargent & Lundy SNCR cost module from the IPM to achieve a 0.22 lb/MMBtu NO_X rate (20% removal across the SNCR) demonstrated that SNCR has a higher cost-effectiveness value than is presented in the proposed rule. While EPA presented and relied on a cost effectiveness for SNCR of $721/ton, correcting the flaws in that analysis demonstrates a cost effectiveness for SNCR of $1,443/ton. Based on these corrected cost calculations, the cost of SCR plus LNBs/OFA is $1,632/ton, not appreciably higher than the cost of SNCR at $1,443/ton.

Comment: EPA makes the same errors in its BART analysis for Dave Johnston Unit 4 as it did for Unit 3. EPA has proposed to approve Wyoming's NO_X BART determination for Dave Johnston Unit 4, requiring LNBs with advanced OFA to achieve a NO_X emission limit of 0.15 lb/MMBtu. Although the cost effectiveness of SCR plus LNBs with OFA at Dave Johnston Unit 4 presented by Wyoming and relied upon by EPA was abundantly reasonable at $2,210 per ton of NO_X removed, EPA apparently agreed with Wyoming that the incremental cost effectiveness of these controls compared to LNBs/OFA was too high to justify SCR as BART.

Wyoming calculated the cost effectiveness of SCR plus LNBs/OFA to be $2,210/ton with a projected maximum visibility improvement of 0.97 deciviews. In comparison, Wyoming and EPA found that these same controls constitute BART at Naughton Unit 3, even though the cost was greater, $2,830/ton, and the projected maximum visibility improvement was roughly the same, 1.0 deciviews. Wyoming and EPA also found that SCR plus LNBs and SOFA met BART for Jim Bridger Units 3 and 4 at a cost effectiveness of $2,258/ton and a projected visibility improvement of 0.80 and 0.82 deciviews, respectively. Further, EPA found that SCR plus LNBs and SOFA met BART for Jim Bridger Units 1 and 2 at a cost effectiveness of $2,258/ton and a visibility improvement of 0.76 deciviews and 0.82 deciviews, respectively. EPA's contrary conclusion for Dave Johnston Unit 4 is arbitrary and inconsistent with EPA's other decisions.

Comment: Although EPA's data in the proposed rule demonstrated that SCR plus LNBs/OFA is cost effective at $2,210/ton of NO_X removed, EPA overestimated the cost of SCR for Dave Johnston Unit 4 in the same way it did for Dave Johnston Unit 3. We recalculated the cost effectiveness of SCR plus combustion controls at Dave Johnston Unit 4 using the Sargent & Lundy SCR IPM Cost Module to meet a NO_X rate of 0.05 lb/MMBtu. The revised cost analysis shows a cost effectiveness of $1,837/ton for these controls.

Comment: EPA appears to have placed undue weight on incremental costs. In its proposal to disapprove part of the North Dakota plan, EPA cited the ''. . . relatively low incremental cost effectiveness between the two control options ($4,855 per ton) . . .'' For Johnston units 3 and 4, the NPS estimates of incremental costs of SCR are two—three times greater than LNB+OFA+SCR's average costs, which are reasonable when compared to costs accepted by other states and EPA.

E. Naughton Units 1–3

Comment: We received comments that the cost analysis of SCR at Naughton is over inflated. One commenter estimated that, using a capital cost of $266/kW, LNB+OFA+SCR for Unit 1 would remove 3,249 tpy and cost $2,098/ton. The commenter went on to say that they estimated the cost for the addition of SCR to Unit 2 and Unit 3 would be $2,037 and $2,844/ton. A commenter estimated the costs for the addition of SCR to Unit 3 would be $1,788/ton. Another commenter estimated the cost of SCR of $1,550/ton for Naughton Unit 1 and $1,501/ton for Naughton Unit 2.

Comment: Even taken at face value, the $2,750 and $2,848 costs per ton estimated by Wyoming for LNB+OFA+SCR on Naughton Units 1 and 2, respectively, are similar to or lower than the cost/ton values accepted as reasonable in other BART analyses, including Wyoming's and EPA's conclusion that addition of OFA+SCR at $2,830/ton is reasonable for Naughton Unit 3.

Comment: Despite our concerns with the visibility modeling conducted by EPA, taken at face value, the annual costs and visibility improvements (presented by EPA) associated with the addition of SCR result in cost-effectiveness of $9.6 million/deciview for Naughton Unit 1, $11.5 million/deciview for Unit 2, and $15.7 million/deciview for Unit 3 (which EPA deemed reasonable) at the nearest Class I area.

All three of these estimates are below or within the range of average cost/deciview accepted as ''reasonable''.

Comment: EPA relied solely on an incremental cost-benefit rationale to reject SCR as BART for Naughton Units 1 and 2. This conclusion is improper where SCR plus combustion controls is cost effective, even using EPA's inflated numbers, and its visibility benefit would be significant. Indeed, the costs and visibility benefits of SCR at Units 1 and 2 are nearly identical to the costs and visibility benefits of SCR at Unit 3, at which EPA found SCR to be BART. Specifically, SCR at Naughton Units 1 and 2 has a cost effectiveness of $2,750/$2,848 per ton of NO_X removed and results in maximum visibility improvements of 1.07/1.10 deciviews. Given these very similar numbers, EPA's determination that SCR is BART at Unit 3 but SCR is not BART at Units 1 and 2 is arbitrary.

Comment: EPA has placed undue emphasis on incremental cost effectiveness is even more improper considering its inaccuracy. EPA stated incorrectly the incremental cost effectiveness of LNBs/OFA plus SCR compared to LNBs/OFA as $8,000/ton. However, this calculation actually refers to the incremental cost effectiveness of the SCR option compared to the SNCR BART option. The incremental cost effectiveness between the SCR option and the LNB/OFA option based on Wyoming's cost and emission estimates provided in its BART Application Analyses are $6,665/ton for Unit 1 and $6,518/ton for Unit 2.

F. Wyodak

Comment: We received comments that the costs for SCR were overinflated. One commenter estimated that LNB+OFA+SCR would remove 3,773 tpy and cost $3,475/ton. Another commenter estimated that based on the Sargent & Lundy SCR cost module, the revised cost estimate for these controls to meet a NO_X limit of 0.05 lb/MMBtu is $2,602/ton of NO_X removed.

Comment: As it did for Dave Johnston Unit 3, EPA also relied on Wyoming's gross underestimate of the costs of SNCR. Rather than the $958/ton of NO_X removed assumed by EPA, the more accurate cost effectiveness of SNCR based on the Sargent & Lundy SNCR IPM cost module is $3,139/ton. Thus, SCR is more cost effective than SNCR to control NO_X at Wyodak.

Comment: EPA has placed undue weight on incremental costs and incremental benefits. Our analysis of the LNB+OFA+SCR option shows an incremental cost of $3,726/ton for adding SCR to LNB+OFA. Our estimates of incremental costs of SCR are only slightly greater than LNB+OFA+SCR's average costs, which are reasonable when compared to costs accepted by other states and EPA.

G. Dave Johnston Units 1 and 2

Comment: The Conservation Organizations agree with EPA that reasonable progress controls for NO_X emissions are needed for Dave Johnston Units 1 and 2. EPA correctly found that it was unreasonable for Wyoming to reject cost effective NO_X controls that would improve visibility. EPA proposes to require only LNBs/OFA to achieve a NO_X emission limit of 0.20 lb/MMBtu (30-day rolling average). While we commend EPA for proposing a FIP to reduce NO_X emissions from Dave Johnston Units 1 and 2, we urge EPA to require SCR plus LNBs/OFA to meet a NO_X emission limit of 0.05 lb/MMBtu to achieve reasonable progress. Although EPA concluded that the cost of SCR is not justified by the projected visibility improvement, EPA's analysis unreasonably assumed that SCR would only achieve a NO_X emission rate of 0.12 lb/MMBtu, even though an emission rate of 0.05 lb/MMBtu is readily achievable. Correcting for this error, it appears that SCR at Dave Johnston Units 1 and 2 is very cost effective at $2,001 and $1,987/ton of NO_X removed, respectively. Accordingly, EPA should reconsider requiring SCR at Dave Johnston Units 1 and 2 to meet reasonable progress requirements.

Comment: EPA deviated from the BART Guidelines in the way it estimated the emission rates it used in its modeling analyses. For Dave Johnston Unit 1 and Unit 2, EPA assumed that NO_X emissions would drop from 1,012.5 lb/hr (base case) to 354.375 lb/hr with the addition of LNB+OFA and to 202.5 lb/hr with addition of SCR. However, our review of 2001–2003 daily CAMD data found that daily NO_X emissions from Johnston Unit 1 and Unit 2 during 2001–2003 never exceeded 680 lb/hr. EPA modeling analysis cannot be relied upon to estimate ''a comparatively small incremental visibility improvement'' because the emissions modeled are incorrect.

Comment: The EPA conclusion that the addition of SCR is not justified due to the ''small incremental visibility improvement'' is based upon a flawed visibility analysis that over-values the addition of LNB+OFA and under-values addition of SCR. Furthermore, the degree of visibility improvement is not one of the four statutory factors to be considered under the reasonable progress provisions of the RHR. Incremental visibility improvement is not mentioned anywhere in the reasonable progress provisions or BART Guidelines and EPA cannot create a new criterion for the sole purpose of eliminating a control option that is reasonably cost-effective and would yield a significant visibility improvement.

H. Modeling

Comment: EPA conducted visibility impact modeling from the Wyoming sources for its BART and reasonable progress analyses. Unfortunately, EPA failed to present and/or fully explain the results of its modeling to the public, thus preventing a complete analysis of the benefits of installation of SCR on the Wyoming sources. Accordingly, we request that EPA provide clarification on the following issues: (1) Please clarify whether the spreadsheet provided in response to our FOIA request represents EPA's complete and final modeling results. If not, we request that EPA post all final visibility modeling results to the docket for this rulemaking, including any post-processing of modeling results, and allow the public to submit comment on the modeling results; (2) Please describe and clarify any discrepancies between EPA's proposed rule and its final modeling results; (3) Please explain how EPA calculated the visibility results presented in its proposed rule and provide all data upon which these calculations were made. In addition, we request that EPA re-run its visibility impact modeling for years 2001–2003 and incorporate all proposed changes to its modeling provided in this comment letter, in the TSD, and in the Expert Report of Howard Gebhart, including, but not limited to utilization of the correct version of the model, correct emission rates, and compressive inclusion of impacted Class I areas. We also request that EPA post its new corrected modeling results to the docket for this rulemaking and provide the public with an adequate opportunity to respond and comment on the new visibility impact modeling.

Comment: Wyoming DEQ evaluated visibility improvements at the three nearest Class I areas—Bridger, Fitzpatrick, and Mount Zirkel Wilderness Areas—and reported the ''cumulative 3-year averaged visibility improvement from Post-Control Scenario A across the three Class I areas . . .'' We requested to DEQ that the other eight Class I areas within 300 km of Bridger (Grand Teton National Park, Yellowstone National Park, Rocky Mountain National Park, Washakie

Wilderness Area, Teton Wilderness Area, Flat Tops Wilderness Area, Rawah Wilderness Area, and Eagles Nest Wilderness Area) be included in the modeling analysis. However, instead of expanding the modeling analysis, EPA R8 reported results for only the Mount Zirkel Wilderness Area.

Comment: EPA R8 has incorrectly estimated visibility improvement from all NO_X control options: WY DEQ evaluated visibility improvements at the four nearest Class I areas and reported the ''The cumulative 3-year averaged 98th percentile visibility improvement from Post-Control Scenario A summed across all four Class I areas achieved with Post-Control Scenario B was 0.754 delta deciviews from Unit 3 and 0.405 delta from Unit 4.'' EPA R8 reported results for only one Class I area. PacifiCorp apparently considered cost a useful metric when it made the following statements for its Unit #3 BART proposal: ''the incremental cost effectiveness for Scenario 1 compared to the Baseline is reasonable at $0.4 million per day and $14.4 million per deciview to improve visibility at Badlands NP'' and for its Unit #4 BART proposal, ''the incremental cost effectiveness for Scenario 1 compared to the Baseline is reasonable at about $800,000 per day and $31.7 million per deciview.'' PacifiCorp's conclusions are consistent with those reached across the country that the average cost per deciview proposed by either a state or a BART source is $14–$18 million, with a maximum of almost $50 million per deciview proposed by Colorado at the Martin Drake power plant. Combining the modeling results provided by EPA R8 (which we believe have underestimated SCR benefits) and Wyoming DEQ's cost analyses (which we believe have overestimated SCR costs), addition of SCR at Dave Johnston Unit 3 would improve visibility by 1.16 deciview at a cost of $14 million per deciview at the most-impacted Class I area. Likewise, addition of SCR at Dave Johnston Unit 4 would improve visibility by 0.97 deciview at a cost of $17 million per deciview. Not only is addition of SCR cost-effective (even by PacifiCorp's criteria), it would be even more cost-effective if the issues we have noted above are addressed. By overestimating costs of SCR and underestimating control efficiency and visibility benefits, EPA R8 concluded that combustion controls plus SNCR is BART for Unit 3 and combustion controls are BART for Unit 4, rather than SCR.

Comment: EPA states that a change of 1.0 deciview is perceptible and causes visibility impairment and a change of 0.5 deciviews, although not perceptible, is considered to contribute to visibility impairment. 40 CFR part 51, App. Y, section III.A.1, 70 FR 39120. Sources that do not have an impact of 0.5 deciviews or more may be exempted from BART altogether. 40 CFR part 51, App. Y, section III.A.1. In Wyoming, EPA approved the State's selection of a 0.5 deciview threshold for exempting sources from BART, based on the ''relatively limited impact on visibility'' from sources under the threshold.

In Colorado, the state established criteria that SNCR would be required as BART only if the cost effectiveness for SNCR was less than $5,000/ton and the visibility improvement was greater than 0.2 deciviews. Although EPA stated it did ''not necessarily agree'' that these criteria would always be appropriate for determining BART, it proposed to approve all BART determinations the state made using these criteria.

The modeled visibility improvement using the final BART permit levels that would be achieved with SNCR at Laramie River is one-tenth of what EPA contends is humanly perceptible, one-fifth of the level used to exempt Wyoming sources from BART due to relatively limited visibility impact, and one-half the SNCR threshold used by Colorado to establish limits that EPA proposed to approve. This de minimis improvement rebuts EPA's disapproval of the State's NO_X BART for Laramie River, and supports the State's final BART determination. Even if EPA were entitled to disapprove a state's BART determination based on a standard of ''unreasonableness,'' it cannot be unreasonable for the state to fail to require additional SNCR controls that would offer tiny and imperceptible visibility improvements at enormous cost. However one characterizes the facts, millions of dollars would be spent every year to install and operate SNCR.

Moreover, the modeled visibility improvements for the Jim Bridger units resulting from the requirement to install SCR (as BART under the EPA regional haze FIP and as part of the LTS under the Wyoming Regional Haze SIP) are too small to justify the overall expense of requiring these controls. Spending hundreds of millions of dollars for imperceptible visibility changes does not meet the intent, or purpose, of the regional haze program.

Comment: EPA has improperly failed to account for the very few number of days of visibility impacts or the seasonal timing of when those few impacts occur. EPA is proposing to accelerate the timeline for installing the Jim Bridger Unit 1 SCR from 2022 to 2017 and the Jim Bridger Unit 2 SCR from 2021 to 2017. Even when relying on the CALPUFF models that significantly overestimate the visibility impacts, EPA's proposal will only result in imperceptible visibility improvements for only eleven days a year until the SCRs would have been installed as required by the State's plan.

In a similar manner, the days of impacts need to be considered when evaluating the additional controls that EPA proposes to install on Wyodak and Dave Johnston Unit 3. EPA's modeling of Wyodak indicates that installing and incurring the additional costs for the SNCR will not only result in an imperceptible 0.15 deciview of visibility improvement, but the days per year the unit is modeled to impact the park by greater than 0.5 deciviews will be reduced from sixteen to twelve days; a benefit of only four days per year.

EPA's modeling of Dave Johnston Unit 3 indicates that installing and incurring the additional costs for SNCR will result not only in an imperceptible 0.17 deciview improvement, but the days per year the unit is modeled to impact the park by greater than 0.5 deciviews will only be reduced from nine to six days; a benefit of only three days per year. None of these imperceptible modeled visibility improvements occurring during only a few days a year justify the tremendous cost of controls required under EPA's regional haze FIP.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). As discussed in section C below, the final FIP applies to only three facilities and five BART units.[241] It is therefore not a rule of general applicability.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). Because the final FIP applies to just three facilities, the Paperwork Reduction Act does not apply. See 5 CFR 1320(c).

[241] Dave Johnston Unit 3, Laramie River units 1, 2, and 3, and the unit at Wyodak.

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 impacts of today's final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The Regional Haze FIP that EPA is finalizing for purposes of the regional haze program consists of imposing federal controls to meet the BART requirement for NO_X emissions on five specific BART units at three facilities in Wyoming. The net result of this FIP action is that EPA is finalizing direct emission controls on selected units at only three sources. The sources in question are each large electric generating plants that are not owned by small entities, and therefore are not small entities. The final partial approval of the SIP merely approves state law as meeting Federal requirements and does not impose additional requirements. *See, e.g., Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985)(hereinafter *Mid-Tex*).

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more (adjusted for inflation) in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 of UMRA do not apply when they are inconsistent with applicable law. Moreover, section 205 of UMRA allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory actions with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Under Title II of UMRA, EPA has determined that this final rule does not contain a federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million ($150 in 2013 when adjusted for inflation) by State, local, or Tribal governments or the private sector in any one year. The private sector expenditures that will result from the FIP, including BART controls for Basin Electric Laramie River Station Units 1–3 ($67,128,584 per year)[242], and PacifiCorp Dave Johnston Unit 3 ($11,680,144 per year)[243] and Wyodak ($15,073,502)[244], are $93,882,230 per year. This calculation assumes that PacifiCorp would choose to install SCR on Dave Johnston Unit 3, and not to otherwise voluntarily retire the unit, an option which the FIP allows. Additionally, we do not foresee significant costs (if any) for state and local governments. Thus, because the annual expenditures associated with the FIP are less than the inflation-adjusted threshold of $150 million in any one year, this rule is not subject to the requirements of sections 202 or 205 of UMRA. This rule 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.

E. Executive Order 13132: Federalism

Executive Order 13132, *Federalism,* (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the final regulation. EPA also may not issue a regulation that has federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the final regulation.

This rule 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, because it merely addresses the State not fully meeting its obligation under the CAA to include in its SIP provisions to meet the visibility requirements of Part C of Title I of the CAA and to prohibit emissions from interfering with other states measures to protect visibility. Thus, Executive Order 13132 does not apply to this action.

[242] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/2013.

[243] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/2013.

[244] Andover Technology Partners, ''Cost of NO_X Controls on Wyoming EGUs'', October 28, 2013; Wyoming EGU BART and Reasonable Progress Costs—10/2013.

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

Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it implements specific standards established by Congress in statutes. However, to the extent this final rule will limit emissions of NO_X and PM, the rule will have a beneficial effect on children's health by reducing air pollution.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629, 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.

We have determined that this final action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This final rule limits emissions of NO_X from three facilities and five BART units in Wyoming. The partial approval of the SIP merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law.

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. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability. This rule finalizes a FIP for three sources.

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 31, 2014. Pursuant to CAA section 307(d)(1)(B), this action is subject to the requirements of CAA section 307(d) as it promulgates a FIP under CAA section 110(c). Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 10, 2014.

Gina McCarthy,

Administrator, U.S. EPA.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart ZZ—Wyoming

■ 2. Section 52.2620, in the table in paragraph (e) is amended by adding an entry for ''XXIII. Wyoming State Implementation Plan for Regional Haze for 309(g)'' at the end of the table.

§ 52.2620 Identification of plan.

* * * * *

(e) * * *

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/adopted date	EPA approval date and citation [3]	Explanations
*	*	*	*	* * *
XXIII. Wyoming State Implementation Plan for Regional Haze for 309(g).	Statewide	Submitted: 1/12/2011	1/30/14, [Insert **Federal Register** page number where the document begins.].	Excluding portions of the following: Chapter 6.4, Chapter 6.5.5, Chapter 6.5.7, Chapter 6.5.8, and Chapter 7.5. We are excluding portions of these chapters because EPA disapproved: (1) The NO_X BART determinations for: (1) Laramie River Units 1–3, Dave Johnston Unit 3, and Wyodak Unit 1; (2) the State's monitoring, recordkeeping, and reporting requirements for BART units; (3) the State's reasonable progress goals.

■ 3. Add § 52.2636 to subpart ZZ to read as follows:

§ 52.2636 Implementation plan for regional haze.

(a) *Applicability.* (1) This section applies to each owner and operator of the following emissions units in the State of Wyoming for which EPA approved the State's BART determination:

(i) FMC Westvaco Trona Plant Units NS–1A and NS–1B (PM and NO_X);

(ii) TATA Chemicals Partners (previously General Chemical) Boilers C and D (PM and NO_X);

(iii) Basin Electric Power Cooperative Laramie River Station Units 1, 2, and 3 (PM);

(iv) PacifiCorp Dave Johnston Power Plant Unit 3 (PM);

(v) PacifiCorp Dave Johnston Power Plant Unit 4 (PM and NO_X);

(vi) PacifiCorp Jim Bridger Power Plant Units 1, 2, 3, and 4 (PM and NO_X);

(vii) PacifiCorp Naughton Power Plant Units 1, 2, and 3 (PM and NO_X); and

(viii) PacifiCorp Wyodak Power Plant Unit 1 (PM).

(2) This section also applies to each owner and operator of the following emissions units in the State of Wyoming for which EPA disapproved the State's BART determination and issued a NO_X BART Federal Implementation Plan:

(i) Basin Electric Power Cooperative Laramie River Station Units 1, 2, and 3;

(ii) PacifiCorp Dave Johnston Unit 3; and

(iii) PacifiCorp Wyodak Power Plant Unit 1.

(b) *Definitions.* Terms not defined below shall have the meaning given them in the Clean Air Act or EPA's regulations implementing the Clean Air Act. For purposes of this section:

(1) *BART* means Best Available Retrofit Technology.

(2) *BART unit* means any unit subject to a Regional Haze emission limit in Table 1 and Table 2 of this section.

(3) *CAM* means Compliance Assurance Monitoring as required by 40 CFR part 64.

(4) *Continuous emission monitoring system or CEMS* means the equipment required by this section to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system (DAHS)), a permanent record of NO_X emissions, diluent, or stack gas volumetric flow rate.

(5) *FIP* means Federal Implementation Plan.

(6) The term *lb/hr* means pounds per hour.

(7) The term *lb/MMBtu* means pounds per million British thermal units of heat input to the fuel-burning unit.

(8) *NO_X* means nitrogen oxides.

(9) *Operating day* means a 24-hour period between 12 midnight and the following midnight during which any fuel is combusted at any time in the BART unit. It is not necessary for fuel to be combusted for the entire 24-hour period.

(10) The *owner/operator* means any person who owns or who operates, controls, or supervises a unit identified in paragraph (a) of this section.

(11) *PM* means filterable total particulate matter.

(12) *Unit* means any of the units identified in paragraph (a) of this section.

(c) *Emissions limitations.* (1) The owners/operators of emissions units subject to this section shall not emit, or cause to be emitted, PM or NO_X in excess of the following limitations:

TABLE 1 TO § 52.2636

[Emission limits for BART units for which EPA approved the State's BART and Reasonable Progress determinations]

Source name/BART unit	PM emission limits—lb/MMBtu	NO_X emission limits—lb/MMBtu (30-day rolling average)
FMC Westvaco Trona Plant/Unit NS–1A	0.05	0.35
FMC Westvaco Trona Plant/Unit NS–1B	0.05	0.35
TATA Chemicals Partners (General Chemical) Green River Trona Plant/Boiler C	0.09	0.28
TATA Chemicals Partners (General Chemical) Green River Trona Plant/Boiler D	0.09	0.28
Basin Electric Power Cooperative Laramie River Station/Unit 1	0.03	N/A
Basin Electric Power Cooperative Laramie River Station/Unit 2	0.03	N/A
Basin Electric Power Cooperative Laramie River Station/Unit 3	0.03	N/A
PacifiCorp Dave Johnston Power Plant/Unit 3	0.015	N/A

[3] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

TABLE 1 TO § 52.2636—Continued

[Emission limits for BART units for which EPA approved the State's BART and Reasonable Progress determinations]

Source name/BART unit	PM emission limits—lb/MMBtu	NO_X emission limits—lb/MMBtu (30-day rolling average)
PacifiCorp Dave Johnston Power Plant/Unit 4	0.015	0.15
PacifiCorp Jim Bridger Power Plant/Unit 1 [1]	0.03	0.26/0.07
PacifiCorp Jim Bridger Power Plant/Unit 2 [1]	0.03	0.26/0.07
PacifiCorp Jim Bridger Power Plant/Unit 3 [1]	0.03	0.26/0.07
PacifiCorp Jim Bridger Power Plant/Unit 4 [1]	0.03	0.26/0.07
PacifiCorp Naughton Power Plant/Unit 1	0.04	0.26
PacifiCorp Naughton Power Plant/Unit 2	0.04	0.26
PacifiCorp Naughton Power Plant/Unit 3	0.015	0.07
PacifiCorp Wyodak Power Plant/Unit 1	0.015	N/A

[1] The owners and operators of PacifiCorp Jim Bridger Units 1, 2, 3, and 4 shall comply with the NO_X emission limit for BART of 0.26 lb/MMBtu and PM emission limit for BART of 0.03 lb/MMBtu and other requirements of this section by March 4, 2019. The owners and operators of PacifiCorp Jim Bridger Units 1, 2, 3 and 4 shall comply with the NO_X emission limit for reasonable progress of 0.07 lb/MMBtu by: December 31, 2022 for Unit 1, December 31, 2021 for Unit 2, December 31, 2015, for Unit 3, and December 31, 2016, for Unit 4.

TABLE 2 TO § 52.2636

[Emission limits for BART units for which EPA disapproved the State's BART determination and implemented a FIP]

Source name/BART unit	NO_X emission limit—lb/MMBtu (30-day rolling average)
Basin Electric Power Cooperative Laramie River Station/Unit 1	0.07
Basin Electric Power Cooperative Laramie River Station/Unit 2	0.07
Basin Electric Power Cooperative Laramie River Station/Unit 3	0.07
PacifiCorp Dave Johnston Unit 3	*0.07
PacifiCorp Wyodak Power Plant/Unit 1	0.07

* (or 0.28 and shut-down-by December 31, 2027).

(2) These emission limitations shall apply at all times, including startups, shutdowns, emergencies, and malfunctions.

(d) *Compliance date.* (1) The owners and operators of PacifiCorp Jim Bridger Units 1, 2, 3, and 4 shall comply with the NO_X emission limit of 0.26 lb/MMBtu and PM emission limit of 0.03 lb/MMBtu and other requirements of this section by March 4, 2019. The owners and operators of PacifiCorp Jim Bridger Units 1, 2, 3 and 4 shall comply with the NO_X emission limit of 0.07 lb/MMBtu by: December 31, 2022 for Unit 1, December 31, 2021 for Unit 2, December 31, 2015, for Unit 3, and December 31, 2016, for Unit 4.

(2) The owners and operators of the other BART sources subject to this section shall comply with the emissions limitations and other requirements of this section by March 4, 2019.

(3) *Compliance alternatives for PacifiCorp Dave Johnston Unit 3.* (i) The owners and operators of PacifiCorp Dave Johnston Unit 3 will meet a NO_X emission limit of 0.07 lb/MMBtu (30-day rolling average) by March 4, 2019; or

(ii) Alternatively, the owners and operators of PacifiCorp Dave Johnston Unit 3 will permanently cease operation of this unit on or before December 31, 2027.

(e) *Compliance determinations for NO_X.* (1) For all BART units other than Trona Plant units:

(i) *CEMS.* At all times after the earliest compliance date specified in paragraph (d) of this section, the owner/operator of each unit shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR part 75, to accurately measure NO_X, diluent, and stack gas volumetric flow rate from each unit. The CEMS shall be used to determine compliance with the emission limitations in paragraph (c) of this section for each unit.

(ii) *Method.* (A) For any hour in which fuel is combusted in a unit, the owner/operator of each unit shall calculate the hourly average NO_X emission rate in lb/MMBtu at the CEMS in accordance with the requirements of 40 CFR part 75. At the end of each operating day, the owner/operator shall calculate and record a new 30-day rolling average emission rate in lb/MMBtu from the arithmetic average of all valid hourly emission rates from the CEMS for the current operating day and the previous 29 successive operating days.

(B) An hourly average NO_X emission rate in lb/MMBtu is valid only if the minimum number of data points, as specified in 40 CFR part 75, is acquired by both the pollutant concentration monitor (NO_X) and the diluent monitor (O_2 or CO_2).

(C) Data reported to meet the requirements of this section shall not include data substituted using the missing data substitution procedures of subpart D of 40 CFR part 75, nor shall the data have been bias adjusted according to the procedures of 40 CFR part 75.

(2) For all Trona Plant BART units:

(i) *CEMS.* At all times after the compliance date specified in paragraph (d) of this section, the owner/operator of each unit shall maintain, calibrate, and operate a CEMS, in full compliance with

the requirements found at 40 CFR part 60, to accurately measure NO_X, diluent, and stack gas volumetric flow rate from each unit, including the CEMS quality assurance requirements in appendix F of 40 CFR part 60. The CEMS shall be used to determine compliance with the emission limitations in paragraph (c) of this section for each unit.

(ii) *Method.* (A) For any hour in which fuel is combusted in a unit, the owner/operator of each unit shall calculate the hourly average NO_X emission rate in lb/MMBtu at the CEMS in accordance with the requirements of 40 CFR part 60. At the end of each operating day, the owner/operator shall calculate and record a new 30-day rolling average emission rate in lb/MMBtu from the arithmetic average of all valid hourly emission rates from the CEMS for the current operating day and the previous 29 successive operating days.

(B) An hourly average NO_X emission rate in lb/MMBtu is valid only if the minimum number of data points, as specified in 40 CFR part 60, is acquired by both the pollutant concentration monitor (NO_X) and the diluent monitor (O_2 or CO_2).

(f) *Compliance determinations for particulate matter.* Compliance with the particulate matter emission limit for each BART unit shall be determined from annual performance stack tests. Within 60 days of the compliance deadline specified in paragraph (d) of this section, and on at least an annual basis thereafter, the owner/operator of each unit shall conduct a stack test on each unit to measure particulate emissions using EPA Method 5, 5B, 5D, or 17, as appropriate, in 40 CFR part 60, Appendix A. A test shall consist of three runs, with each run at least 120 minutes in duration and each run collecting a minimum sample of 60 dry standard cubic feet. Results shall be reported in lb/MMBtu. In addition to annual stack tests, the owner/operator shall monitor particulate emissions for compliance with the BART emission limits in accordance with the applicable Compliance Assurance Monitoring (CAM) plan developed and approved by the State in accordance with 40 CFR part 64.

(g) *Recordkeeping.* The owner/operator shall maintain the following records for at least five years:

(1) All CEMS data, including the date, place, and time of sampling or measurement; parameters sampled or measured; and results.

(2) Records of quality assurance and quality control activities for emissions measuring systems including, but not limited to, any records required by 40 CFR part 75. Or, for Trona Plant units, records of quality assurance and quality control activities for emissions measuring systems including, but not limited to appendix F of 40 CFR part 60.

(3) Records of all major maintenance activities conducted on emission units, air pollution control equipment, and CEMS.

(4) Any other CEMS records required by 40 CFR part 75. Or, for Trona Plant units, any other CEMs records required by 40 CFR part 60.

(5) Records of all particulate stack test results.

(6) All data collected pursuant to the CAM plan.

(h) *Reporting.* All reports under this section shall be submitted to the Director, Office of Enforcement, Compliance and Environmental Justice, U.S. Environmental Protection Agency, Region 8, Mail Code 8ENF–AT, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

(1) The owner/operator of each unit shall submit quarterly excess emissions reports for NO_X BART units no later than the 30th day following the end of each calendar quarter. Excess emissions means emissions that exceed the emissions limits specified in paragraph (c) of this section. The reports shall include the magnitude, date(s), and duration of each period of excess emissions, specific identification of each period of excess emissions that occurs during startups, shutdowns, and malfunctions of the unit, the nature and cause of any malfunction (if known), and the corrective action taken or preventative measures adopted.

(2) The owner/operator of each unit shall submit quarterly CEMS performance reports, to include dates and duration of each period during which the CEMS was inoperative (except for zero and span adjustments and calibration checks), reason(s) why the CEMS was inoperative and steps taken to prevent recurrence, and any CEMS repairs or adjustments. The owner/operator of each unit shall also submit results of any CEMS performance tests required by 40 CFR part 75. Or, for Trona Plant units, the owner/operator of each unit shall also submit results of any CEMs performance test required appendix F of 40 CFR part 60 (Relative Accuracy Test Audits, Relative Accuracy Audits, and Cylinder Gas Audits).

(3) When no excess emissions have occurred or the CEMS has not been inoperative, repaired, or adjusted during the reporting period, such information shall be stated in the quarterly reports required by paragraphs (h)(1) and (2) of this section.

(4) The owner/operator of each unit shall submit results of any particulate matter stack tests conducted for demonstrating compliance with the particulate matter BART limits in paragraphs (c) of this section, within 60 calendar days after completion of the test.

(5) The owner/operator of each unit shall submit semi-annual reports of any excursions under the approved CAM plan in accordance with the schedule specified in the source's title V permit.

(i) *Notifications.* (1) The owner/operator shall promptly submit notification of commencement of construction of any equipment which is being constructed to comply with the NO_X emission limits in paragraph (c) of this section.

(2) The owner/operator shall promptly submit semi-annual progress reports on construction of any such equipment.

(3) The owner/operator shall promptly submit notification of initial startup of any such equipment.

(j) *Equipment operation.* At all times, the owner/operator shall maintain each unit, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.

(k) *Credible evidence.* Nothing in this section shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with requirements of this section if the appropriate performance or compliance test procedures or method had been performed.

■ 4. Add § 52.2637 to subpart ZZ to read as follows:

§ 52.2637 Federal implementation plan for reasonable attributable visibility impairment long-term strategy.

As required by 40 CFR 41.306(c), EPA will ensure that the review of the State's reasonably attributable visibility impairment long-term strategy is coordinated with the regional haze long-term strategy under 40 CFR 51.308(g). EPA's review will be in accordance with the requirements of 40 CFR 51.306(c).

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